Affirms in part, vacated in part PELRB Decision No. 2006-038

THE SUPREME COURT OF NEW HAMPSHIRE

Public Employee Labor Relations Board
No. 2006-525

APPEAL OF MERRIMACK COUNTY
(New Hampshire Public Employee Labor Relations Board)

Argued: April 19, 2007
Opinion Issued: August 23, 2007

Atlas & Atlas, P.C., of Nashua (Susan A. Atlas on the brief and orally), for the petitioner.

Backus, Meyer, Solomon & Branch, LLP, of Manchester (Jon Meyer and Ellen Purcell on the brief), and International Chemical Workers Union Council/United Food & Commercial Workers, Local 1046C, of Akron, Ohio (Randall Vehar, assistant general counsel, on the brief and orally), for the respondent.

DALIANIS, J. The petitioner, Merrimack County (county), appeals and the respondent, International Chemical Workers Union Council/United Food & Commercial Workers, Local 1046C (union), cross-appeals a decision of the New Hampshire Public Employee Labor Relations Board (PELRB) ordering the county to implement an arbitrator's award mandating reinstatement of an employee represented by the union. We affirm in part, vacate in part and remand.

The record supports the following: The county is a public employer within the meaning of RSA 273-A:1, X (Supp. 2006). The union is the exclusive

bargaining representative for certain workers at the county's nursing home. The county and the union were signatories to a collective bargaining agreement (CBA). Particularly relevant to this appeal are articles 1, 2, 24 and 25 of the CBA:

- Article 1 contained the parties' agreement that "any rights, duties or authority existing by virtue of the New Hampshire Revised Stat[ut]es Annotated or other law shall in no way be abridged or limited" by the CBA and that, to the extent that any CBA provision was inconsistent with "any such law, the provision(s) of law shall prevail."

- Article 2 gave the county the exclusive right to manage the nursing home, including the right to discipline or discharge employees, "[e]xcept as specifically limited or abridged by the terms of [the CBA]."

- Article 24 provided that "[r]esident abuse/neglect/exploitation" would not be tolerated and that "[a]ny instance of physical, verbal, mental or medical abuse/neglect/exploitation of any resident shall be grounds for immediate termination."

- Article 25 contained grievance and arbitration procedures. In the case of arbitration, this article provided that the arbitrator's decision would be "final and binding" if it was "within the scope of authority and power of the Arbitrator set forth within this Agreement." This article also provided: "The function of the Arbitrator is to determine the interpretation of the specific provisions of this Agreement. It is agreed that the arbitrator shall have no authority to add to, subtract from, or modify any terms of this agreement."

The CBA expired on March 31, 2002; the parties did not enter into a new CBA until after the events herein described.

Beginning in May 1999, the county employed Melissa Foote as a resident assistant, and later as a licensed nursing assistant (LNA), at the nursing home. Foote also served as a shop steward for the union, participating in contract negotiations and representing bargaining unit members.

On October 28, 2002, Foote was working at the nursing home where her duties included performing safety checks on certain nursing home residents every half hour and responding to their calls. At approximately 2:30 p.m., two LNAs found one of the residents sitting in his wheelchair. He had defecated. One LNA thought that the resident should be wearing an adult diaper, but the other was unsure. Foote, as the LNA primarily responsible for this resident, was called to answer this question. Foote responded to the resident's accusation that she had not attended him by pointing a finger in his face and

yelling, or loudly interrupting him, to emphasize what she had done that day. Ultimately, this incident was reported to the assistant director of nursing at the nursing home, who filled out a complaint form, asked a social worker to interview the resident, and called Foote and a union representative to her office to discuss what had happened. It was also reported to the New Hampshire Department of Health and Human Services (DHHS).

Based upon recommendations from the administrator and assistant administrator of the nursing home, the county's board of commissioners voted to terminate Foote's employment effective November 23, 2002. The administrator testified that he based his recommendation, at least in part, upon Foote's refusal to admit to wrongdoing. The union then filed a grievance on Foote's behalf.

The parties proceeded to arbitration. The arbitration issue to which they stipulated was: "Whether there was just cause for the County to terminate Ms. Foote under the collective bargaining agreement? If not, what shall the remedy be?" In its brief to the arbitrator, the county agreed that "under RSA 28:10-a, County employees who have been employed for more than one year are entitled to a 'good cause' standard of discharge." According to that brief, the county further agreed that "good cause would be examined under traditional just cause standards."

After five days of hearing, the arbitrator found that while Foote had not neglected the resident, she had verbally abused him. The arbitrator further found, however, that her conduct "was no more serious than employees who have continued to work at the Nursing Home," and that had Foote admitted to having verbally abused the resident, she would not have been terminated. Therefore, the arbitrator found that terminating Foote was an "overly harsh and unreasonable penalty" for which the county lacked just cause. The arbitrator ordered the county to reinstate Foote, without back pay or other lost benefits, conditioned upon Foote's taking anger management and abuse/neglect training programs. The county refused to reinstate Foote, prompting the union to file an unfair labor practice charge with the PELRB. The county filed a counterclaim alleging that the union had engaged in an unfair labor practice by demanding Foote's reinstatement. Specifically, the county asserted that the arbitrator's award was void and unenforceable because it exceeded his authority under the CBA and because it violated public policy. The PELRB ruled in the union's favor. This appeal and cross-appeal followed.

When reviewing a decision of the PELRB, we defer to its findings of fact, and, absent an erroneous ruling of law, we will not set aside its decision unless the appealing party demonstrates by a clear preponderance of the evidence that the order is unjust or unreasonable. Appeal of Nashua Police Comm'n, 149 N.H.

688, 689 (2003); see also RSA 541:13 (2007). Though the PELRB's findings of fact are presumptively lawful and reasonable, we require that the record support its determinations. Appeal of City of Laconia, 150 N.H. 91, 93 (2003).

I

The county first argues that the PELRB erred by enforcing the arbitrator's award because the award exceeded the arbitrator's authority and, therefore, was not final and binding. "A judicial challenge to arbitral authority requires the reviewing court to consider both the CBA and the arbitral submission." Larocque v. R.W.F., Inc., 8 F.3d 95, 96 (1st Cir. 1993); see Appeal of Police Comm'n of City of Rochester, 149 N.H. 528, 534 (2003) (extent of arbitrator's jurisdiction is determined by parties' agreement to arbitrate; parties may agree to submit even question of arbitrability to arbitrator); Local 238 Intern. Broth. Teamsters v. Cargill, Inc., 66 F.3d 988, 991 (8th Cir. 1995) ("Once the parties have gone beyond their promise to arbitrate and have actually submitted an issue to an arbiter, we must look both to their contract and to the submission of the issue to the arbitrator to determine his authority." (quotation omitted)). [T]he overriding concern is whether the contracting parties have agreed to arbitrate a particular dispute, not whether the agreement is within the CBA." Appeal of Police Comm'n of City of Rochester, 149 N.H. at 534 (quotation and citation omitted).

While ordinarily we interpret contractual provisions de novo, see Appeal of Town of Durham, 149 N.H. 486, 487 (2003), "the general rule [is] that the interpretation of a CBA is within the province of the arbitrator, subject to certain exceptions recognized by our case law" that are not relevant here. Appeal of State of N.H., 147 N.H. 106, 109 (2001); see Appeal of City of Manchester, 153 N.H. 289, 294 (2006) (where PELRB had authority to interpret CBA to determine whether claim was arbitrable, we review PELRB's interpretation of CBA de novo); Appeal of Town of Durham, 149 N.H. at 487-88 (same). "[W]hen the parties include an arbitration clause in their CBA, they choose to have disputes concerning constructions of the CBA resolved by the arbitrator." Appeal of State of N.H., 147 N.H. at 109 (quotation and brackets omitted). "Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept." Paperworkers v. Misco, Inc., 484 U.S. 29, 37-38 (1987); see Keebler Co. v. Truck Drivers, Local 170, 247 F.3d 8, 10 (1st Cir. 2001). For this reason, the PELRB does not regularly have jurisdiction to interpret the CBA when it provides for final and binding arbitration. Appeal of State of N.H., 147 N.H. at 108.

Our review of the arbitrator's interpretation of the CBA is similarly limited. See Georgia-Pacific Corp. v. Local 27, 864 F.2d 940, 944 (1st Cir.

1988). Just as the court may not reject the arbitrator's factual findings simply because it disagrees with them, neither may the court reject the arbitrator's interpretation of the CBA simply because the court disagrees with it. See Misco, 484 U.S. at 38. While the arbitrator cannot ignore the plain language of the CBA, because the parties authorized the arbitrator to give meaning to that language, "a court should not reject an award on the ground that the arbitrator misread the contract." Id. "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." Id.; see Georgia-Pacific Corp., 864 F.2d at 944. The court's task is thus "ordinarily . . . limited to determining whether the arbitrator's construction of the [CBA] is to any extent plausible." Exxon Corp. v. Esso Workers' Union, Inc., 118 F.3d 841, 844 (1st Cir. 1997), abrogated on other grounds by Eastern Associated Coal Corp. v. United Mine Workers, 531 U.S. 57 (2000). "[A]n arbitrator's view of the scope of the issue is entitled to the same deference normally accorded to the arbitrator's interpretation of the collective bargaining agreement." Larocque, 8 F.3d at 97 (quotation and ellipses omitted); see Pelletier v. Auclair Transp. Co., 109 N.H. 302, 304 (1969).

In looking to the parties' submission, which asked the arbitrator to decide whether the county had "just cause" to terminate Foote and, if not, to formulate a remedy, and in light of the parties' expired CBA, which did not reference "just cause," the arbitrator determined that the "traditional just cause standard" applied to his review of the county's decision. Under this standard, "the arbitrator . . . has the authority to consider the underlying issues and surrounding circumstances necessary to interpret and apply the express provisions of the CBA and reach a final decision." Appeal of City of Manchester, 153 N.H. at 293. The United States Supreme Court has identified seven criteria for analyzing whether just cause exists: (1) the reasonableness of the employer's position; (2) the notice given to the employee; (3) the timing of the investigation undertaken; (4) the fairness of the investigation; (5) the evidence against the employee; (6) the possibility of discrimination; and (7) the relation of the degree of discipline to the nature of the offense and the employee's past record. Misco, 484 U.S. at 34 n.5; see Appeal of City of Manchester, 153 N.H. at 293 (citing seven criteria with approval). Consistent with this standard, the arbitrator examined whether Foote's conduct warranted the maximum penalty under the CBA, and determined that it did not.

