



State of New Hampshire
Public Employee Labor Relations Board

Peter Moisakis

v.

Town of Hampton Board of Selectmen

Case No. G-0290-1
Decision No. 2020-133

Background:

Peter Moisakis filed an unfair labor practice complaint with the PELRB on December 20, 2019. He is a police officer in a bargaining unit represented by the Hampton Police Association (Union). He complains about the Board of Selectmen's (BOS) refusal to recognize and process his appeal of a Town Manager grievance decision. The underlying grievance challenged unspecified disciplinary action against Moisakis imposed sometime in April of 2019. According to Moisakis, the BOS's refusal to process his grievance constitutes an unfair labor practice under the Public Employee Labor Relations Act, and he alleges that the Town has violated RSA 273-A:5, I (a), (c), (g), (h), and (i) because the Town disciplined him without any legitimate cause or basis and refused to allow him to use the grievance procedure to challenge the disciplinary action before the BOS.

The Town has filed an answer denying the charges and has also filed a motion to dismiss. According to the Town, only the Union had standing to prosecute the Moisakis disciplinary grievance under the grievance procedure, inclusive of any appeal of the Town Manager's grievance decision to the BOS. In substance the Town maintains that since Moisakis had no right

or standing to appeal the Town Manager's grievance decision to the BOS, he has no standing to file, and cannot prove, an unfair labor practice charge based upon the BOS's treatment of his grievance appeal. The Town argues that not only did the Union fail to appeal the Town Manager's grievance decision to the BOS, it also never requested grievance arbitration, the last step of the grievance procedure. Therefore, the Town contends the Moisakis grievance was abandoned and there are no grounds upon which the complaint can be sustained.

Upon review of the filings in this matter I have determined that the PELRB lacks jurisdiction given the nature of the complaint, the terms of the collective bargaining agreement,¹ and the law applicable to the PELRB's jurisdiction over complaints based on alleged contract violations when the CBA grievance procedure includes binding arbitration. After reviewing the filings, I have also concluded that as to the analysis of, and decision on, the jurisdictional issue, there are no issues of material and relevant fact in dispute which require a hearing. See Pub 201.06 (a).

Factual Basis for Jurisdictional Decision:

1. The Town is a public employer within the meaning of RSA 273-A:I, X.
2. The Hampton Police Relief Association (Union) is the certified exclusive representative of certain employees of the Hampton Police Department, including police officer Peter Moisakis. See PELRB Recognition of an Exclusive Representative, Case No. P-0703 (December 7, 1976).

3. CBA Article 4 is titled "Management Rights" and sub-section 3 provides as follows:

All disciplinary actions such as but not limited to suspensions and discharges shall be specifically subject to the grievance procedure as set forth in Article 29 entitled "Grievance Procedure," provided, however, that the Association specifically agrees that after the Town Manager's level of the grievance procedure (see Article 29, Section 2, Paragraph C), the Association will inform the Selectman [sic] as part of its written request for the review of the Town Manager's decision whether or not the Association intends to pursue a remedy

¹ The Union and the Town are parties to an April 1, 2019 to March 31, 2022 collective bargaining agreement (CBA).

either in court or before a neutral arbitrator (but not both) in the event the Association disagrees with the Selectmen's decision. This selection shall be exclusive and binding upon the Association and/or the Town provided that both parties retain any right of appeal pursuant to New Hampshire RSA Chapter 542, as amended, as set forth in Article 29, (Grievance Procedure), Section 5D.

4. CBA Article 29 is titled "Grievance Procedure" and includes the following sections:

Section 1.

A grievance is defined as a written dispute, claim or complaint which is filed and signed by the Association or the Board and which arises under and during the terms of this Agreement. Grievances are limited to matters of interpretation or application of specific provisions of this Agreement, except where such provisions have been excluded. Either the Association or the Board has a right to initiate a grievance in accordance with the provisions of this Article.

Section 2.

Whenever an employee in the Bargaining Unit has a grievance as defined above, the following procedure shall be utilized or such grievance shall be deemed waived.

