

fifteen (15) days from receipt of the answer given at the preceding level” and states, accordingly, that the Association’s grievance is not arbitrable because it is time barred by this clear and express time limitation period. The District further avers that since the parties’ CBA does not grant authority to the arbitrator to determine arbitrability, the PELRB has exclusive original jurisdiction over the threshold question of arbitrability, citing *School District #42 of the City of Nashua v. Murray*, 128 N.H. 417 (1986).

The District requests that the PELRB (1) issue an *ex parte* temporary cease and desist order prohibiting the arbitration of the Beardsley grievance pending the PELRB decision on arbitrability, (2) find that the grievance is not arbitrable, (3) find that the Association violated the CBA and committed an unfair labor practice, (4) issue a permanent cease and desist order requiring the Association to withdraw its Demand for Arbitration, and (5) award costs and attorney’s fees to the District.

On January 6, 2004, the Association filed its answer denying the District’s complaint as well as a counter-claim of unfair labor practices against the District. In its answer, the Association admits that it filed its demand for arbitration in October, but states that a timely notice of intent to arbitrate was sent to the Westmoreland School Board via US Mail on August 15, 2003, the same day the School Board’s response was received.¹ The Association avers that the parties’ CBA does not establish a time requirement for filing with the AAA. Nevertheless, based upon the language in the CBA, the Association contends that questions of arbitrability are appropriately presented to an arbitrator for decision. In reference to its complaint, the Association claims that the District has itself violated RSA 273-A:5, I (a), (g), (h) and (i) by terminating Ms. Beardsley without just cause and without providing to her the specific basis or reason(s) for such action, as well as by refusing to proceed to arbitration on her grievance. The Association states that Ms. Beardsley, as a school nurse, has appropriate standing to pursue a grievance under the parties’ CBA, and that pursuant to the CBA she may not be disciplined without just cause. It claims that Ms. Beardsley has no discipline on record, nor has she been informed as to why she was discharged, thus constituting a breach of Article 10 of the parties’ CBA.

The Association requests, inter alia, that the PELRB dismiss the District’s unfair labor practice charges, sustain the Association’s unfair labor practice charges, order the District to reinstate Ms. Beardsley to her position and make her whole for any and all losses she has suffered, and order the District to pay all fees and costs incurred by the Association as a result of these charges.

On January 8, 2004, the District filed a Motion to Dismiss the Association’s counter-claim of unfair labor practices, alleging that it is barred by the six (6) month statute of limitations period set forth in RSA 273-A:6 and Pub.201.02. The District’s claim in this regard is based upon the fact that Ms. Beardsley was notified on April 9, 2003 that her contract would not be renewed and it was not until January 5, 2004 that the Association filed its counter claim. On

¹ During the course of the pre-hearing conference, counsel for the District represented to the Hearing Officer that the District has no record of ever receiving such notice. In response thereto, Counsel for the Association indicated that the Association does not dispute the District’s representation that it did not receive the Association’s notice of intent to arbitrate, but that it is relying on the so called “mail box rule” as its’ basis for establishing delivery.

January 15, 2004, the District also filed a motion to delay its answer to the Association's counter claim asserting that said counter claim should be disposed of based upon the District's motion to dismiss.

On January 20, 2004, the Association filed responses to the District's Motion to Dismiss and the District's Motion to Delay Its' Answer. The Association answered that as the School Board makes the final determination regarding continuation of employment, and did not do so until August 13, 2003, the counter claim is timely. Moreover, since it was not until January 2004 that the District notified the Association that it intended to breach the grievance and arbitration procedures in the CBA, that portion of the charge, as maintained by the Association, is also not barred by the statute of limitations. The Association objected to the District's motion to delay its answer on the general grounds that it would be contrary to the efficient use of time and resources before the PELRB, and requested, inter alia, to be awarded any costs incurred by the District's motion to delay.