We cannot say that the arbitrator's interpretation of the CBA and the parties' submission is so implausible as to require reversal. See Misco, 484 U.S. at 38. Nor can we say that the county has demonstrated by a clear preponderance of the evidence that the PELRB's decision to uphold this interpretation is either unjust or unreasonable. See Appeal of Nashua Police Comm'n, 149 N.H. at 689. "By requesting that the arbitrator determine whether [the county] had just cause to discharge [Foote], both parties conferred

authority upon the arbitrator to decide that issue." Homestake Min. Co. v. United Steelworkers, 153 F.3d 678, 680 (8th Cir. 1998) (quotation and brackets omitted). Having been asked whether there was just cause to terminate Foote and, if not, to provide a remedy, "[t]he arbitrator was free to conclude that there was no just cause for discharging [Foote], but that there was just cause for a lesser discipline." Boston Medical v. Service Employees, Local 285, 260 F.3d 16, 22 (1st Cir. 2001), cert. denied, 534 U.S. 1083 (2002).

Our conclusion is consonant with the decisions of other courts. See id. (citing cases). In Bureau of Engraving v. Graphic Communication International Union, 284 F.3d 821, 823-24 (8th Cir. 2002), for instance, as here, the arbitrator ordered the employer to reinstate an employee who had been terminated for accruing thirteen unexcused absences. Unlike the CBA at issue here, the CBA in Bureau of Engraving included a just cause provision. Bureau of Engraving, 284 F.3d at 824. It did not, however, state that thirteen unexcused absences constituted just cause. Id. at 825. As did the parties in this case, the parties in Bureau of Engraving framed the issue for the arbitration as: "Whether the Employer had just cause to terminate the employment of the grievant . . . , and if not, what should be the remedy?" Id. at 824 (quotation omitted). The arbitrator concluded that although the employee had accrued thirteen absences, the employer lacked just cause for terminating her. Id.

On appeal, the employer contended that the arbitrator had exceeded his authority by ignoring the plain language of the attendance policy, which provided that the remedy for thirteen unexcused absences was termination, and by conducting a just cause analysis. Id. The court ruled that the parties' submission conferred authority on the arbitrator to conduct a just cause analysis and that the arbitrator's interpretation of the submission was reasonable. Id. at 825. As the court explained: "For reasons known only to it, [the employer] agreed to stipulate to the just cause analysis. . . . Having entered into the just cause stipulation, it is disingenuous for [the employer] to argue now that the arbitrator acted improperly by conducting the very analysis [the employer] asked it to undertake." Id.; see Homestake Min. Co., 153 F.3d at 680 (where employer requested arbitrator to determine whether employer had just cause to discharge employee, employer cannot argue that arbitrator lacked authority to decide this issue); Cargill, Inc., 66 F.3d at 990-91 (same).

Similarly, here, having agreed that the arbitrator would apply "traditional just cause standards" and, in its brief to the arbitrator, having itself analyzed the decision to terminate Foote under those standards, the county cannot argue now that the arbitrator acted improperly by analyzing just cause as he did. In its brief to the arbitrator, the county conceded that "for the purposes of this arbitration, good cause would be examined under traditional just cause standards or principles." In keeping with this concession, the county argued

that: the CBA permitted the county to discharge Foote; Foote's conduct could not be tolerated; Foote knew or should have known that her conduct would result in discharge; Foote was not entitled to progressive disciplinary or corrective action as such action would have been futile; Foote was not discharged because of anti-union bias; Foote was not disparately treated; and no mitigating circumstances existed that would warrant reducing Foote's termination to a lesser sanction. In short, the county argued the seven criteria set forth in Misco, 484 U.S. at 34 n.5. Having itself analyzed its decision to terminate Foote under traditional just cause principles, the county cannot fault the arbitrator for engaging in the same analysis.

The county argues that under articles 2, 24 and 25 of the CBA, once the arbitrator found that Foote had verbally abused the resident, he lacked the authority to disagree with the county's decision to terminate her. See Poland Spring Corp. v. United Food, Local 1445, 314 F.3d 29, 35 (1st Cir. 2002), cert. denied, 540 U.S. 818 (2003). To the county, once the arbitrator found that Foote committed an act listed in the CBA as "grounds for immediate termination," he was "not free to fashion a separate remedy apart from the one provided in the parties' agreement." Id. at 34.

The county also contends, contrary to its argument before the arbitrator, that the parties' submission did not ask the arbitrator to apply traditional just cause principles, but rather to apply the CBA's implied definition of "just cause." While the county concedes that the CBA "was silent with respect to the articulation of a just cause standard," the county asserts that "the mere existence of a collectively bargained labor agreement mandates that the employer . . . demonstrate 'cause,' 'just cause' or 'good cause.'" Thus, according to the county, the reference in Article 24(B) to "grounds for termination" was akin to a reference to "just cause," and that under this provision, terminating an employee for verbally abusing a resident constituted per se just cause. See Georgia-Pacific Corp., 864 F.2d at 945.

To support its assertions, the county relies upon Georgia-Pacific Corp., 864 F.2d at 945-46, and Poland Spring Corp., 314 F.3d at 34-35. Both of these cases are distinguishable from this case. The CBAs in those cases unambiguously provided that employees could not be terminated except for just cause and expressly included the employee's act within the definition of just cause. See Georgia-Pacific Corp., 864 F.2d at 942; Poland Spring, 314 F.3d at 31. The CBA in the instant appeal does not even use the phrase "just cause." The instant case is, thus, unlike Georgia-Pacific Corp. and Poland Spring, which stand "for the proposition that, once an arbitrator finds that an employee committed some act specifically listed in the [CBA] as providing just cause for termination, the arbitrator is not free to determine that the act does not warrant termination but rather warrants some lesser penalty." Keebler Co., 247 F.3d at 13. When confronted with the CBA and the parties'

submission asking him to determine whether just cause existed, we cannot say that the arbitrator unreasonably harmonized the two. See Trailmobile Trail. v. Inter. Un. of Elec. Workers, 223 F.3d 744, 747 (8th Cir. 2000) (holding that it was up to arbitrator to harmonize management rights clause with just cause provision of CBA); Metro Chevrolet v. Union de Tronquistas, 835 F.2d 3, 4-5 (1st Cir. 1987) (when CBA contains general clause prohibiting termination except for just cause and does not equate certain behavior with just cause, "an arbitrator is empowered to determine whether the employee's action which precipitated the dismissal constitutes just cause").

Had the county wanted the arbitrator to determine only whether Foote had engaged in the conduct of which she was accused, it could have framed the issue accordingly. "If the factual finding were the only bone of contention, why not frame the issue as whether [Foote] committed [abuse]? In essence, [the county] submitted a single question to the arbitrator and now complains that he lacked the authority to answer it." Hartco Flooring v. Local 14597, 192 Fed. Appx. 387, 391 (6th Cir. 2006) (not recommended for full-text publication). Having requested that the arbitrator determine whether Foote was discharged for just cause, the county should "not now be heard to complain that the arbitrator performed the analysis that it requested instead of making a purely factual finding." Trailmobile Trail., 223 F.3d at 747.

Further, while the county's interpretation of the submission may be plausible, "[w]e do not agree that the submission to arbitration requires this interpretation, and the . . . limitations upon review of arbitration awards militate against an interpretation of the submission which would upset the award[ ] in this case." Pelletier, 109 N.H. at 304; see LB & B Associates v. International Broth., 461 F.3d 1195, 1198 (10th Cir. 2006) (while employer's interpretation of CBA's just cause and immediate discharge provisions was one interpretation, arbitrator read these provisions differently and his interpretation was not unreasonable). The arbitrator's decision that the parties' stipulation "gave him the authority to conduct a just cause analysis is reasonable as well and the interpretation of [the stipulation] [was] within the arbitrator's domain." Bureau of Engraving, 284 F.3d at 825. While the county assumes that engaging in one episode of verbal abuse "equaled just cause for termination, . . . the arbitrator concluded otherwise. That conclusion will not be disturbed here." Id. "Whether the arbitrator's reading of the [CBA and stipulation] was strained or even seriously flawed . . . is irrelevant. The arbitrator arguably construed and applied [them], and this is precisely what the parties bargained for him to do." Bruce Hardwood Floors v. So. Coun. of Ind. Workers, 8 F.3d 1104, 1108 (6th Cir. 1993); see LB & B Associates, 461 F.3d at 1200.

For all of the above reasons, therefore, we hold that the PELRB did not err as a matter of law by enforcing the arbitrator's award.

II

The county next asserts that the PELRB erroneously enforced the arbitrator's award because the award violated public policy. "To so find, we must conclude that the PELRB's order contravenes a strong and dominant public policy as expressed in controlling statutes, regulations, common law, and other applicable authority." Appeal of Town of Pelham, 154 N.H. 125, 129 (2006) (quotation omitted). "[I]n such cases our review is limited to the confines of positive law, rather than general considerations of supposed public interests." Id.; see W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 766 (1983).

"In the context of an arbitration award that reinstates a fired employee, the question is not whether the charged conduct offends public policy, or whether some remedy short of unconditional reinstatement . . . might have been preferable. Rather, the sole question is whether the award itself -- the order for reinstatement -- gives offense." Mercy Hospital v. Massachusetts Nurses Ass'n, 429 F.3d 338, 343 (1st Cir. 2005), cert. denied, 126 S. Ct. 1939 (2006); see Eastern Associated Coal Corp., 531 U.S. at 62-63. In making this determination, "we must read the pertinent statutes and regulations in light of background labor law policy that favors determination of disciplinary questions through arbitration when chosen as a result of labor-management negotiation." Mercy Hospital, 429 F.3d at 344 (quotation omitted); Eastern Associated Coal Corp., 531 U.S. at 65. Further, "[w]ith a few limited exceptions not relevant here, [we are] bound by [the] arbitrator's findings of fact." Mercy Hospital, 429 F.3d at 344. Thus, we examine "only whether the reinstatement award, on the facts as found by the arbitrator, contravenes an explicit, well-defined, and dominant public policy." Id. at 345.

The county argues that there are strong and dominant public policies against reinstating an LNA who has been found to have verbally abused a resident and who fails to understand the wrongful nature of her conduct. To support this argument, the county relies upon 42 C.F.R. § 483.13 (2006).

