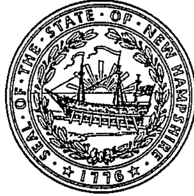


State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME Council 93, Local 863	*	
Complainant	*	Case No: A-0493-11
v.	*	Decision No. 2004-084
City of Rochester	*	
Respondent	*	

PRE-HEARING MEMORANDUM AND ORDER

BACKGROUND

AFSCME Counsel 93, Local 863 (hereinafter "the Union") filed an unfair labor practice complaint on February 27, 2004 alleging that the City of Rochester, Department of Public Works (hereinafter "the City") committed unfair labor practices in violation of RSA 273-A:5 I (g), (h) and (i) as the result of the certain conduct, or lack thereof, relating to annual performance evaluations. More specifically, the Union claims that pursuant to the parties' collective bargaining agreement (CBA), employee evaluations are to be conducted annually prior to July 1st and that those who do not receive a satisfactory evaluation are to be re-evaluated within ninety-days of the first evaluation. The Union states that the City failed to conduct employee evaluations by July 1, 2003 and also failed in its requirement to conduct a second evaluation. By virtue of such inaction, the Union alleges that the City has violated RSA 273-A:5 I (g), (h) and (i) and requests, among other things, that the PELRB order the City to conduct employee evaluations.

The City filed its answer to the complaint on March 26, 2004. While the City generally admits to the chronological history as alleged by the Union, it states that the Union has failed to state a claim upon which relief can be granted and that the Union's improper practice charge is otherwise procedurally defective. In this regard, the City also filed a Motion to Dismiss on March 26, 2004, wherein it raises two arguments. The City first contends that the Union's improper labor practice should be dismissed as untimely, in that it was filed beyond the applicable six (6) month statute of limitations period. The City states that the alleged violation occurred as of July 1, 2003, the date by which employee evaluations were to be completed, and that since the improper practice charge was not filed until February 27, 2004, the Union's case is

time barred. Any claim by the Union that the time clock for filing an improper practice charge actually commenced ninety days after July 1, 2003, the City characterizes as "a transparent attempt to bootstrap a meritless allegation onto its untimely charge…" Secondly, the City asserts that based upon the "final and binding" arbitration procedure agreed upon by the parties, the PELRB does not have jurisdiction to hear allegations raised concerning the City's failure to conduct annual performance evaluations.

The Union filed its opposition to the City's Motion to Dismiss on May 19, 2004. It avers that the time period for filing an unfair labor practice did not commence until October 1, 2003, at the end of the ninety-day, "two prong," evaluation procedure, and thus the filing date of February 27, 2004 was within the six (6) month statute of limitations period. As to the City's jurisdictional claim, the Union states that the City's failure to evaluate employees constitutes a new policy that negates a portion of the parties' CBA. Accordingly, it argues that the matter is within the jurisdiction of the PELRB.

A pre-hearing conference was conducted at PELRB offices on June 9, 2004 during which both parties were represented by counsel.

PARTICIPATING REPRESENTATIVES

For the Union: Katherine M. McClure, Esq.

For the City: Warren D. Atlas, Esq.

ISSUES FOR DETERMINATION BY THE BOARD

(1) Should the Union's complaint be dismissed based upon the PELRB's lack of jurisdiction over the instant matter?

(2) Should the Union's complaint, or any portions thereof, be dismissed as being violative of the six-month statute of limitations per RSA 273-A:6 VII?

(3) Has the City committed an unfair labor practice within the meaning of RSA 273-A:5 I (g), (h) and/or (i) by its failure to conduct annual employee evaluations?

EXHIBITS

Joint Exhibits:

1. Parties' Collective Bargaining Agreement, July 5, 2000 to June 30, 2003.

For the Union

1. Letter dated February 5, 2004 from James Keegan to Melodie Esterberg.

For the City:

None other than those marked as "Joint."

DECISION AND ORDER

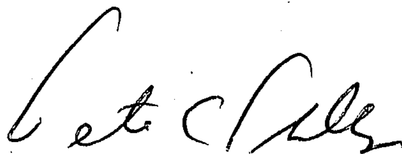
1. Upon discussion between the parties' representatives and the Hearing Officer during the pre-hearing conference, the parties stipulated to submitting the instant matter to the Hearing Officer for decision through written submissions.

2. It was further stipulated that the parties' representatives shall meet, or otherwise confer, 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, on or before **June 28, 2004**. Moreover, on or before **June 28, 2004**, the parties' representatives shall file any supplemental memoranda regarding the City's Motion to Dismiss and the merits of the Union's Improper Practice Complaint.

3. 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 that a hearing is necessary prior to a final determination on the merits.

4. In the event that it is determined 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 11th day of June, 2004.



Peter C. Phillips, Esq.
Hearing Officer

Distribution:
Katherine M. McClure, Esq.
Warren Atlas, Esq.