

**State of New Hampshire**

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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City of Portsmouth	*	
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Petitioner	*	
	*	Case No. A-0411-41
	*	
	*	Decision No. 2003-153
AFSCME Council 93, Local 1386	*	
Portsmouth City Employees	*	
	*	
Respondent	*	
	*	

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PRE-HEARING MEMORANDUM AND ORDER

BACKGROUND

The City of Portsmouth (hereinafter "the City") filed an improper practice charge on December 2, 2003 alleging that the Portsmouth City Employees, AFSCME Local 1386 (hereinafter "the Union") committed an unfair labor practice by demanding arbitration of three (3) grievances after the time limit for submitting the grievances to arbitration had already expired. In its complaint, the City specifically references provisions contained in the parties' collective bargaining agreement (CBA) that establish a time period of thirty (30) workdays, following the Union's receipt of the City's Step 2 answer, for the Union to file for arbitration and deem any grievance not so submitted to arbitration as being "dropped." Whereas the Step 2 answers for the subject grievances were issued by the City Manager on June 10, 2003 and the Union did not file for arbitration until October 7, 2003, the City argues that the arbitration demands are untimely and the grievances not arbitrable. The City states that the Union's actions in this regard violate RSA 273-A:5 II (d), (f) and (g), and, accordingly, it requests that the PELRB (1) find and hold that the Union has committed an unfair labor practice, (2) order the Union to cease and desist in attempting to arbitrate the subject grievances, (3) order the Union to reimburse the City for the fees and expenses that the City has incurred in pursuing the instant charge, and (4) order any other relief that it deems just and fair.

The Union filed its answer to the City's charge on December 15, 2003. The Union denies the City's contention that it has committed an unfair labor practice and raises, as a counter-claim, the allegation that the City itself has consistently disregarded the time limits set forth in the parties' grievance procedure. In support of this assertion, the Union cites a grievance that it filed on July 29, 2002 that was subsequently answered by the City, at Step 1, on October 9, 2002

and, at Step 2, on December 20, 2003. By way of further answer, the Union states that the grievance procedure allows for the parties to extend time limits by mutual agreement and that through the actions of the parties this provision has been and continues to be in effect. The Union requests, inter alia, that the PELRB (1) deny the relief sought by the City in its charge, and (2) award the Union its costs, including attorney's fees, that it has suffered in responding to the charge.

A pre-hearing conference was conducted at PELRB offices on December 18, 2003 during which both parties were represented by counsel.

PARTICIPATING REPRESENTATIVES

For the City: Thomas J. Flygare, Esquire

For the Union: Katherine McClure, Esquire

ISSUES FOR DETERMINATION BY THE BOARD

- (1) Has the Union violated the parties' collective bargaining agreement, and therefore committed an unfair labor practice, by demanding arbitration of the subject grievances?
- (2) Has the City committed an unfair labor practice by refusing to proceed to arbitration on the subject grievances or otherwise failing to participate in good faith in the parties' contractual grievance procedure?

WITNESSES

For the City:

1. Dianna Fogarty, Director of Human Resources
2. Linda Corriveau, Admin. Asst., Human Resources
3. John Bohenko, City Manager
4. Steve Parkinson, Director of Public Works

For the Union:

1. Jack McMath, NH AFSCME Coordinator
2. Kenneth Fanjoy, Pres., AFSCME Local 1386
3. John Mercer, Vice-Pres., AFSCME Local 1386

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

### Joint Exhibits:

1. Current Collective Bargaining Agreement, 7/1/98 – 6/30/03
2. Request for Arbitration letter dated October 7, 2003 to PELRB from Jack McMath re: "Grapple Truck" grievance (with attachments).
3. Request for Arbitration letter dated October 7, 2003 to PELRB from Jack McMath re: "Call Back" grievance (with attachments).
4. Request for Arbitration letter dated October 7, 2003 to PELRB from Jack McMath re: "Hazardous Waste Day" grievance (with attachments).
5. Letter dated June 10, 2003 to Ken Fanjoy from John Bohenko re: "Grapple Truck" grievance.
6. Letter dated June 10, 2003 to Ken Fanjoy from John Bohenko re: "Call Back" grievance.
7. Letter dated June 10, 2003 to Ken Fanjoy from John Bohenko re: "Hazardous Waste Day" grievance.

### For the City:

None other than those marked as "Joint."

### For the Union:

1. Letter dated December 20, 2002 to Ken Fanjoy from John Bohenko.
2. Letter dated October 9, 2002 to Ken Fanjoy from Steven Parkinson.
3. Lee Roseberry Grievance, dated July 29, 2002.
4. Letter dated July 29, 2002 to Lee Roseberry from David Allen.

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.

## LENGTH OF HEARING

The time being set aside for this hearing is one (1) day. 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 twenty (20) days prior to the date of the evidentiary hearing.

DECISION

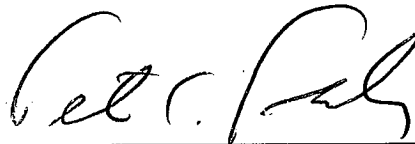
1. The parties' representatives shall meet, or otherwise confer, no later than **February 10, 2004** in order to compose a mutual statement of agreed facts and they shall memorialize those facts upon which they can so stipulate and file said document with the PELRB at least five (5) days prior to the date of the hearing.
2. The party representatives shall forward any amendments to, or deletions from, their Witness and Exhibit lists, as detailed above, to the opposing representative or counsel, and to the PELRB, at least five (5) days prior to the scheduled hearing date. The party representatives shall meet, or otherwise arrange, to pre-mark any exhibits, for identification, prior to the time of hearing and have sufficient copies available for distribution at the hearing as required by Pub 203.02.
3. The parties shall file any additional preliminary, procedural or dispositive motions no later than twenty (20) calendar days prior to the scheduled hearing date.
4. Unless otherwise ordered as a result of the filing of any subsequent motion or for other good cause shown, an evidentiary hearing between the parties will be held on

**March 11, 2004 at 9:30 AM**

at the offices of the Public Employee Labor Relations Board, Concord, New Hampshire.

So ordered.

Signed this 22<sup>nd</sup> day of December, 2003.



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Peter C. Phillips, Esq.  
Hearings Officer

Distribution:

Thomas J. Flygare, Esquire  
Katherine McClure, Esquire