42 C.F.R. § 483.13 provides that a resident of a long-term care facility, like the nursing home, "has the right to be free from verbal, sexual, physical, and mental abuse, corporal punishment, and involuntary seclusion." 42 C.F.R. § 483.13(b). It also provides that a long-term care facility, like the nursing home, must "[n]ot employ individuals who have been . . . [f]ound guilty of abusing, neglecting, or mistreating residents by a court of law; or . . . [h]ave had a finding entered into the State nurse aide registry concerning abuse, neglect, mistreatment of residents or misappropriation of their property." 42 C.F.R. § 483.13(c)(ii).

We disagree that 42 C.F.R. § 483.13 expresses a strong and dominant public policy against reinstating an LNA who has been found by an arbitrator to have engaged in one episode of verbal abuse and/or who fails to admit her wrongdoing. While the regulation precludes nursing homes from employing individuals who have been found guilty by a court of abusing, neglecting or mistreating residents, as those terms are defined elsewhere, and from employing those for whom the State has entered an adverse finding into the State's nurse aide registry, it is silent with respect to reinstating an LNA such as Foote.

Foote was not found by a court to have engaged in abuse as that term is used in 42 U.S.C.A. § 3002(1) (Supp. 2007). 42 U.S.C.A. § 3002(1) defines "abuse" as the willful "infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical harm, pain, or mental anguish . . . or . . . deprivation . . . of goods or services that are necessary to avoid physical harm, mental anguish, or mental illness." The arbitrator did not use this definition and we express no opinion as to whether Foote's conduct meets it.

Moreover, the regulation is silent with respect to reinstatement. Other provisions in the same statutory and regulatory scheme, however, reveal that hiring (and, by extension, reinstating) an LNA who engages in a single episode of verbal abuse is not precluded. Pursuant to 42 U.S.C.A. § 1395i-3(g) (Supp. 2007), a nurse aide may petition the State for removal of his or her name from the registry "upon a determination by the State that . . . the employment and personal history of the nurse aide does not reflect a pattern of abusive behavior or neglect; and . . . the neglect involved in the original finding was a singular occurrence." Thus, under federal law, a nursing home is not precluded from having in its employ an LNA, such as Foote, who was found by an arbitrator to have engaged in one episode of verbal abuse. We therefore conclude that 42 C.F.R. § 483.13 does not "establish a public policy prohibiting [Foote's] reinstatement with [sufficient] clarity." Boston Medical, 260 F.3d at 25.

The county mistakenly relies upon the strong and dominant public policy against abuse of nursing home residents as support for its arguments. See, e.g., 42 U.S.C.A. § 1395i-3(c)(1)(A) (Supp. 2007) (residents in skilled nursing facility have "[t]he right to be free from physical or mental abuse"). As discussed previously, "the question is not whether [Foote's] conduct violated a public policy in favor of competent nursing care, but whether the order to reinstate her violated that policy." Boston Medical, 260 F.3d at 23; see Eastern Associated Coal Corp., 531 U.S. at 62-63.

Similarly misplaced is the county's reliance upon Gogebic Medical Care v. AFSCME Local 992, 531 N.W.2d 728 (Mich. Ct. App.), appeal denied, 549 N.W.2d 560 (Mich. 1995). In that case, unlike the instant appeal, the State

had entered an adverse finding against the nurse on the State's nurse aide registry. Gogebic Med. Care, 531 N.W.2d at 731. Moreover, Gogebic Medical Care Facility was decided before the United States Supreme Court decided Eastern Associated Coal Corporation and conflicts with our decision in Appeal of Town of Pelham, 154 N.H. at 129-31. In Eastern Associated Coal Corporation, the United States Supreme Court "adhered to the so[-]called narrow approach applied by . . . most . . . federal circuit courts, namely that a reviewing court must find the terms of an award, not the underlying conduct at issue, violated public policy." Glanstein, A Hail Mary Pass: Public Policy Review of Arbitration Awards, 16 Ohio St. J. on Disp. Resol. 297, 301 (2001); see Eastern Associated Coal Corp., 531 U.S. at 62-63. We embraced this narrow approach in Appeal of Town of Pelham, 154 N.H. at 129-31, where we examined whether there was a strong and dominant public policy against reinstating untruthful police department employees. The court in Gogebic Medical Care, 531 N.W.2d at 731, by contrast, examined whether the nurse's underlying conduct violated the general public policy in favor of protecting long-term care facility residents from abuse, not whether there was a strong and dominant public policy against reinstating her.

Because we find that no strong and dominant public policy exists against reinstating an employee such as Foote, we hold that the PELRB did not err as a matter of law by ordering the county to comply with the arbitrator's award. See Appeal of Town of Pelham, 154 N.H. at 131.

III

In its cross-appeal, the union raises the following issues: (1) whether the PELRB erroneously dismissed the bifurcated "Reserved Issues" without an opportunity for the union to address those matters; (2) whether the PELRB applied the wrong legal standard when it failed to admit or take administrative notice of the union's evidence that would have reinforced its position that State agencies with primary responsibility to protect the public interest had recently taken actions to permit Foote to practice as an LNA; and (3) whether, if reinstatement to her former position is improper, Foote may be reinstated to another position in the county. In light of our decision to affirm the PELRB's decision upholding the arbitration award, we conclude that issues (2) and (3) are moot.

With respect to issue (1), the union argues that the PELRB erred when it dismissed the Reserved Issues sua sponte. The record submitted on appeal reveals that the hearing officer's March 2, 2006 decision notified the union that the Reserved Issues would be "administratively dismissed unless either party files a request for further PELRB proceedings within 30 days." The record further reveals that on March 24, 2006, the union filed a request for further

PELRB proceedings on the Reserved Issues. Nonetheless, on April 19, 2006, the PELRB dismissed the Reserved Issues as moot.

The so-called Reserved Issues involved whether the county violated RSA 273-A:5, I (1999) by: (1) refusing to reinstate Foote in contravention of the arbitrator's award, thereby interfering with her licensing obligations and future job prospects; (2) engaging in anti-union discrimination by refusing to reinstate Foote; and (3) failing or refusing to provide discovery materials in connection with a proceeding before DHHS. The union argues that proving anti-union discrimination would "strengthen [its] request for additional remedies," including attorney's fees and costs. Thus, whether the county engaged in anti-union discrimination by failing to reinstate Foote does not appear to be moot. While the county asserts that the arbitrator already addressed the union's anti-union discrimination claim, the county is mistaken. The arbitrator addressed only whether the county engaged in anti-union discrimination when it terminated Foote, not whether it did so when it refused to reinstate her.

In light of the record submitted on appeal, we therefore vacate the PELRB's dismissal of the Reserved Issues as moot and remand for further proceedings consistent with this opinion. See RSA 273-A:6, IX (1999) (orders and decisions of PELRB shall contain findings of fact and conclusions of law).

Affirmed in part; vacated in part; and remanded.

GALWAY and HICKS, JJ., concurred; DUGGAN, J., with whom BRODERICK, C.J., joined, dissented.

DUGGAN, J., dissenting. Because I believe that the arbitrator fashioned his own brand of industrial justice, and that affirming the PELRB's decision threatens to create unnecessary uncertainty in our state's labor law jurisprudence, I respectfully dissent. I first explain why I disagree with the majority's analysis, and then set forth how I would resolve this case.

I

The arbitral submission asked the arbitrator to resolve the following inquiry: "Whether there was just cause for the County to terminate Ms. Foote under the collective bargaining agreement? If not, what shall the remedy be?" The majority holds that this submission, combined with the fact that the CBA "did not reference 'just cause'" allowed the arbitrator to apply a "'traditional just cause standard'" to essentially exercise his independent judgment to determine the level of discipline for Foote's conduct.

Article 24 of the CBA provides: "Any instance of physical, verbal, mental or medical abuse/neglect/exploitation of any resident shall be grounds for immediate termination." (Emphasis added.) The majority apparently concludes that there is a meaningful difference between article 24 and a hypothetical CBA that provides: "Any instance of physical, verbal, mental or medical abuse/neglect/exploitation of any resident shall be just cause for immediate termination." I do not agree. Moreover, drawing such a distinction threatens to create unnecessary uncertainty about how we will resolve future cases. For example, other CBAs might contain language such as: (1) "Any instance of physical, verbal, mental or medical abuse/neglect/exploitation of any resident shall be reason for immediate termination"; or (2) "Any instance of physical, verbal, mental or medical abuse/neglect/exploitation of any resident shall be cause for immediate termination." We will have to decide where, along a continuum, this alternative language falls, or require parties at the bargaining table to use one synonym, i.e. "just cause" over another, i.e. "grounds," "reason" or "cause."

Treatises, case law, and dictionaries support the view that "just cause," "cause," "reason" and "grounds" are not distinct concepts when they are used in a collectively bargained-for agreement to describe conduct that serves as an adequate basis for discharge. Those offenses that are "grounds," "cause" or "reason" for termination are necessarily "just cause" for termination. Thus, by expressly and unambiguously providing specific "grounds" for termination, the CBA did reference a "just cause" standard.

One respected arbitration treatise observes:

> Most collective bargaining agreements do, in fact, require "cause" or "just cause" for discharge or discipline. . . . It is common to include the right to suspend and discharge for "just cause," "justifiable cause," "proper cause," "obvious cause," or quite commonly simply for "cause." There is no significant difference between these various phrases.

Elkouri & Elkouri, How Arbitration Works 887 (5th ed. 1997) (brackets omitted; emphasis added).

Numerous courts use these terms interchangeably. See, e.g., Intern. Broth. of Firemen v. Nestle Co., Inc., 630 F.2d 474, 475-77 (6th Cir. 1980) (repeatedly using "cause" and "grounds" interchangeably); Bruce Hardwood Floors v. UBC, Indus. Work. No. 2713, 103 F.3d 449, 455 (5th Cir. 1997) (Benavides, J., dissenting) (using "ground" as synonym for "proper cause"), cert. denied, 522 U.S. 928 (1997); Ohio Off. of Coll. Barg. v. Civ. Serv. Emp., 572 N.E.2d 71, 75 (Ohio 1991) (using "ground" interchangeably with "causes" and holding, "In essence, dishonesty, as a ground for immediate discharge, is

per se just cause."); School Dist. of Beverly v. Geller, 755 N.E.2d 1241, 1247 n.8 (Mass. 2001) (summarizing cases where CBAs list reasons for dismissal and using the terms "just cause," "proper cause," "cause" and "grounds" interchangeably); Marathon Oil Co. v. Local Union No. 283, No. 97-1780, 1998 WL 702357, at *2 (6th Cir. Sept. 25, 1998)(using "grounds" and "cause" synonymously).