- a. The employee shall file the grievance, in writing, with the Association within five (5) calendar days from the date of the event which gives rise to the alleged grievance. The Association shall review the merits of the grievance.
- b. The Association shall, if wishing to process the grievance, file said grievance with the Chief of Police or his designated agent for disposition within five (5) calendar days after the grievance was filed with the Association.
- c. If the Association is not satisfied with the disposition of its grievance by the Chief, or if no written decision has been rendered within fourteen (14) working days (i.e., Monday through Friday excluding holidays) after filing with the Chief, the Association may file the grievance with the Town Manager for disposition within nineteen (19) working days after said grievance was filed with the Town Manager.
- d. If the Association is not satisfied with the disposition of its grievance by the Town Manager or if no written decision has been rendered within fourteen (14) working days (i.e. Monday through Friday excluding holidays) after filing with said Town Manager, the Association may file the grievance with the Board for disposition within thirty (30) working days after the grievance was filed with the Board.
- e. All parties to this grievance procedure shall make every effort to meet to discuss the merits of the grievance within the allotted time frames. If scheduling conflicts prevent either side from meeting during the scheduled time allotted, the parties may agree to extend the time limits to accommodate the conflict. However, no extension of time can exceed beyond as additional thirty days from the allotted time frames. Agreement from the parties to extend the time limits shall not be unreasonably withheld.

Section 3.

Any mutually satisfactory disposition reached as a result of action taken above shall be final and binding upon the parties as to the matter in dispute.

Section 4.

If said grievance is not reported and/or processed within the time limit set forth in this Article, the matter shall be dismissed and no further action shall be taken in respect to such grievance.

Section 5.

Should any grievance, as defined in Section 1 above, arise which cannot be settled within the scope of the foregoing sections of this Article, except for disputes or grievances arising out of contract negotiations, either the Board or the Association may submit such grievances to arbitration as follows:

a. If the Association is not satisfied with the disposition of its grievance by the Board or if no written disposition has been rendered within twenty-one (21) working days (i.e. Monday through Friday excluding holidays) after filing with the Board, the Association may submit, in writing, a request to the American Arbitration Association to appoint an arbitrator to hear said grievance in accordance with the rules and regulations of the American Arbitration Association within seven (7) days after the decision of the Board or expiration of time for same as noted above. If the Association fails to submit such written request for appointment of an arbitrator to the American Arbitration Association within seven (7) days, the grievance shall be deemed abandoned and no further action shall be taken with respect to such grievance.

b. The arbitrator shall not have the power to add to, ignore or modify any of the terms and conditions of this Agreement. The arbitrator's opinion shall not go beyond what is necessary for the interpretation and application of express provisions of this Agreement.

c. Excluded from arbitration are unadjusted grievances which question the exercise of rights set forth in Article 4, Sections 1 and 2 of this agreement entitled "Management Rights" and Article 10, Section 5 entitled "Promotions," or which questions [sic] the use or application of any right over which the Board has unilateral jurisdiction.

d. The decisions of the arbitrator shall be binding on both parties. However, both parties shall have a right to appeal to the New Hampshire Courts under the provisions of New Hampshire RSA Chapter 542, as amended. It is hereby specifically agreed by the Board and the Association that this contract and grievance procedure clause are subject to the provisions of New Hampshire RSA Chapter 542, as amended except for NH RSA 542:6.

Sections 6 and 7 (omitted).

Section 8.

Nothing contained herein shall be construed as limiting the right of any employee having a grievance to discuss the matter informally with any appropriate member of the Police Department and having the grievance adjusted without the intervention of the Association, provided the adjustment is not inconsistent with the terms of this Agreement.

5. In April of 2019, the Town disciplined Moisakis for unspecified reasons. The Union and Moisakis filed a grievance with the Chief of Police and then with the Town Manager, both of whom denied the grievance.

6. On July 22, 2019, Attorney J. Joseph McKittrick emailed a letter to the Town Manager with the reference "Moisakis Grievance Appeal to the Board of Selectmen" and which provided as follows:

Please accept this letter as notice *that the grievant, Officer Peter Moisakis, is appealing your grievance decision to the Board of Selectmen.* The grievance alleges that there are no grounds to administer discipline based upon the events of January 16, 2019. Please contact my office with potential dates for a hearing. I would anticipate that such a hearing may well require several hours to accommodate testimony etc.

While *this matter is being pursued by Office[r] Moisakis personally,* the Association will act as the facilitator in arranging the time and place for the hearing, etc. Additionally, as the grievance involves an interpretation of the Collective Bargaining Agreement, the Association will be present both to observe and ensure that both the CBA and attendant Past Practice is [sic] recognized and followed. (Emphasis added)

In his letter Attorney McKittrick did not state that he was acting as counsel for the Union, or that he was grieving the Town Manager's denial of the Moisakis grievance on behalf of the Union.

