



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Mountain View Nursing Home

Complainant

v.

AFSCME Council 93, Local 3685

Respondent

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Case No: A-0546-9

Decision No. 2006-077

PRE-HEARING MEMORANDUM AND ORDER

BACKGROUND

The Mountain View Nursing Home (hereinafter "Mountain View" or "Employer") filed an unfair labor practice complaint on February 10, 2006 alleging that AFSCME Council 93, Local 3685 (hereinafter "the Union") committed an unfair labor practice in violation of RSA 273-A:5 II (d), (f), and (g) by demanding arbitration of an otherwise untimely grievance. More specifically, Mountain View states that on September 13, 2005 its Acting Administrator, Forrest Painter, notified Bobbi Roach that her employment as a Licensed Nurse Assistant (LNA) was being terminated. According to Mountain View, Step 1 of the parties' contractual grievance procedure provides that "the employee involved and the Union's Steward shall first discuss the grievance with the grievant's immediate supervisor within two (2) work days of the event..." Since, as Mountain View alleges, no action was taken by the Union or the grievant (Roach) until September 28, 2005, when a Step 2 grievance, dated September 22, 2005 was presented to Mr. Painter, it contends that the grievance does not comply with Step 1. Mountain View also refers to language contained in Section 10.4 of the parties' CBA, specifically "that if the grievance is not reported and/or processed within the time limits set forth above, the matter shall be deemed waived..." as grounds for why the subject grievance is not arbitrable. Accordingly, Mountain View requests that the PELRB (1) find that the Union has committed unfair labor practices in violation of RSA 273-A, (2) order the Union to cease and desist in attempting to arbitrate the "Roach" grievance, (3) order the Union to pay Mountain View's fees and expenses in this matter, and (4) order such other relief as may be just and fair under the circumstances.

After approval of an assented to motion to extend the time period for filing its answer, the Union formally denied Mountain View's charge on March 9, 2006. Although the Union admits

to the facts alleged in the complaint, it denies that by demanding arbitration of the subject grievance it violated RSA 273-A:5 II (d), (f), and (g). Answering further, the Union states that Ms. Roach received the termination letter on September 19, 2005 and contacted her Union representative, Chapter Chair Deanna Chaffe, that same day. Since the termination letter was not the act of her immediate supervisor, the Union submits that Ms. Chaffe attempted to present the grievance to the author of the termination letter, namely Mr. Painter. As explained by the Union, Mr. Painter was away from work until September 28, 2005 and Ms. Chaffe presented the grievance to him at that time. In this regard, the Union points out that the CBA is silent as to when and to whom a grievance is to be presented when the act that serves as the basis of the grievance is performed by someone other than the grievant's immediate supervisor. In a supporting memorandum of law filed with the Union's answer, the Union asserts that it is for an arbitrator to interpret the CBA, and that issue(s) raised in Mountain View's charge should proceed to arbitration as they involve the interpretation of the grievance procedure, a part of the CBA.

The undersigned hearing officer conducted a pre-hearing conference via telephone on May 8, 2006 at 11:00 a.m.

PARTICIPATING REPRESENTATIVES

For the Employer: Daniel P. Schwarz, Esq.

For the Union: Joseph L. DeLorey, Esq.

ISSUES PRESENTED FOR BOARD REVIEW

- (1) Whether the Board should determine the question of procedural arbitrability related to the Union's grievance rather than an arbitrator appointed under the parties' grievance procedure.
- (2) If the Board shall determine arbitrability, is the Roach grievance procedurally arbitrable?

WITNESSES

For the Employer:

1. Forrest Painter

For the Union:

None at this time.

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 any scheduled hearing.

EXHIBITS

Joint Exhibits:

1. Collective Bargaining Agreement (dated April 1, 2004 - March 31, 2006).
2. Letter dated September 13, 2005 from F. Painter to B. Roach.
3. Grievance Form dated September 22, 2005.
4. Grievance response dated September 30, 2005 from F. Painter to B. Roach.
5. Grievance Form dated October 7, 2005.
6. Letter dated October 12, 2005 from Carroll County Commissioners to B. Lamirande.
7. Request for Arbitration, dated October 27, 2005 (PELRB Case No. A-0546-8).

For the Employer:

1. Affidavit(s) to be filed with the Employer's Memorandum of Law.

For the Union:

None other than those referenced above as joint. (It is understood that the Union may elect to file responsive affidavit(s) to any filed by the Employer).

Both parties reserve the right to amend their List of Exhibits in conformity with the DECISION SECTION appearing at the conclusion of this order or, upon proper showing, later with reasonable notice to the other party. If a hearing is held, 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 any scheduled hearing.

LENGTH OF HEARING

No hearing is scheduled at this time.

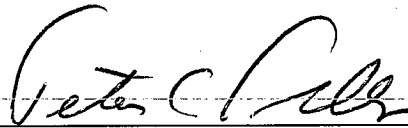
DECISION

1. As stipulated during the pre-hearing conference, the instant case shall be presented through the written submissions of the parties. Accordingly, the adjudicative hearing scheduled for May 23, 2006 is hereby cancelled.
2. The Union's supporting memorandum already having been filed, the Employer shall file its memorandum of law in response on or before **May 17, 2006**. The Union's reply brief, if any, to the Employer's memorandum shall be filed on or before **May 23, 2006**.

3. Upon receipt of these documents, the record shall be deemed closed and a decision shall be issued based solely upon the parties pleadings and file documents, the exhibits referenced above, and the parties' memoranda, unless it is determined that a hearing is necessary prior to a final decision on the merits.
4. Pursuant to Pub. 203.02(g)(2), the Board shall take official notice of the Union's request for arbitration in Case No. A-0546-9.
5. In the event that a hearing is deemed necessary, 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.

It is so ordered.

Signed this 10th day of May, 2006.



Peter C. Phillips, Esq.
Hearing Officer

Distribution:

Daniel P. Schwarz, Esq.
Joseph L. DeLorey, Esq.