Neither dictionaries nor thesauruses augur well for a distinction between these terms. See, e.g., American Heritage Dictionary 799 (3d ed. 1992) (definition of "ground" provides: "Often **grounds.** The underlying condition prompting an action; a cause: grounds for suspicion; a ground for divorce."); Webster's Third New International Dictionary 356 (unabridged ed. 2002) ("cause" means "a good or adequate reason**:** a sufficient activating factor <an employee discharged for ~>"); Random House Dictionary of the English Language 235 (1966) (similar); Black's Law Dictionary 1031 (8th ed. 1999) ("cause" means "A ground for legal action <the plaintiff does not have cause to file suit>. **good cause.** A legally sufficient reason. . . . The term is often used in employment-termination cases. – Also termed good cause shown; just cause; lawful cause; sufficient cause."); Legal Thesaurus 67 (2d ed. 1992) ("cause" and "ground" are synonyms).

Even the arbitrator, with his broad discretion to construe the CBA, Paperworkers v. Misco, Inc., 484 U.S. 29, 38 (1987), did not specifically offer an interpretation of the word "grounds." Instead, he acknowledged that article 24 provides that "certain kinds of conduct shall be grounds for immediate termination" and "clearly put[s] members of the bargaining unit, including Foote, on notice that they could be subject to immediate termination for incidents of abuse." Then, as the basis for his decision, he appears to have essentially used "just cause" in the arbitral submission as a vehicle to mete out a penalty that he did not find "harsh" or "unreasonable." In so doing, the arbitrator did not engage in contract interpretation, or even permissible contract misinterpretation. See Misco, 484 U.S. at 38 ("[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision."). Instead, he departed from the CBA to arrive at his own brand of industrial justice, a result that is prohibited by the plain language of the CBA ("the arbitrator shall have no authority to add to, subtract from, or modify any terms of this agreement"), the plain language of the arbitral submission ("Whether there was just cause for the County to terminate Ms. Foote under the collective bargaining agreement? If not, what shall the remedy be?" (emphasis added)), and well-settled, persuasive and overwhelming authority from jurisdictions across the country.

Courts in other jurisdictions consistently hold that where an employment agreement lists certain behavior as grounds or cause for termination, and where there is a finding that such conduct has occurred, the arbitrator is not free to fashion his own remedy. Although the term "just cause" often appears in these cases, its absence does not change the essential reasoning. See, e.g., Poland Spring Corp. v. United Food, Local 1445, 314 F.3d 29, 34-35 (1st Cir. 2002), cert. denied, 540 U.S. 818 (2003) ("once an arbitrator finds that an employee has committed an act specifically listed in the collective bargaining agreement as providing just cause for termination, the arbitrator is not free to fashion a separate remedy apart from the one provided by the parties' agreement"); Logistics Personnel v. Truck Drivers Local Union, 6 F. Supp. 2d 650, 655 (E.D. Mich. 1998) (where CBA provides that testing positive on drug test is grounds for termination, "the only relevant question, under the collective bargaining agreement, is whether the employee . . . tested positive"); Bruce, 103 F.3d at 452 (where CBA states that employee will be discharged for immoral conduct, arbitrator not free to impose ten-day suspension); Warrior & Gulf Nav. v. United Steelworkers, 996 F.2d 279, 281 (11th Cir. 1993), cert. denied, 511 U.S. 1083 (1994) (where agreement required "just cause" for termination and listed certain acts for which an employee could be discharged, arbitrator lacked discretion to reduce discharge to suspension); Delta Queen Steamboat Co. v. Dist. 2 Marine Eng., 889 F.2d 599, 601, 604 (5th Cir. 1989), cert. denied, 498 U.S. 853 (1990) (where agreement provides for termination for "proper cause" and lists behavior that would constitute cause, arbitrator is not free to weigh proved conduct against other factors); Georgia-Pacific Corp. v. Local 27, 864 F.2d 940, 945 (1st Cir. 1988) (where arbitrator uses "just cause" as a means of ignoring specifically enumerated grounds for discharge, he engages in a "patent example of arbitral excess"); S.D. Warren Co. v. United Paperworkers' Intern., 845 F.2d 3, 8 (1st Cir. 1988), cert. denied, 488 U.S. 992 (1988) (where agreement provides discharge for "proper cause" and identifies specific causes upon which discharge may be based, arbitrator may not order different remedy for proved conduct); Metro Chevrolet v. Union de Tronquistas, 835 F.2d 3, 5 (1st Cir. 1987) (when general "just cause" provision in contract is combined with provision that lists specific conduct upon which discharge may be based, appropriateness of penalty is removed from arbitrator's consideration); Nestle, 630 F.2d at 476 (where contract provides insubordination is basis for termination, arbitrator not free to decide that termination is too severe a penalty); Mistletoe Exp. Serv. v. Motor Expressmen's Union, 566 F.2d 692, 695 (10th Cir. 1977) (where agreement provides employer may terminate employment if employee fails to meet certain conditions, arbitrator not free to substitute his own judgment for the employer's decision to terminate); Cty. Coll. of Morris Staff v. Cty. Coll., 495 A.2d 865 (N.J. 1985) (where agreement includes list of conduct for which employees can be discharged, arbitrator exceeds his authority by reducing discharge to suspension); Ohio Off. of Coll. Barg., 572 N.E.2d at 75 (agreement provides that abuse of patient is cause to terminate and arbitrator not free to reduce

penalty from termination); City of East Providence v. United Steel Workers of Am., Local 15509, Nos. 2006-145-Appeal & 2006-162-Appeal, 2007 WL 1828760, at *8 (R.I. June 27, 2007) (where arbitrator determines that just cause exists, it is "patently irrational" for him to exceed his authority by considering an alternate form of discipline). There is no persuasive reason that our state's labor law jurisprudence should be different.

The cases relied upon by the majority are distinguishable. For example, in Bureau of Engraving v. Graphic Communication International Union, 284 F.3d 821, 824 (8th Cir. 2002), the arbitral submission asked the arbitrator to determine "'Whether the Employer had just cause to terminate the employment of grievant, Linda Puffer, and if not, what should be the remedy?'" Thus, in contrast to the instant case, the arbitral submission in Bureau of Engraving made no reference to determining just cause "under the CBA." The argument for allowing an arbitrator to depart from the CBA is much stronger when the arbitral submission, for whatever reason, gives the arbitrator broad authority and does not require him to be grounded in the parties' agreement.

In Homestake Mining Co. v. United Steelworkers of America, 153 F.3d 678, 680 (8th Cir. 1998), the arbitrator determined that the worker's conduct did not constitute a violation of the employer's rule. Here, by contrast, the arbitrator expressly found that Foote did abuse the elderly resident.

In Trailmobile Trailer, LLC v. International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, 223 F.3d 744, 746 (8th Cir. 2000), a handbook provision that listed examples of conduct that "may subject an employee to immediate discharge without warning" was at issue, and the CBA provided that the employer could only enforce "reasonable rules." In the instant case, there is no provision at issue regarding the enforcement of "reasonable rules" and the proscribed conduct is written directly into the CBA.

In LB & B Associates v. International Brotherhood, 461 F.3d 1195, 1196 (10th Cir. 2006), the CBA provided that an employee who engaged in sexual harassment "'may be subject to immediate discharge.'" Id. (emphasis omitted). The Tenth Circuit expressly noted that if the CBA did not use such permissive language, a different outcome would have obtained. Id. at 1198 n.2. The CBA here uses the word "shall." See Dancart Corp. v. St. Albans Rubber Co., 124 N.H. 598, 602 (1984) (the word "shall" "commonly does have a mandatory character").

In Boston Medical v. Service Employees, Local 285, 260 F.3d 16, 21 (1st Cir. 2001), cert. denied, 534 U.S. 1083 (2002), there was no provision at issue which enumerated specific grounds for dismissal. Instead, the arbitrator was charged with reconciling a management rights clause, reserving to management the exclusive right to discipline, and a clause providing that

employees could be discharged only for "just cause." Id. at 20-21. The First Circuit expressly noted that Boston Medical is distinguishable from "a case where the collective bargaining agreement specifically provides for automatic discharge in [certain] situations . . . ." Id. at 23 n.5.

In Local 238 International Brotherhood of Teamsters v. Cargill, Inc., 66 F.3d 988, 990 (8th Cir. 1995), the Eighth Circuit found "an inherent tension or ambiguity" between the CBA and a drug and alcohol policy that was not "written verbatim into the collective bargaining agreement." However, the court clearly stated that "[i]f the collective bargaining agreement expressly provided that an employee who refuses to take an alcohol test 'will be terminated,' we would agree with the district court's decision that the arbitrator's award 'ignored the plain mandatory language' of that agreement . . . ." Id. Here, the CBA states that abuse shall be grounds for termination. No separate policy is involved.

In order to uphold the arbitrator's decision, the majority turns to a seven-factor test. There are two reasons why we should not turn to that test in this case. First, the arbitral submission did not ask the arbitrator to decide: "Whether there was just cause for the County to terminate Ms. Foote? If not, what shall the remedy be?" Instead, it asked the arbitrator to resolve the following concrete inquiry: "Whether there was just cause for the County to terminate Ms. Foote under the collective bargaining agreement? If not, what shall the remedy be?" (Emphasis added.) Thus, the arbitrator's decision had to be anchored in the plain language of the CBA, language that unambiguously lists the conduct that constitutes "grounds" – "just cause" – to terminate. The arbitrator was not free to depart from that language. If the parties had no intention of requiring the arbitrator to enforce the unambiguous contract terms, then they would not have inserted the phrase "under the collective bargaining agreement" into the arbitral submission.

Second, as the United States Court of Appeals for the Eleventh Circuit has explained, the type of broad "just cause" analysis embodied by the seven-factor test comes into play when a collective bargaining agreement does not spell out conduct that shall serve as an adequate basis for discharge. Warrior Gulf & Nav., 996 F.2d at 281 n.8. It is not employed in every single case.

The Eleventh Circuit's explanation is not inconsistent with Appeal of City of Manchester, 153 N.H. 289, 293 (2006), where we cited the seven-factor test with approval, but noted that in deciding just cause issues, the arbitrator has "the authority to consider the underlying issues and surrounding circumstances necessary to interpret and apply the express provisions of the CBA and reach a final decision." (Emphasis added.) Here, the arbitrator examined the surrounding circumstances and found abuse. He was then compelled to apply the express provisions of the CBA. Nothing in Appeal of

City of Manchester authorizes the arbitrator to supplant an express CBA provision with a seven-factor test. If we conclude that "just cause" means employing a seven-factor test in every case, then employers will never be able to make specific types of conduct grounds for immediate termination, because anytime they try to do so, their disciplinary decisions will be subject to upset by an arbitrator.

