



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME Local 2715, Hillsborough County
Nursing Employees

Complainant

v.

Hillsborough County Nursing Home

Respondent

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Case No: A-0426-69

Decision No. 2007-059

APPEARANCES

For the Complainant:

Jamie DiPaola-Kenny, Esq., Associate General Counsel, AFSCME Council 93

For the Respondent:

Carolyn M. Kirby, Esq., Legal Counsel

BACKGROUND

AFSCME Local 2715, Hillsborough County Nursing Employees (hereinafter "Union") filed an unfair labor practice complaint on October 28, 2005 alleging that the Hillsborough County Nursing Home (hereinafter "Nursing Home" or "County") committed an unfair labor practice in violation of RSA 273-A:5 I (e), (h), and (i), by unilaterally imposing a new restriction on the use of vacation time. More specifically, the Union alleges that on April 29, 2005 the Director of Nurses for the Nursing Home, Irene Belanger, distributed a memorandum regarding the use of vacation time. This memorandum, as referenced by the Union, reads, in part, that "[v]acation time on weekends has only been approved if the weekend falls in the middle of a two (2) week vacation." It is the Union's contention that this language constitutes a new restriction in vacation usage.

The County filed its answer denying the Union's charge on November 28, 2005.¹ While the County generally admits to the factual chronology as described in the Union's complaint, it denies that it has committed any improper labor practice. While the County admits that Director of Nursing Irene Belanger authored the April 29, 2005 memorandum, it denies that the contents therein imposed a new restriction on vacation usage. It also submits that contrary to the allegation raised in the complaint, Administrator Moorehead provided a written response to the Union's October 13th letter. By way of further answer, the County states, among other things, that the instant matter involves the application and interpretation of provisions of the parties' CBA, which includes final and binding arbitration and asserts that the complaint should be dismissed. The County further asserts that the Union's failure to pursue the matter through the grievance process constitutes a waiver of any claim it may have had under the CBA.

A pre-hearing conference was conducted on February 13, 2006. Following assented motions that the matter be held in abeyance and later be re-opened and still later be continued and rescheduling by the PELRB, a final evidentiary hearing was conducted on March 29, 2007 at the PELRB offices in Concord, New Hampshire. At that time both parties were present and represented by counsel. The PELRB first heard argument from counsel for both parties on the Respondent County's request for dismissal asserting that this matter should have gone to arbitration. At the conclusion of oral argument, the PELRB elected to take the dismissal under advisement and, as both sides were prepared with witnesses and exhibits, proceeded to hear evidence on the Union complaint. Each party had the opportunity to present evidence, including the direct examination and right to cross-examine witnesses as well as to submit exhibits. In conformance with the pre-hearing order, counsel for both parties did stipulate to a statement as to uncontested facts those of which were deemed relevant to the PELRB decision appear below as Findings of Fact #1-4 and the evidentiary hearing proceeded. At the conclusion of the evidence, the Respondent renewed its request through an oral motion to dismiss the complaint asserting that the matter should have gone to arbitration, and at the request of the PELRB, counsel made brief closing arguments in lieu of the submission of written memoranda of law.

FINDINGS OF FACT

1. Hillsborough County is a public employer under RSA 273-A.
2. AFSCME Council 93, Local 2715 is currently the certified exclusive representative of certain employees of the Hillsborough County Nursing Home.
3. A Bargaining Unit Certification dated June 25, 2003 identifies AFSCME Local 2715 as the certified representative for certain positions at the Hillsborough County Nursing Home.
4. The Union and the County are parties to an expired collective bargaining agreement dated July 1, 2003 through June 30, 2004. At all times relevant, the parties were operating under the status quo doctrine.

¹ A motion to extend the deadline for filing the County's answer to November 30, 2005 was granted by the Board on November 7, 2005.

5. Article XVI – Grievance Procedure of the parties collective bargaining agreement (CBA) provides as follows:

16.1 ... a grievance is defined as a complaint or claim by an employee or group of employees in the bargaining unit or the Union...

16.1 (d) If the Union fails to submit such written request for the appointment of an arbitrator to the New Hampshire Public Employees (sic) Labor Relations Board within said ten (10) workdays, the grievance shall be deemed waived.

16.2 – The decision of the arbitrator shall be final and binding upon the parties as to the matter in dispute.