On January 29, 2004, the District filed a "Replication to Answer to Motion to Dismiss Counter Claim of Unfair Labor Practices" and a "Replication to Answer to Motion to Delay Answer to Counter Claim of Unfair Labor Practices" stating, among other things, that the District would be prejudiced and forced to incur unnecessary attorney's fees and costs if it is forced to litigate the merits of the Association's complaint that should be otherwise be dismissed as a matter of law. The Association filed its responses to the District's replications on February 5, 2004, wherein it reaffirmed the positions it had previously articulated.

On February 20, 2004, the District filed a Motion for Summary Judgment regarding Case No. T-0320-4.

A pre-hearing conference was conducted at PELRB offices on February 25, 2004 at which both parties were represented by counsel. With the agreement of the parties, the Hearing Officer indicated that the respective cases would be consolidated for purposes of the pre-hearing conference and for submission to the PELRB for decision.

PARTICIPATING REPRESENTATIVES

For the District: Thomas T. Barry, Esquire

For the Association: James F. Allmendinger, Esquire, NEA-NH

ISSUES FOR DETERMINATION BY THE BOARD

- (1) Whether the Association violated RSA 273-A:5, II (f) by filing a demand for arbitration on October 15, 2003 regarding the Brenda Beardsley grievance.
- (2) Whether the District violated RSA 273-A:5, I (a), (g), (h) and/or (i) by terminating Ms. Beardsley without just cause, terminating her without providing any reasons for such action, and for refusing to proceed to arbitration on her grievance.

- (3) Whether the Association's counter claim of unfair labor practices is barred by the six (6) month statute of limitations in RSA 273-A:6 and Pub. 201.02(a).
- (4) Is the District's receipt of the Association's notice of intent to arbitrate satisfied through application of the so called "mail box rule."

WITNESSES

For the District:

1. Patricia Trow Parent, School District Personnel Manager
2. Phillip G. McCormack, Superintendent of Schools
3. Michael Acerno
4. Douglas S. Hatfield, Esq.

For the Association:

1. Mary Gaul, UniServ Director, NEA/NH
2. Brenda Beardsley

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.

EXHIBITS

Joint Exhibits:

1. Parties' collective bargaining agreement, 7/1/03 – 6/30/05.
2. Decision of the Westmoreland School Board dated August 13, 2003.
3. Demand for Arbitration dated October 15, 2003.
4. Other Beardsley Grievance correspondence.

For the District:

1. None other than those marked as "Joint."

For the Association:

1. August 15, 2003 letter from Mary Gaul to Westmoreland School Board

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 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.

DECISION

1. Case No. T-0320-4 and Case No. T-0320-5 are hereby consolidated for PELRB review and consideration.
2. Upon discussion between the parties' representatives and the hearing officer during the pre-hearing conference, and the recognition that the instant cases primarily concern questions of law, it was stipulated that they are appropriately submitted to the PELRB through written motions/submissions of the parties.
3. It was further stipulated that the parties' representatives shall meet, or otherwise confer, on or before **March 12, 2004**, in order to compose a mutual statement of agreed facts. The parties' representatives shall both execute the "Stipulation of Facts" and file said document with the PELRB within five (5) days of such execution.
4. As referenced above, the District previously filed a Motion for Summary Judgment with the PELRB on February 20, 2004. Accordingly, the Association shall file its Motion for Summary Judgment and Memorandum of Law, including its response to the District's motion, on or before **March 22, 2004**.
5. The District shall then file its response, if any, to the Union's submission, on or before **April 1, 2004**.
6. Upon receipt of these documents, the record shall be deemed closed and a decision shall issue based solely upon the file documents, stipulated facts and the parties' memoranda, unless it is determined by the PELRB that a hearing is necessary prior to a final determination on the merits.
7. In the event the PELRB determines that a hearing is necessary, the party representatives shall forward any amendments to, or deletions from, their Witness and Exhibit lists, as specified in their pre-hearing worksheets, 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.

So ordered.

Signed this 8th day of March, 2004.



Peter C. Phillips, Esq.
Hearings Officer

Distribution:

Thomas T. Barry, Esquire

James F. Allmendinger, Esquire, NEA-NH