The majority states that if the county was concerned that the arbitrator might second-guess its decision to discharge Foote, then it could just have asked the arbitrator to "determine only whether Foote had engaged in the conduct of which she was accused." If that is true, then both sides would have had to have been agreeable to the idea that under the CBA, abuse, alone, does constitute a valid basis to terminate employment. Clearly (and understandably), given the posture of this case, the union would never have made such a concession. In fact, it would seem that firing Foote for abuse was one impetus that led the union to grieve the case in the first place. Furthermore, it seems unfair to fault the county for failing to anticipate that the arbitrator would depart from the plain language of the CBA.

To borrow from the First Circuit:

> The reservation of a right to . . . discharge for [a particular type of conduct] would be wholly ineffective and meaningless if the employer's action, pursuant to such right, is subject to review by an arbitrator on the basis of appropriateness. If the reserved right is construed to mean that the employer can take no disciplinary action in excess of a reprimand, except at its own risk and subject to severe penalties in case an arbitrator should later be of the opinion that some milder action is appropriate, the effect would be that the employer's inherent right which has not been expressly relinquished by contract is no right at all.

Metro Chevrolet, 835 F.2d at 5 (quotation omitted).

II

Accordingly, I would adopt the reasoning of the cases that hold that where a CBA lists particular types of conduct as grounds for termination, the arbitrator's inquiry ends when he finds that such conduct has occurred. Consistent with those cases, I would hold that although the "arbitrator ha[d] the authority, in the context of a just cause grievance, to consider the underlying issues and surrounding circumstances necessary to interpret and apply the express provisions of the CBA and reach a final decision," Appeal of

Town of Pelham, 154 N.H. 125, 128 (2006), his award nevertheless had to be consistent with the CBA and the arbitral submission. LaRocque v. R.W.F., Inc., 8 F.3d 95, 96-97 (1st Cir. 1993).

Article 24 does not say that termination for abuse may occur only where equitable or "fair." See Poland Spring, 314 F.3d at 38 (Boudin, C.J., concurring). Rather, it states, "Any instance of physical, verbal, mental or medical abuse/neglect/exploitation of any resident shall be grounds for immediate termination." (Emphasis added.) This language unambiguously gives the county just cause to terminate employment where abuse occurs. Moreover, article 2 of the CBA reserves "exclusively" to management the right to "discipline or discharge" employees. Taken together, articles 2 and 24 plainly contemplate that certain management decisions, such as termination for abuse, will not be second-guessed during arbitration. Significantly, as part of the CBA, these two provisions were among the terms and conditions bargained for by the parties and it was not for the arbitrator to ignore them. If the parties desired some other outcome, they were free to negotiate for other language to be included within the CBA.

> The paramount point to be remembered in labor arbitration is that the power and authority of an arbitrator is totally derived from the collective bargaining agreement and that he violates his obligation to the parties if he substitutes his own brand of industrial justice for what has been agreed to by the parties.

Id. at 33 (quotations omitted).

The rationale for this holding is persuasive: "contractual provisions like the [termination for abuse] clause . . . are bargained for and inserted precisely to take discretion away from arbitrators charged with enforcing the collective bargaining agreement." Poland Spring, 314 F.3d at 34-35.

> [T]o sustain [the arbitrator's decision] in this case, notwithstanding the pre-negotiation that took place, [is] the equivalent of . . . saying that the parties engaged in a meaningless act by negotiating the disciplinary rules and incorporating them into the collective bargaining agreement. [It says] that the arbitrator retained the right to fashion remedies even when this contractual authority was not given by the parties. That is not the law.

Warren, 845 F.2d at 8.

The approach outlined above may seem unfair when applied to the instant case, especially since other employees had not been discharged for abusive conduct. However, the arbitrator was free to interpret the word "abuse," and apply it however he saw fit. He was also free to find that Foote's conduct did not constitute "abuse" within the meaning of the CBA. That said, once he made a finding that abuse occurred, the CBA unambiguously required him to uphold the county's decision to terminate employment under the CBA. No interpretation of that directive is required, and ignoring it is reversible error.

In conclusion,

> [i]t is not . . . satisfactory to say to employers that they can draft the collective bargaining agreement to clearly restrict the arbitrator from exercising the authority the arbitrator applied here. The realities of what happens at the bargaining table may make this illusory. [The CBA article at issue] was admirably drafted to give management some flexibility and give workers the protection that not every instance of [prohibited conduct] must mean termination. It can be questioned why the price of that flexibility should be to permit an arbitrator to second guess management's judgment to be less forgiving [in certain instances].

Poland Spring, 314 F.3d at 42 (Lynch, J., dissenting). I would not impose such a price, and therefore respectfully dissent.

BRODERICK, C.J., joins in the dissent.

NH Supreme Court affirmed in part, vacated in part this decision on 8-23-2007, Slip Op. No. 2006-525 (NH Supreme Court Case No. 2006-525)

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

International Chemical Workers Union Council UFCW, Local 1046C Complainant v. Merrimack County Nursing Home and County of Merrimack Respondent	*	Case No. M-0738-9 Decision No. 2006-038

APPEARANCES

Representing International Chemical Workers Union Council, UFCW, Local 1046C:

Randall Vehar, Esquire
UFCW Assistant General Counsel

Representing Merrimack County Nursing Home and County of Merrimack:

Warren Atlas, Esquire
Atlas & Atlas

BACKGROUND

The International Chemical Workers Union Council of the United Food and Commercial Workers, Local 1046C (the "Union") filed an improper practice charge on May 12, 2005 against the Merrimack County Nursing Home and County of Merrimack (the "County") alleging violations of RSA 273-A I (a), (b), (c), (e), (g), (h) and (i) generally related to and resulting from the County's refusal to comply with an arbitration award ordering the reinstatement of Melissa Foote to her former position with the County, including claims of anti-union discrimination and failure to provide relevant information to the Union regarding said refusal. The County filed an Answer, Counterclaim, and Motion to Strike on June 10, 2005. In its Counterclaim, the County asserts that the Union has failed to bargain in good faith and repudiated the parties' collective bargaining agreement (CBA), in violation of RSA 273-A:5 II (d) and (f), by its demand that the

County implement an award that is void and unenforceable as a matter of law and public policy. In its Motion to Strike, the County claimed that certain allegations contained within the Union's improper practice charge are irrelevant, outside the scope of the jurisdiction of the Public Employee Labor Relations Board ("PELRB" or "Board") to review, and potentially prejudicial. On June 20, 2005, the County filed a Motion for Hearing on the Motion to Strike.

On June 24, 2005 the Union filed its Answer and Response to the Merrimack County Nursing Home's Counterclaim, Memorandum in Opposition to Merrimack County Nursing Home's Motion to Strike, and Opposition to Motion to Conduct Oral Argument on the Motion to Strike. The Union denied that it had committed an improper labor practice as alleged in the counterclaim or that it is in violation of RSA 273-A:5 II (d) or (f), or any other section of RSA 273-A. The Union asserted, inter alia, that the County has failed to properly perfect its bringing of an improper labor practice against the Union in accordance with PELRB procedures and failed to pay the filing fee for such a charge.

Following a telephonic pre-hearing conference conducted on June 27, 2005, the PELRB Hearing Officer issued a Pre-hearing Memorandum and Order (PELRB Decision No. 2005-093) directing the parties, among other things, to attempt to reach stipulations of fact and exhibits, and, if possible, to reach agreement on presenting the instant case by written submission, or, in the alternative, without the need for testimonial evidence. On July 22, 2005 the parties' representatives filed a "Joint Motion to Postpone Hearing and to Submit Certain Issues by Briefs and Reserve Other Issues for Later Resolution." In an Interim Order (PELRB Decision No. 2005-095) the PELRB (1) postponed the adjudicative hearing scheduled July 26, 2005; (2) ruled that the so-called "reserved issues," as set forth in paragraph 2 of the parties' joint motion, would be held in abeyance and shall remain in such status until 30 days following a decision of the Board on the so-called "submitted issues," as described in paragraph 1 of the parties' joint motion; (3) granted the parties' proposed schedule for presentation and filing of the submitted issues, as set forth in paragraph 6 of their joint motion, contingent upon the parties' stipulation and submission of sufficient relevant facts, executed by the parties' representatives, and the timely submission of legal memoranda; and (4) determined that upon receipt of these documents, the record would be deemed closed on the submitted issues, and a decision would be issued based solely upon the file documents, stipulated facts and the parties' legal memoranda, unless it is determined that a hearing is necessary prior to a final decision.

On September 19, 2005, the Board received the parties' stipulated exhibits[1] and memorandums of law on the submitted issues. Also on September 19, 2005, the Union filed a "Notice of Additional Information" with the Board. The Board received the parties' reply briefs on October 4, 2005. On October 14, 2005, the Union filed a "Petition to Submit Additional Evidence in Support of its Motion for Summary Judgment on the Jointly-Submitted Issues," in response to which the County filed its "Opposition to the Union's Petition to Reopen the Record on the Jointly Submitted Issues" on November 3, 2005. On November 9, 2005, the Union filed a "Motion for Leave to File Reply Brief and/or to Strike County's Opposition to Union Petition,

[1] It is noted that certain proposed Union exhibits are disputed by the County on relevancy grounds as to the submitted issues. Also acknowledged is the County's filing on September 27, 2005 of redacted copies of its exhibits, as well as the Union representative's letter of September 28, 2005 in response thereto.

and the County's "Opposition to the Union's Motion for Leave to File Reply Brief and/or to Strike County's Opposition to Union Petition" was received by the Board on November 28, 2005. In a letter dated December 1, 2005, the PELRB hearing officer notified the parties' representatives that subject to later rulings on the pending motions/petitions relative to the record, the record shall be considered closed as of the close of business, November 30, 2005. Having reviewed all filings submitted by the parties, considered and weighed all appropriate and relevant evidence, including the parties' joint factual stipulations incorporated as Findings of Fact paragraphs 1 through 22, below, the hearing officer determines as follows:

FINDINGS OF FACT

1. The County of Merrimack, State of New Hampshire (hereinafter the "County') employs individuals at the Merrimack County Nursing Home (hereinafter "Nursing Home") and, therefore, is a "public employer" within the meaning of RSA 273-A:1, X.

