State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Mountain View Nursing Home Complainant v. AFSCME Council 93, Local 3685 Respondent	*	Case No: A-0546-9 Decision No. 2006-089

APPEARANCES

Representing Mountain View Nursing Home:

Daniel P. Schwarz, Esquire
Flygare, Schwarz & Closson

Representing AFSCME Council 93, Local 3685:

Joseph L. DeLorey, Esquire
General Counsel

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. 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). The Union filed a supporting memorandum of law at the time it filed its answer.

The undersigned hearing officer conducted a pre-hearing conference on May 8, 2006. Based upon the respondent Union's answer to the Employer's charge, there being

no dispute as to the facts as alleged in paragraphs 1 through 10 of the complaint[1], counsel stipulated during the pre-hearing conference to presenting the instant case through the written submissions of the parties. The Union's supporting memorandum having already been filed, the Employer filed its memorandum of law on May 22, 2006. The Union filed a reply brief on May 30, 2006. In accordance with PELRB Decision No. 2006-077, upon receipt of these documents, the record was closed. Following review and consideration of the parties' pleadings, all relevant evidence contained therein, and the arguments of the parties, the hearing officer determines as follows:

FINDINGS OF FACT

1. The Mountain View Nursing Home of Carroll County is a public employer as defined in RSA 273-A:1, X. It, along with the Carroll County Board of Commissioners, is a party to a collective bargaining agreement ("CBA") from March 31, 2004 until March 30, 2006 with AFSCME Local 3685 ("Union"). Mountain View and the Union recently concluded negotiating for a successor agreement.

2. AFSCME Council 93, Local 3685 is the duly certified exclusive representative for certain public employees employed by Mountain View.

3. On September 13, 2005, the Acting Administrator of Mountain View, Forrest Painter, notified an employee, Bobbi Roach ("Grievant"), that her employment as a Licensed Nursing Assistant (LNA) was being terminated.

4. Article 10.1 of the CBA requires that as Step 1 of the grievance procedure, "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..."

5. An affidavit of Union Staff Representative Bryan Lamirande, dated March 9, 2006, states that Ms. Roache contacted Chapter Chair Deanna Chaffe on or about September 19, 2005, as Ms. Roache had received the termination letter that day.

6. No action was taken by the Union or the Grievant until September 28, 2005 when a Step 2 grievance, dated September 22, 2005 was presented to Forrest Painter.

7. On September 30, Mr. Painter denied the Step 2 grievance because there had been no compliance with the Step 1 requirements.

8. On October 7, 2005, the Grievant filed a Step 3 grievance with the Carroll County Commissioners.

[1] Paragraphs 1 through 10 of Mountain View's complaint are set forth below as Findings of Fact Nos. 1, 3, 4, 6-9, and 14.

9. By letter dated October 12, 2005, the Commissioners denied the Step 3 grievance, affirming the Step 2 decision that the grievance was untimely.

10. On October 27, 2005, the Union filed a request for arbitration with this Board.

11. On November 16, 2005, Donald E. Mitchell, Esq., Executive Director of the PELRB, issued a list of arbitrators for the grievance.

12. Section 10.2 of the CBA provides:

> The decision of the arbitrator shall be final and binding on the parties as to the matter in dispute. Either party may appeal the arbitrator's decision to the Superior Court in accordance with RSA 542.

13. Section 10.3 of the CBA provides:

> The arbitrator shall not have the power to add to, ignore or modify any of the terms and/or conditions of this Agreement. The arbitrator's decision shall not go beyond what is necessary for the interpretation and application of express provisions of this Agreement. The arbitrator's judgment shall not substitute for that of the parties in the exercise of rights granted or retained by this Agreement.

14. Section 10.4 of the CBA states as follows:

> 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 time limits.

DECISION

JURISDICTION

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5 (see RSA 273-A:6, I). It is well-settled that a wrongful demand for arbitration constitutes an unfair labor practice. *Keene School District v. Keene Education Association/NEA-New Hampshire*, PELRB Decision No. 2003-146 (December 3, 2003), *aff'd mem.*, Case No. 2004-0108 (N.H. April 14, 2004). Where the instant Employer has alleged violations of RSA 273-A:5 II (d), (f) and (g) by the Union based upon a wrongful demand to arbitrate, PELRB jurisdiction is appropriate.

DISCUSSION

The instant dispute presents two issues for decision. The first is 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 and secondly, if the Board shall determine arbitrability, whether the Union's grievance is procedurally arbitrable.

As to the first issue, unless it is otherwise agreed by the parties to submit such questions to an arbitrator, it is well-settled that the PELRB has exclusive original jurisdiction to determine arbitrability issues. *School District #42 v. Murray*, 128 N.H. 417 (1986). Stated alternatively, "[w]here the parties 'clearly and unmistakably [submit] the issue of arbitrability to the arbitrator without reservation'...the arbitrator will have authority to render a decision on the issue." *Appeal of Police Commission of City of Rochester*, 149 N.H. 528, 534 (2003). Here, although the parties' contractual grievance procedure does provide for final and binding arbitration, it does not expressly state that questions of arbitrability shall be presented to an arbitrator, nor is there evidence of any collateral agreements (outside the CBA) establishing that arbitrability disputes shall be resolved in such manner. Therefore the parties have not specifically reserved questions of arbitrability to be resolved by an arbitrator. I accordingly conclude that the PELRB has exclusive jurisdiction to determine the question of arbitrability in the instant case.

The arbitrability dispute at hand is procedural in nature. Mountain View contends that the Union's grievance contesting the termination of Ms. Roach, and which it seeks to have heard at arbitration, was untimely filed. In accordance with Article 10.1 of the parties' CBA, Step 1 of the grievance procedure requires 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..." Furthermore, pursuant to Article 10.4, "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 time limits."

The record indicates that Ms. Roach's letter of termination was issued on September 13, 2005, although a affidavit, challenged by the Employer,[2] states that it was not received until September 19, 2005. (Findings of Fact No. 3 & 5, above). No grievance was filed until September 28, 2005. (Finding of Fact No. 6, above). Since there is no evidence of any mutual agreement between the parties to an extension of the two (2) work day time limit for filing a grievance, the Union's grievance is untimely. In accepting Mr. Lamirande's representation that Ms. Roach did not receive the letter of termination until September 19, 2005, the grievance was still due to be filed within two (2) work days thereafter under the parties grievance procedure (i.e., on or about September 21, 2005) and yet was not filed until September 28, 2005. I would agree with the Union that the CBA is silent as to when and to whom a grievance is to be presented when the act complained of is performed by someone other than the grievant's immediate supervisor. However, lacking

[2] Mountain View submitted an affidavit of Forrest Painter stating, *inter alia*, that he sent Ms. Roach the letter of termination on September 13, 2005 and left phone messages for her on September 13 and 15, 2005.

evidence of allowable exceptions, accepted past practice, or mutual waiver between the parties, such an omission does not overcome the clear and express language contained in Article 10.1 establishing a two (2) work day time limit for filing a grievance.

I therefore find that the Union's grievance is not arbitrable and that the Union has committed an unfair labor practice, in violation of RSA 273-A:5 II (d), (f), and (g), by requesting arbitration of same. The Union shall forthwith withdraw its request to arbitrate. No award of costs and fees is made.

It is so ordered.

Signed this 1st day of June, 2006.

Peter C. Phillips, Esq.
Hearing Officer

Distribution:
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