7. On August 13, 2019, the Town's attorney (Thomas Closson) responded by letter stating the he represented the Town and that the BOS passed the following motion at its August 12, 2019 meeting:

In response to the July 22, 2019 letter from Attorney McKittrick requesting a grievance hearing before the Board, we respectfully deny the request for a hearing on the grounds that the Union, and not an individual officer, is the only party with standing under the collective bargaining (sic) to pursue a grievance.

8. On September 26, 2019, Attorney McKittrick sent another letter to the BOS stating in part as follows:

Recently the Board of Selectmen declined to hear the Moisakis grievance allegedly as it was to be presented by Officer Moisakis by and or with the assistance of his private attorney. It did so noting, inter alia, that:

...on the grounds that the Union, and not an individual officer, is the only party with standing under the collective bargaining agreement to pursue a grievance.

That response is in error on a number of grounds. Article 29, Section 2, D of the CBA specifically states that

...the Association may file the grievance with the Board...

By my letter to you dated July 22, 2019, I, on behalf of the Association (Union), specifically filed the grievance for disposition with the Board. The HPA (Union) elected not to present the grievance but chose to allow Officer Moisakis to do so with the understanding that the HPA would be present. The presenter should not be an impediment to hearing the grievance.

Please schedule a grievance hearing with the Board to hear the Moisakis matter at your earliest convenience and notify me of that time and date.

9. On October 8, 2019, Attorney Closson sent a letter to attorney McKittrick stating he represented the Town and advising that the BOS passed the following motion on October 7, 2019:

The Board respectfully refuses to consider Attorney McKittrick's September 26, 2019 request for a hearing. The Board denied an identical request on August 12, 2019. Thereafter, no timely request for arbitration was filed by the Hampton Police Association. As such, per the terms of Article 29, Section 5(a) of the current collective bargaining agreement between the Town and the Hampton Police Association, the Board now considers the matter abandoned.

10. Neither the Union nor Moisakis ever filed for grievance arbitration, or took any steps to file for grievance arbitration.

Jurisdiction:

The law applicable to the analysis of the PELRB's jurisdiction in this case is summarized in *Appeal of the City of Manchester*, 153 N.H. 289 (2006):

A CBA is a contract between a public employer and a union over the terms and conditions of employment. When parties enter into a CBA, they are obligated to adhere to its terms, which are the product of their collective bargaining. Every CBA must contain a workable grievance procedure. RSA 273-A:4 (Supp. 2005). The extent of the parties' agreement to arbitrate determines the arbitrator's jurisdiction, and "[t]he overriding concern is whether the contracting parties have agreed to arbitrate a particular dispute." In the context of a just cause grievance, the arbitrator also has the authority to consider the underlying issues and surrounding circumstances necessary to interpret and apply the express provisions of the CBA and reach a final decision.

While the PELRB has primary jurisdiction of all ULP claims alleging violations of RSA 273-A:5, see RSA 273-A:6, I, it 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. Thus, as a threshold matter, the PELRB is empowered to interpret the CBA to the extent necessary to determine whether a dispute is arbitrable.

Id. at 293 (quotations and citations omitted)(finding PELRB had no jurisdiction over unfair labor practice complaint challenging discipline and claiming a denial of union representation). The court revisited these principles in *Appeal of Silverstein*, 163 N.H. 192, 197-98 (2012). In that case, the court rejected the argument that the PELRB does have jurisdiction to interpret collective bargaining agreements and decide disputes arising out of the collective bargaining agreement on the merits when a grievance procedure concludes with an employer based binding last step (school board hearing) instead of a third party last step like binding arbitration. In its decision, the court also noted that the CBA grievance procedure "language was specifically negotiated and agreed upon by the parties (the public employer and the union), and, therefore, it is binding upon both the *public employee* and the public employer." *Appeal of Silverstein*, 163 N.H. at 196, citing *Appeal of Berlin Board of Education*, 120 N.H. 226, 230 (1980)(emphasis added).