2. The International Chemical Workers Union Council, United Food & Commercial Workers Union, and its Local 1046C (hereinafter collectively, the "Union"), during relevant times is, and has been, the exclusive bargaining representative for certain public employees employed by the County at the Home.

3. The County and the Union were signatories to a collective bargaining agreement effective from June, 1999, and expiring on March 31, 2002 (hereinafter, the "CBA"), that governed the terms and conditions of employment for certain "public employees," as that term is defined in RSA 273-A:1, at the Nursing Home.

4. The CBA, through its Recognition Clause (Article I), provided that the County recognized the Union as the exclusive bargaining agent within the meaning of RSA 273-A for all full-time regular and part-time regular employees in certain positions (hereinafter, "bargaining unit employees"), including Certified Nursing Assistants, also referred to as Licensed Nursing Assistants (hereinafter, "CNA" or "LNA").

5. Melissa Foote (hereinafter, "Foote") began her employment with the Home on or about May 17, 1999, as a Resident Assistant.

6. In or about October, 2001, Foote completed her training to become licensed as a CNA/LNA and began working as such for the Home.

7. On or about November 13, 2002, the county terminated Foote effective November 23, 2002.

8. A grievance protesting Foote's discharge was filed on November 23, 2002 ("Grievance").

9. On or about February 17, 2003, the Union filed a demand for arbitration when the Grievance was not resolved.

10. The County and the Union mutually agreed, after selecting John B. Cochran as the arbitrator (hereinafter, the "Arbitrator"), to proceed to final and binding arbitration to resolve the Grievance.

11. A hearing was conducted pursuant to the Union's request for arbitration before Arbitrator John B. Cochran in connection with the Grievance over the discharge of Foote.

12. Because the County terminated Ms. Foote during a hiatus between collective bargaining agreements, the parties disagreed at the arbitration hearing about the proper standard of cause to be applied by Arbitrator Cochran. In the County's view, the issue was whether it had cause under the collective bargaining agreement to terminate the grievant. However, the Union argued that, because there was no agreement in effect at the time, the good cause standard in New Hampshire's RSA 28:10-a should govern. Following a lengthy colloquy on this point, the parties agreed to frame the issue using the term just cause but to reserve their rights to argue what just cause means in the context of the arbitration. Despite their differences about the source of the cause standard to be applied, the parties' briefs each referenced good cause as the governing standard. Arbitrator Cochran noted in his Award that, even though the parties have disagreed about whether this matter arose under their expired collective bargaining agreement or the statutory procedure in New Hampshire RSA 28:10-a, they had agreed that he had authority to decide the merits of the County's decision to terminate Ms. Foote.

13. Arbitrator Cochran conducted hearings on December 10, 2003; March 4 and 5, 2004: and July 19 and 20, 2004. During those proceedings, neither party raised any procedural arbitrability issues.

14. On December 8, 2004, Arbitrator Cochran issued his Opinion and Award (hereinafter, the "Award").

15. On or about December 17, 2004, the Union demanded that the Company comply with Arbitrator Cochran's Award and reinstate Foote to her former position.

16. All of the communications between the Union and the Home, regarding the information request involving the submitted issues and the Home's responses thereto, were by either e-mail or letter, rather than being made verbally, and are contained in the exhibits that both parties agree are authentic and relevant.

17. Since December 8, 2004, the County has refused to reinstate Foote.

18. In response to Robert K. Ehlers' letter of December 17, 2004 ("Letter"), Foote timely challenged the findings relied on by Ehlers, as provided for in his letter, and her challenge is now pending before Presiding Officer Diane Crichton, Administrative

Appeals Unit ("AAU") of the New Hampshire Department of Health and Human Services ("DHHS") as Case No. 05-0004.

19. Foote is not now, nor has she ever been lawfully, on DHHS's disqualifying registry for LNA's, nor did the State of New Hampshire timely establish a nurse aide registry, as required by federal law, until late, 2004, nor did it establish, nor notify Foote, of her right to challenge DHHS's intention to place her on the newly-formed registry until on or about December 17, 2004.

20. No notice (other than those contained in Ehlers' Letter and Paula Patten's letters dated March 3, 2003, to Foote) of Patten's findings relied on by Ehlers in his Letter, or of Foote's rights, if any, to dispute those findings, were given by the State of New Hampshire, or its agencies, to Foote. Foote did not request reconsideration of Patten's preliminary findings in response to Patten's March 3, 2003, letters, though she did timely request a hearing to dispute those findings once she received Ehler's Letter.

21. The Union is not a party to the proceedings pending before AAU Presiding Officer Crichton in Case No. 05-0004, though it has been providing Foote with representation in those proceedings through Union representative (now retired) John Mendolusky, Local Union President Shari Tinkham, and ICWUC/UFCW Assistant General Counsel/Local 1046C Counsel Randall Vehar. While Vehar is an attorney, he has not been representing Foote as an attorney in those (or these) proceedings.

22. Since December 17, 2004, the Union has continued to assert that the County should comply with Arbitrator Cochran's Award, including his reinstatement remedy, so long as Foote has a valid LNA license and is not lawfully on the disqualifying registry.

23. Article 24 of the parties' CBA is entitled "Disciplinary Procedure." Paragraph B of Article 24 provides, in pertinent part, that:

> "[r]esident abuse/neglect/exploitation will not be tolerated by the county and its employees. Any instance of physical, verbal, mental or medical abuse/neglect/exploitation of any resident shall be grounds for immediate termination. Areas concerning neglect (as a result of not following proper nursing procedures) include: ....8. Lack of treating each resident with respect and dignity – not meeting resident's personal hygiene requirement. ...13. Any measure that compromises quality of life for the resident." (Union Exhibit A, JX-1, p.26, 27).

24. Paragraph C of Article 24 establishes offenses that "shall be cause [for] disciplinary action up to and including termination: [including]...5. Discourteous conduct towards any resident, visitor or employee." (Union Exhibit A, JX-1, p. 28).

25. The basis for the County's termination of Foote was abuse/neglect/exploitation of a Nursing Home resident, hereinafter referred to as "G.T.," "...in accordance with Article 24 Section B.8 (Lack of treating each resident with respect and dignity – not meeting residents personal hygiene requirements), B.13 (Any measure that compromises quality of life for the resident), and C.5 (Discourteous conduct towards any resident, visitor or employee) of the Collective Bargaining Contract." (Union Exhibit A, JX-2).

26. Article 25 of the parties' CBA contains the parties' negotiated grievance procedure. The arbitration provisions contained therein state, in pertinent part, that the decision of the arbitrator:

> will be final and binding upon the parties, if the decision is within the scope of authority and power of the Arbitrator set-forth within this Agreement. The function of the Arbitrator is to determine the interpretation of the specific provisions of this Agreement. It is agreed that the arbitrator shall have no authority to add to, subtract from, or modify any terms of this agreement.

(Union Exhibit A, JX-1, pp. 30, 31).

27. The parties have made no reference within their CBA that it shall be subject to the provisions of RSA 542, or made any other reservation of appellate rights to have the PELRB or any other body review the merits of an arbitrator's award.

28. The parties' stipulated issue before the arbitrator on Foote's termination grievance was as follows:

> Whether there was just cause for the County to terminate Ms. Foote under the collective bargaining agreement?
>
> If not, what shall the remedy be?

(Union Exhibit E, p. 1)

29. The arbitrator issued a forty-four page decision, consisting of nineteen pages of factual findings and conclusions. (Union Exhibit E).

30. The arbitrator found that the County's Nursing Home "is licensed by the New Hampshire Department of Health and Human Services and is governed by standards established by both the New Hampshire and Federal governments." (Union Exhibit E, pp. 4, 5). He also determined that "[i]f the Nursing Home receives a complaint of abuse or neglect, it must report it to the state within five days, and the state will investigate." (Union Exhibit E, p. 5).

31. The arbitrator found that in accordance with 42 C.F.R. Section 483.13(c)(ii)(B), the County cannot "employ individuals who have a finding entered into the State nurse

aide registry concerning abuse, neglect, mistreatment of residents or misappropriation of their property." (Union Exhibit E, p. 5).

32. The arbitrator's decision contains detailed factual findings of the events of October 28, 2002, and specifically Foote's interaction with G.T. on that date, that led to her termination, including analysis of testimony and credibility determinations. (Union Exhibit E, pp. 9-16).

33. The arbitrator determined that Robert Chase ("Chase"), the Administrator of the Nursing Home, recommended that Foote be terminated for four connected incidents, but by his own admission "there were only two grounds for [the] decision...: 1) failing to attend to G.T. and 2) verbally abusing G.T..." (Union Exhibit E, p. 34).

34. Based upon the evidence presented, the arbitrator concluded that he could not "say that Foote failed to provide services necessary to avoid physical harm or mental anguish...[A]lthough [he did] not find clear and convincing evidence that Foote was negligent, [he did find] that she failed to perform the duties set out in her job description on October 28, 2002." Foote was primarily responsible for ensuring that G.T.'s care plan was followed that day, and when she did not check on him every two hours, he determined that she had not fulfilled her responsibilities in this regard. (Union Exhibit E, p. 36).

35. The arbitrator described the allegation of verbal abuse against Foote as more serious. As stated by the arbitrator, the

> charge stems from statements she made to G.T. after he accused her of not answering his 'f___ing call button all day.'...[The testimony of the witnesses] portray a consistent and believable version of what occurred in G.T.'s room the afternoon of October 28, 2002: Foote responded to G.T.'s accusation that she had not attended him by pointing a finger in his face and yelling or loudly interrupting him to emphasize what she had done that day."

(Union Exhibit E, p. 37).

36. The arbitrator found that there was clear and convincing evidence that Foote did verbally abuse G.T. on October 28, 2002, and "that Foote made a serious mistake by verbally abusing G.T." (Union Exhibit E, p. 38, 40).

37. As to the penalty of termination, the arbitrator found that:

> Although the language in Article 24 clearly put members of the bargaining unit, including Foote, on notice that they could be subject to immediate termination for incidents of abuse, it does not mandate that termination will occur in every case. To the contrary, [testimony established] that not every violation of the Nursing Home's neglect and abuse policy results in

termination. Therefore, although Article 24 provides that termination is an appropriate remedy for abuse, it is not the only appropriate remedy...

(Union Exhibit E, p. 38).

38. The arbitrator also found that Foote's conduct was no more serious than other employees who have continued to work at the Nursing Home. (Union Exhibit E, pp. 19-20, 40-43).

