NH Supreme Court reversed this decision September 11, 2001, Slip Opinion No. 1999-707.

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

BELKNAP COUNTY NURSING HOME, STATE EMPLOYEES ASSOCIATION OF NEW HAMPSHIRE, S.E.I.U., LOCAL 1984	:	
Complainant	:	CASE NO. S-0334:9
v.	:	DECISION NO. 1999-063
BELKNAP COUNTY COMMISSIONERS	:	
Respondent	:	

APPEARANCES

Representing Belknap County Nursing Home:

Terri Donovan, Negotiator

Representing Belknap County Commissioners:

Bradley Kidder, Esq.

Also appearing:

Irene Hill, Belknap County Nursing Home
Carol Graves, Belknap County Nursing Home
John Tsakiris, Belknap County Nursing Home
Robert Chase, Administrator, Belknap County

BACKGROUND

On November 18, 1998, the State Employees Association of New Hampshire, S.E.I.U., Local 1984 (Union) filed unfair labor practice charges against The Belknap County Commissioners (County) pursuant to RSA 273-A:5 I (h) and (i) alleging breach of the collective bargaining agreement (CBA) by implementing a decision of an arbitrator that is contrary to the collective bargaining agreement, the terms of which continued under the status quo doctrine. On December 3, 1998, the County filed its response denying the charges and challenging the timeliness of the Association's complaint. On January 21, 1998, a hearing was commenced before the hearing officer and the matter was dismissed on account of timeliness. The decision was remanded by the Board on March 29, 1999. Decision No. 1999-030. A hearing on the matter was held before the undersigned hearing officer on May 3, 1999. The record was closed

with the receipt of briefs from the parties on May 25, 1999. There is no dispute between the parties as to the facts of the case.

FINDINGS OF FACT

1. Belknap County employs nurses and others who care for residents of the Belknap County Nursing Home and thus is a "public employer" within the meaning of RSA 273-A:1 X.

2. State Employees Association of New Hampshire, SEIU Local 1984, is the duly certified bargaining agent for certain organized employees at Belknap County Nursing Home.

3. The Union and the County are parties to a collective bargaining agreement for the period, April 1, 1993 through December 31, 1996. Subsequently, the parties ratified a CBA for the period, April 1, 1997 through December 31, 1999. The parties stipulate that the grievance procedure of the former CBA is the same as the grievance procedure of the latter CBA. (Article XIII, Joint Exhibit No. 1).

4. Article XIII of the CBA, in pertinent part, reads as follows:

> 13.4.5. Step #5: If subsequent to the Commissioner's decision the grievant feels that further review is necessary, the matter shall be submitted to arbitration by an arbitrator mutually agreed to or, failing agreement, through the procedures of the NH Public Employee Labor Relations Board.
>
> The parties agree that the jurisdiction and authority of the arbitrator and his opinions as expressed will be confined exclusively to the interpretation of this agreement. The arbitrator will have no authority to add to, subtract from, alter, amend or modify any provision of this agreement or impose on either party any limitation or obligation not specifically provided for under the terms of this agreement.
>
> In the event the written decision of an arbitrator resulting from any arbitration of grievances hereunder would result in or require the expenditure by the County of unappropriated funds or funds not appropriated for the purposes for which the arbitrator's decision would require their expenditure, the decision shall be advisory in nature and shall in no way be binding upon any of the parties hereto or appealable.
>
> In all other cases the written decision of an

arbitrator resulting from any arbitration of the grievances hereunder shall be binding on the parties.

5. The Union filed a grievance on the subject of shift differential payments on or about February 5, 1997, alleging that the County had violated the collective bargaining agreement. The grievance was processed through to arbitration.

6. Arbitrator Michael Ryan heard the grievance on February 20, 1998 and issued his Decision and Award on May 18, 1998. He determined that he was not authorized to rule on a grievance that occurred during the hiatus between CBAs. Although he was "well aware of the State law bearing on the hiatus period issue," he was limited from ruling on it. He then did rule concluding that the matter was not substantively arbitrable.

DECISION AND ORDER

The County again raises the question of timeliness stating that the question pursuant to RSA 273-A:6 VII was raised by the County but was not addressed by the hearing officer and subsequently by the Board. The above subparagraph requires summary dismissal of any complaint of an alleged unfair labor practice, which occurred more than six months prior to filing. The County relates the violation that gives rise to the charge to the grievance filed in February, 1997. The Union relates the filing to the issuance of the Arbitrator's Award. Indeed, the Union "contends that the decision of the arbitrator and as being enforced [by] the County" violates RSA 273-A:5 I (h) and (i). It would have been impossible for this unfair labor practice to have been raised until the issuance of the arbitrator's award. Summary dismissal based on the six month bar of RSA 273-A:6 VII is not in order. The unfair labor practice was timely filed.

The underlying grievance was filed during the hiatus between two CBAs. The parties did not grant the arbitrator authority to decide the threshold question of arbitrability. When the parties have not reserved the question of arbitrability to the arbitrator, as in this case, the Public Employee Labor Relations Board has exclusive original jurisdiction over the threshold question. School District #42 of the City of Nashua v. Michael Murray, 128 N.H. 417, 419 (1986).

The "status quo" doctrine has bearing on the matter of the hiatus period. It requires that the "balance of power guaranteed by RSA Chapter 273-A" be preserved after a previous CBA has expired. Appeal of Milton School District, 137 N.H. 240 (1993) quoting Appeal of Franklin Education Association, 136 N.H. 332 (1992). The principle of maintaining the "status quo" during a hiatus does not extend the contract in the way of an evergreen clause but it requires that the terms and conditions of a CBA under which bargaining unit members have worked when the CBA was effective remain unchanged.

The bargaining unit members' right to avail themselves of this grievance procedure is such a condition of employment that must continue to

operate unchanged during the period between CBAs under the doctrine of "status quo." Arbitration is the final step in this grievance procedure. (Finding No. 4). Thus, the underlying grievance is arbitrable.

The arbitrator exceeded his authority in ruling on the matter of arbitrability and the County has committed an unfair labor practice pursuant to RSA 273-A:5 I 9 (h) and (i) in accepting and advancing the arbitrators decision. The Decision and Award of the arbitrator are vacated and the parties are to proceed to arbitration on the merits of the grievance
So ordered.

Signed this 2nd day of July, 1999.

Gail C. Morrison
Hearing Officer