This case presents a situation analogous to the ones under consideration in *Appeal of Silverstein*, *Appeal of City of Manchester*, and the line of authorities discussed therein where the court concluded the PELRB lacked jurisdiction. In this case, the CBA does not include language

granting the responsibility to determine whether a specific dispute is covered by the CBA to a third party, like an arbitrator. Therefore, the PELRB's preliminary task is to interpret the CBA to the extent necessary and decide whether the subject matter of the Moisakis' unfair labor practice complaint qualifies as a dispute which "falls within the scope of the CBA." In substance, Moisakis claims two things: 1) that he was improperly disciplined in violation of the CBA; and 2) that the BOS August 12 and October 7, 2019 votes violated the grievance procedure. No matter how these claims are drawn or characterized, it is clear that both are based upon the CBA, and both will require an interpretation of the CBA to resolve.

As to the complaint about the discipline imposed, there are no provisions in RSA 273-A setting forth standards or criteria which govern how public employers may discipline their employees. In other words, such a claim has to rely upon the provisions of the CBA addressing discipline, including any procedures by which the imposition of discipline can be challenged.² In this case, the CBA does not include an express "just cause" discipline standard, and it would have to be interpreted to determine the applicable standard for discipline and further interpreted to decide whether any contractual agreement on discipline was violated in Moisakis' case. Similarly, the CBA must also be interpreted in order to resolve the portion of the complaint based on the BOS votes. In particular, the grievance procedure must be interpreted in order to determine whether the Moisakis disciplinary grievance could be prosecuted in the manner urged by Moisakis or in the manner urged by the Town, and the consequences of either conclusion must also be addressed and decided. Both parts of the Moisakis complaint are grievances which fall "within the scope of the CBA."

² A "just cause" discipline proposal, while not a prohibited subject of bargaining, is a matter of managerial prerogative and is a permissive subject of bargaining, and collective bargaining agreements sometimes provide for "discipline based on a just cause standard." *Appeal of State*, 138 N.H. 716, 723-24 (1994).

The fact that Moisakis, and not the Union, has filed this unfair labor practice complaint is immaterial. Putting aside the dispute over who must prosecute the Moisakis grievance, the law is clear that the grievance procedure is binding upon individual unit employees like Moisakis as well as the Union. To conclude otherwise undermines the fundamental purpose of exclusive representation of the bargaining unit and the outcome of negotiations completed by the bargaining unit's exclusive representative (the Union in this case). Likewise, the fact that neither Moisakis nor the Union sought to advance the grievance to binding arbitration does not change the jurisdictional analysis. In this case the inclusion of binding arbitration as the last step of the grievance procedure means the PELRB will never have jurisdiction over the CBA based disputes raised in this case, regardless of whether the disputes are actually submitted to binding arbitration and regardless of whether it is an individual bargaining unit employee, or the Union, who has filed the complaint with the PELRB.

It is worth noting that in the event a party contends another party has improperly refused to proceed to arbitration, or improperly demanded arbitration, the PELRB does have jurisdiction to adjudicate such claims since 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). The parties are also reminded that the powers of an arbitrator include the authority to decide issues such as "procedural arbitrability,"³ and therefore such matters are also for an arbitrator, and not the PELRB, to decide. See *Appeal of Hillsborough County Nursing Home*, 166 N.H. 731 (2014)(finding that whether the Union procedurally defaulted is an issue for the arbitrator, not

³ Procedural arbitrability issues could be based, for example, on alleged non-compliance with the prior steps of the grievance procedure and the extent to which such alleged non-compliance limits a party's ability to have the merits of a particular grievance decided by the arbitrator.

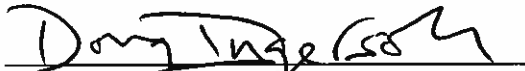
the PELRB and the County violated RSA 273-A:5, I(h) because it wrongfully refused to arbitrate a legitimate grievance).

Decision and Order:

The claims Moisakis has made in this case are within the scope of a CBA which includes a grievance procedure that ends in binding arbitration. Under the cited authorities, neither Moisakis nor the Union has a right to bypass the negotiated grievance procedure and have the contractual disputes raised in the complaint adjudicated by the PELRB. In addition, any procedural arguments about whether the disciplinary grievance was properly filed, maintained, processed, or preserved are also matters for an arbitrator to decide. The PELRB lacks jurisdiction in this case and therefore the complaint is dismissed.

So ordered.

Date: 6-30-2020



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