39. The arbitrator found that Foote would have been returned to work if she had admitted that her conduct was inappropriate and taken steps to prevent it from happening again. Accordingly, he found that she "was in the untenable position of either admitting to something she did not believe was true or losing her job." (Union Exhibit E, pp. 17-18, 40-41).

40. As a result, the arbitrator found "that the decision to terminate Foote primarily because she did not admit she had verbally abused G.T. was an overly harsh and unreasonable penalty." (Union Exhibit E, p. 41).

41. The arbitrator held that "[t]here was not just cause for the County to terminate...Foote under the [CBA]. (Union Exhibit E, p. 44).

42. The arbitrator ordered "the County to reinstate Foote to her former position as an LNA..., without back pay or other contract benefits lost since the date of her termination, provided that [she] takes an anger management course and any neglect and abuse training programs the Nursing Home deems appropriate." (Union Exhibit E, p. 44).

43. While determining that termination was an excessive penalty under the circumstances, the arbitrator awarded no back pay or other contract benefits to Foote "in order for [her] to understand and appreciate the severity of her actions that day and the impact it had on G.T. and her co-workers as well as the potential ramifications for the Nursing Home." (Union Exhibit E, p. 41).

44. The arbitrator considered the Nursing Home's argument that any award of reinstatement would be contrary to public policy and therefore unenforceable. While agreeing with the Nursing Home "that there is a strong public policy of protecting nursing home residents from neglect or abuse,...the Nursing Home's own actions reflect that merely returning an employee to work who has verbally abused a patient is not a per se violation of public policy." (Union Exhibit E, p. 42).

45. The State of New Hampshire, Resident's Bill of Rights provides, in part, that "the resident shall be free from emotional, psychological, sexual and physical abuse and from exploitation, neglect, corporal punishment and involuntary seclusion..." (Union Exhibit A, EX-3, p. 2).

46. The Merrimack County Nursing Home "Abuse and Neglect Policy" provides, in part, that:

> [a]ll residents have the right to be free from verbal, sexual, physical and mental abuse, corporal punishment and involuntary seclusion...
>
> Verbal Abuse: The use of oral, written or gestured language that willfully includes disparaging and derogatory terms to residents or their families, or within hearing distance, regardless of their age, ability to comprehend, or disability....
>
> Neglect: Failure to provide goods and services necessary to avoid physical harm, mental anguish or mental illness.

(Union Exhibit A, EX-4)

47. On December 17, 2004, Robert K. Ehlers, Bureau Chief–Certification, of the Bureau of Health Facilities Administration issued a letter to Foote informing her that the New Hampshire Department of Health and Human Services (HHS), Bureau of Health Facilities Administration was in receipt of a report from Adult Protective Services that made findings of resident neglect and abuse based upon her conduct with G.T. on October 28, 2002. Mr. Ehlers notified Foote of her right to request a hearing to dispute the findings in accordance with 42 CFR §483.156 and §488.335, and State of New Hampshire Administrative Rule He-C 200. Mr. Ehlers informed Foote that if she did not request a hearing, a report of substantiated findings would be placed in the State's Nurse Aide Registry. He further informed her that a consequence of having her name placed in the Nurse Aide Registry is that she could not be employed by any long term care provider that receives Medicare or Medicaid payments. (Union Exhibit F).

48. On January 4, 2005, the Union's representative, Randy Vehar, e-mailed the County's representatives, Atlas & Atlas, with respect to the Foote arbitration and the County's non-compliance with the arbitrator's award as of that date. In conjunction therewith, and as "part of the Union's obligation to represent Ms. Foote," he requested certain information from the County, including:

> Any and all documents, whether created, sent, or exchanged before or after issuance of Arbitrator Cochran's Award, by which the Nursing Home, County, and/or any of its agents, including its attorneys, provided information to Adult Protective Services or its agents regarding Ms. Foote and the accusations contained in the....letter dated December 17, 2004.

> Fully describe...all communications between...the Nursing Home/County... to Adult Protective Services regarding Ms. Foote...and whether she would be placed on a disqualify registry...

(Union Exhibit H).

49. On January 13, 2005, the Union's representative, Randy Vehar, e-mailed the County's representatives, Atlas & Atlas, with respect to the Foote arbitration and the County's non-compliance with the arbitrator's award as of that date. He wrote, in part, that:

> It does not appear that you have addressed the information requests contained in my e-mail to you dated January 4, 2005. I believe that my information requests continue to have relevancy to these matters, particularly those inquiries that are addressed to what, if anything, agents of the County/Nursing Home did, particularly after issuance of Arbitrator Cochran's award, to undermine and/or effect the enforceability of that Award. It just seems awfully suspicious that HHS would issue a letter just a week and a half after issuance of the Award...[based upon purported Protective Investigation Summaries dated November 20, 2002 and November 4, 2002].

(Union Exhibit S).

50. By letter dated February 14, 2005, the Union's representative, Randy Vehar, presented a list of discovery items to the New Hampshire Department of Health and Human Services, Adult Protective Services, and/or the Merrimack County Nursing Home in preparation for the HHS hearing on Foote's placement on the nurse registry. Included within the discovery request was information pertaining to communications between the County and HHS regarding when and how Foote's name was placed on the nurse registry. (Union Exhibit V).[2]

51. By letter dated March 3, 2005, the County's representative, Warren Atlas, responded to Vehar's February 14, 2005 letter, answering certain discovery requests, but none pertaining to communications between the County Nursing Home and HHS between the issuance of the arbitrator's award on December 8, 2004 and the HHS letter of December 17, 2004. (Union Exhibit W).

52. Vehar renewed his request for information concerning December 2004 communications between the Nursing Home and HHS via an e-mail to Atlas & Atlas on March 14, 2005 (Union Exhibit Z), but such information has yet to be provided.

[2] Union Exhibits V, W, and Z are admitted as relevant to the Union's claim in this matter that the County has failed and/or refused to provide information that is relevant and necessary in its role as the exclusive representative.

INTERIM DECISION AND ORDER

JURISDICTION

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5. RSA 273-A:6 I. Here, the Union alleges several violations of RSA 273-A:5, including violations by the County of RSA 273-A:5 I (a), (e), (g), (h) and (i) as a result of its non-compliance with a final and binding arbitrator's award, RSA 273-A:5 I (a), (b), (c), (e), (g) and (h) for acts of anti-union discrimination, and RSA 273-A:5 I (a), (b), and (e) for failing to provide relevant information to the Union in its role as the exclusive representative.

It is well-settled that failure to "comply with an arbitrator's award may constitute an unfair labor practice," *Appeal of Police Commission of City of Rochester*, 149 N.H. 528, 531 (2003), citing *Board of Trustees v. Keene State Coll. Educ. Assoc.*, 126 N.H. 339, 341-342 (1985). This would include RSA 273-A:5 I (h), breach of a collective bargaining agreement, and 273-A:5 I (e), breach of the obligation to negotiate in good faith. *Id.* at 531. Moreover, the Board has inherent and limited jurisdiction to apply strong, dominant and express public policy in determining whether an arbitrator's award violates such a policy. *Appeal of Amalgamated Transit Union, Local 717*, 144 N.H. 325 (1999) ("*Amalgamated*") affirming PELRB Decision No. 97-101. The Board also exercises jurisdiction over claims of anti-union discrimination and interference [See *United Professional Bus Drivers of Concord, UAW v. Concord School District*, PELRB Decision No. 2000-060 (July 17, 2000)] and alleged failures to provide relevant information [See *SEA, SEIU Local 1984, Seabrook Employees Association v. Town of Seabrook*, PELRB Decision No. 2004-103 (July 20, 2004)].

DISCUSSION

At the outset, I address the pending matters with respect to the state of the record. As noted above, on October 14, 2005, the Union filed a "Petition to Submit Additional Evidence in Support of its Motion for Summary Judgment on the Jointly-Submitted Issues," in response to which the County filed its "Opposition to the Union's Petition to Reopen the Record on the Jointly Submitted Issues" on November 3, 2005. On November 9, 2005, the Union filed a "Motion for Leave to File Reply Brief and/or to Strike County's Opposition to Union Petition, and the County's "Opposition to the Union's Motion for Leave to File Reply Brief and/or to Strike County's Opposition to Union Petition" was received by the Board on November 28, 2005. Upon review of the parties' filings, I deny the Union's Petition to Submit Additional Evidence and its Motion for Leave to File Reply Brief and/or Strike County's Opposition to Union Petition since, in accordance with Pub. 203.05 (formerly Pub. 203.04, as referenced in the parties joint motion dated July 22, 2005) such evidence in not necessary to a full consideration of the so called "submitted issues." Indeed, the crux of the instant matter concerns the enforceability and/or non-compliance of the arbitrator's December 8, 2004 award, whether the Union may later proceed on anti-union discrimination claims, and the Union's request for certain information from the County. Facts that were not presented in arbitration or that concern proceedings in other forums are not necessary for my determination of the issues before me.

I also respond to the County's written request dated September 20, 2005 that the Board substitute certain employer exhibits filed on September 19, 2005 with redacted versions of same. Without the parties' prior agreement that the Board effectuate such a swap of exhibits, I must deny the County's request. The County's original filing of exhibits was in conformity with the parties' Joint Motion dated July 22, 2005, as well as the Board's Interim Order dated July 28, 2005. Since the Board's rules do not otherwise provide for the substitution of exhibits previously entered into the record, and in the interest of preserving the official record in this case, it would be inappropriate to take such action now. However, a party (or parties) to a case may file a motion to seal a portion (or portions) of the record at any time.

The first of the five (5) issues submitted for decision by the parties in their Joint Motion dated July 22, 2005 is "[w]hether the County has violated RSA 273-A:5 I (a), (e), (g), (h) and/or (i) by refusing to comply with the arbitrator's award and re-employ Melissa Gale Foote as an LNA. If the County has so violated the act, what shall be the remedy?" (See ¶1, A of the Parties' July 22, 2005 Joint Motion). In order to resolve this question, a review of the arbitrator's award must necessarily occur. When undertaking such a task in *Professional Firefighters of Hanover, Local 3288 v. Town of Hanover; Town of Hanover v. Professional Firefighters of Hanover, Local 3288,* PELRB Decision No. 2004-106 (July 29, 2004)(hereinafter "*Hanover*") the Board stated that:

> Until *Appeal of Amalgamated Transit Union, Local 717*, 144 N.H. 325 (1999), it needed to exercise this authority "only in two narrow areas: first, where the collective bargaining agreement either restricts the arbitrator's discretion or provides for administrative or judicial review, and second, where 'in the case of an unrestricted submission to arbitration, an allegation is made that the arbiters either expressly intended that the case be decided according to principles of law and were mistaken in their application thereof,...or were so mistaken on the facts as to preclude a fair consideration of the issues...Later, in *Amalgamated* the court...stated that the '[Board] inherently has limited jurisdiction to apply strong and dominant public policy as expressed in controlling statutes, regulations, common law and other applicable authority, to address matters necessary to resolve questions arising within the scope of [its] jurisdiction' and can decide that it 'will not enforce a contract or contract term that contravenes public policy.'