16.4 – If the grievance is not reported and/or processed within the time limits set forth above, the matter shall be deemed waived and no further action will be taken with respect to such grievance unless both parties mutually agree to an extension of said limits.

6. The parties have included a specific article in the effective CBA entitle "Article IX – Vacations" which has been at issue in at least one previous arbitration.
7. The parties' CBA contains a workable grievance provision.

DECISION AND ORDER

JURISDICTION

We first state that The Public Employee Labor Relations Act (RSA 273-A) provides that the PELRB has primary jurisdiction to adjudicate claims between the duly elected "exclusive representative" of a certified bargaining unit comprised of public employees, as that designation is applied in RSA 273-A:10, and a "public employer" as defined in RSA 273-A:1,I. (See RSA 273-A:6,I). The PELRB has sole original jurisdiction to adjudicate claims of unfair labor practices committed by a public employer or an exclusive bargaining representative certified under RSA 273-A:8.

In the instant matter, there is also a threshold consideration that arises from the Respondent County's Motion to Dismiss the Union's complaint based upon the Union's failure to arbitrate the dispute. The PELRB has exclusive original jurisdiction, unless the parties have expressly granted that authority to an arbitrator, over the question of whether a dispute between the parties to a collective bargaining agreement (CBA) should be submitted to arbitration. This is a threshold consideration often referred to as "determining the arbitrability" of an issue. In this matter, the parties have not expressly granted that authority to an arbitrator by the terms of their

CBA. Without that specific reservation of authority to an arbitrator, the PELRB assumes jurisdiction to determine whether to refer the matter to arbitration.

DISCUSSION

In this case, before we consider the merits of the Union's complaint charging the County with an improper labor practice, we must determine whether the dispute between the parties is one over which it should exercise its jurisdiction. This is so because the parties were bound to the terms of their CBA, under the doctrine of *status quo*, at the time the dispute arose and the CBA contains a workable grievance procedure. Here the parties have agreed to submit claims or complaints to a grievance procedure ending in final and binding arbitration. Joint Exhibit #2 – Collective Bargaining Agreement, Article 16.2.

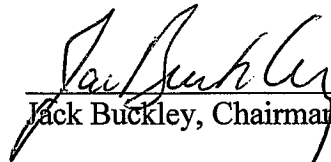
The parties have addressed the topic of vacation utilization in their CBA at Article IX. Unfortunately, the CBA has conflicting language which provides in §9.1 that: "The Nursing Home Administrator shall determine the time and the order in which vacations may be taken" while stating in §9.3. that: "These hours may be taken at any time within the ensuing year."

The application of these two provisions gives rise to the instant dispute and in our opinion a "colorable issue of contract interpretation" is presented by the somewhat contradictory language of this article as applied to the circumstances presented here. Therefore, the need for substantive contract interpretation is necessary.

Under the so-called *Westmoreland doctrine*, (See generally, *Appeal of Westmoreland School Board*, 132 N. H. 103, 109), we cannot determine with "positive assurance" that the parties did not intend to arbitrate this dispute involving the utilization and scheduling of vacation. The presumption of arbitrability remains under the existing language of the parties' CBA as we do not find a preclusion from arbitrability of this vacation scheduling issue in the CBA. Despite the allegations and reasonable inferences that flow from the Union's offers of proof and oral argument being viewed in a light more favorable to the Union, we find that this issue should have been filed as a grievance and ending, if necessary, in an arbitrator's final and binding decision. The parties are commended for their cooperation in presenting this dispute before the Board, but the substantive interpretations necessary to a resolution of this dispute should have been subject to arbitration as previously agreed to by the parties when they agreed to be bound by the terms of their CBA. Therefore, the unfair labor practice complaint is dismissed on the County's initial request for dismissal. Since the Board has made its decision on this basis, it does not reach the substantive merits of the Union's complaint.

Our decision to dismiss this complaint does not prohibit a subsequent dispute of the same issue, should it arise, from being brought through the grievance procedure and arbitration. While the Union may have waived its ability to grieve the instant dispute pursuant to Article IX, §16.4, if the appropriate circumstances still exist or arise in the future such as to create a dispute, a grievance may be filed.

Signed this 20th day of April, 2007



Jack Buckley, Chairman

By unanimous decision. Jack Buckley presiding. Members E. Vincent Hall and Sanford Roberts present and voting.

Distribution:

Jamie DiPaola-Kenny, Esq.

Carolyn Kirby, Esq.