Professional Firefighters of Hanover, Local 3288 v. Town of Hanover, Town of Hanover v. Professional Firefighters of Hanover, Local 3288, PELRB Decision No. 2004-106, p. 12 (July 29, 2004)(aff'd mem., 2004-0714)(citations omitted). The Board has further noted that "[t]he decision of an arbitrator, particularly where there is no issue raised regarding arbitrability, is not usually subject to review by the Board."[3] *Id.* at 12. See also *Town of Pelham v. AFSCME Council 93, Local 3657, Pelham Police Employees*, PELRB Decision No. 2005-035, p. 8 (March 16, 2005)(hereinafter "*Pelham*"). It may however arise, as here, in the context of an unfair labor practice charge based upon alleged non-compliance. While here there is no dispute that the County has refused to comply with the arbitrator's award, the County maintains that the arbitrator exceeded his authority and that his award is void and unenforceable as a matter of law and public policy.

[3] A statutory remedy for parties desiring to appeal arbitrators' decisions exists in RSA 542, but these parties have not incorporated that option into their CBA. (Finding of Fact No. 27, above).

In reviewing the award in a manner consistent the Board's analysis in *Hanover* and *Pelham*, I find it to be a comprehensive treatment of the issues presented to the arbitrator. The parties stipulated that the arbitrator would determine whether there was just cause for the County to terminate Ms. Foote under the collective bargaining agreement and, if not, to determine an appropriate remedy. (Findings of Fact Nos. 11 & 28). In rendering his decision, the arbitrator wrote a forty-four page decision consisting of numerous factual findings, credibility determinations, and legal conclusions. His decision, as stated therein, was that:

> [t]here was not just cause for the County to terminate Melissa Foote under the collective bargaining agreement.
>
> Therefore, the County shall reinstate Foote to her former position as an LNA at the Merrimack County Nursing Home, without back pay or other contract benefits lost since the date of her termination, provided that Foote takes an anger management course and any neglect and abuse training the Nursing Home deems appropriate...

(Union Exhibit E, p. 44). Although he determined that there was clear and convincing evidence that Foote did verbally abuse G.T. on October 28, 2002 (Finding of Fact No. 36), he found evidence of other employees who engaged in similar conduct and yet had been retained by the County. (Findings of Fact Nos. 37, 38 & 44). Despite the County's contention that the arbitrator exceeded his authority under the parties' CBA by ordering the reinstatement of Ms. Foote, citing the fact that Article 24, Paragraph B of the parties' CBA provides, in pertinent part, that "[a]ny instance of physical, verbal, mental or medical abuse/neglect/exploitation of any resident shall be grounds for immediate termination," I concur with the arbitrator's conclusion that such language, while constituting notice upon bargaining unit employees, including Foote, that they could be subject to immediate termination for incidents of abuse, does not require that termination will occur in every case.

In finding that the County did not have just cause to terminate, the arbitrator weighed not only the evidence of other employees being retained who had engaged in similar conduct (Findings of Fact Nos. 37, 38 & 44), but also that Foote would have been returned to work if she had admitted that her conduct was inappropriate and taken steps to prevent it from happening again. (Finding of Fact No. 39). Thus he concluded that she "was in the untenable position of either admitting to something she did not believe was true or losing her job," and that it was ultimately her refusal to admit wrongdoing that led to her termination. (Finding of Fact No. 39 & 40). While directing that Foote be reinstated, the arbitrator imposed a two-year suspension without pay based upon the severity of her actions on October 28, 2002 and in order for her to appreciate (and learn from) her conduct on that particular day. (Finding of Fact No. 43). The arbitrator's authority to reinstate Ms. Foote was derived from the terms of the parties' grievance procedure, providing for final and binding arbitration, and upon the parties' agreement in this case that he fashion an appropriate remedy. (Finding of Fact Nos. 26 & 28). I therefore find the arbitrator's award to be consistent with the terms of the parties' CBA, including those provisions prohibiting resident abuse, and supported by sufficient evidence.

Just as the Board was required to do in *Hanover* and *Pelham*, I must now determine whether the arbitrator's reinstatement of Ms. Foote to her former position violates public policy.

The "public policy exception" to the limited review of arbitration decisions in New Hampshire has been described by the Board as follows:

> We do not believe that the "public policy exception" represents a lowered drawbridge by which to easily assail arbitration decisions, nor license to conduct broad or general reviews of arbitration decisions. After all, the parties have otherwise mutually agreed to abide by them through their bargaining. We must then weigh [against the express, strong and dominant policies contained in RSA 273-A]...the public policy raised by a party contesting an arbitration award by evaluating the strength and dominance as expressed in controlling statutes, regulations, common law and other applicable authority...[T]he "public policy" to be relied upon...is to be found in positive law and legal precedent and not merely a general public interest consideration...We agree that to qualify as a "public policy exception" from the implementation of an otherwise legal and fact supported arbitrator's decision pursuant to New Hampshire law that the policy must be express, well-defined and dominant.

See *Hanover* at 13. (citations omitted). Here, the County maintains that there is a public policy of protecting nursing home residents from neglect and abuse, and that to reinstate Ms. Foote violates this policy by virtue of her status as a confirmed abuser. It offers numerous statutory and regulatory citations, both from federal and state sources, which it contends embody this public policy, including Title 42 U.S. Code, § 1395i-3(c); 42 CFR 483; 42 CFR 488; RSA 161-F:42 – 57; and RSA 631:8, as well as case law (See County's Brief on Jointly Submitted Issues, pp.12-32).

There is no doubt that a strong, dominant and express public policy does exist in New Hampshire for protecting nursing home residents from neglect and abuse. This is reflected not only in the statutes, regulations and case law cited by the County, but also in the State of New Hampshire Resident's Bill of Rights, the County's Abuse and Neglect Policy, and indeed language contained in the parties' CBA. However, while these cited authorities speak to the welfare and protection of nursing home residents, none specifically prohibits the reinstatement of an employee such as Ms. Foote. As the court explained the "public policy exception" in *Boston Medical Center v. Service Employees International Union, Local 285*, "the question is not whether [the employee's] *conduct* violated a public policy..., but whether *the order to reinstate her* violated that policy." *Boston Medical Center v. Service Employees International Union, Local 285*, 260 F.3d 16, 21 (1st Cir. 2001)(Emphasis in original). In *Amalgamated*, the New Hampshire Supreme Court affirmed the PELRB's decision vacating an arbitrator's award based upon the identification of "a dominant public policy against allowing employees who test positive for drug usage to perform safety sensitive positions" and that to reinstate two employees to their former safety sensitive positions in public transit would violate this policy. *Appeal of Amalgamated Transit Union, Local 717*, 144 N.H. 325, 328 (1999). No such *express* policy has been presented here, whereby a person found to have committed one instance of verbal abuse is no longer permitted to work in a nursing home. While 42 C.F.R. Section 483.13(c)(ii)(B), which provides that the County cannot "employ individuals who have a finding entered into the State nurse aide registry concerning abuse, neglect, mistreatment of residents...," does appear to have the requisite level of clarity in this regard, the record before me indicates that Ms. Foote has not had such a finding. (Finding of Fact No. 19).

I therefore conclude that the County has committed an unfair labor practice within the meaning of RSA 273-A:5 I (a), (e), (g) and (h) by failing and refusing to comply with the arbitrator's final and binding award. The County shall reinstate Melissa Foote with back pay and other contract benefits lost as of December 8, 2004, the date of the arbitrator's award. As ordered by the arbitrator, Ms. Foote shall take an anger management course and any neglect and abuse training programs the Nursing Home deems appropriate.

Based upon the foregoing, the second submitted issue, specifically whether the Union has violated RSA 273-A:5 by insisting on implementation of the arbitrator's award, is moot, as is the preliminary question, relative thereto, of whether the County's counterclaim against the Union was filed in conformity with Pub. 201.02. The County's counterclaim is therefore dismissed.

The third submitted issue is whether the Union's claim of anti-union discrimination has been timely filed or is otherwise barred by the doctrines of collateral estoppel and *res judicata* (See ¶1, C of the Parties' July 22, 2005 Joint Motion). Since the filings before me reflect that the Union's claim is based upon events following the issuance of the arbitrator's award on December 8, 2004, the six-month statute of limitations set forth in RSA 273-A:6, VII was satisfied when the charge was filed on May 12, 2005. Moreover, the doctrines of collateral estoppel and *res judicata* do not apply under the instant circumstances because the arbitrator did not, and from a time standpoint alone could not, address the issue raised by the Union of whether or not the County's non-compliance with the award constitutes unlawful anti-union discrimination under RSA 273-A. Whether or not the County unlawfully discriminated against Foote because of her protected union activity in refusing to reinstate her, despite its good faith claims, described above, that the award violated public policy and otherwise exceeded the arbitrator's authority, is technically a question for another day.

The fourth issue presented is whether the County has unlawfully failed and/or refused to provide information to the Union that is relevant to the Union's obligation to fairly represent Foote and insure the County's compliance with the award (See ¶1, D of the Parties' July 22, 2005 Joint Motion). It is well settled that a public employer is obligated to provide information to the Union that is relevant and necessary in its role as the employee's exclusive representative. This obligation is derived from its duty under the law to negotiate in good faith. Information relating to the County's compliance, or lack thereof, with an arbitration award issued under a contractual grievance procedure would generally fall within this scope, and particularly information relating to actions of the County that may otherwise render an award a nullity after its issuance.

It is nevertheless evident from the record that the County has been less than forthcoming to the Union in response to the Union representative's January 4, 2005 and subsequent information requests.[4] I understand the County's concerns as to relevancy and the fact that HHS controls the names that are added to the disqualified nurse registry, not the County. It is also true that the County's refusal to comply with the award is based upon its contention that the award is

[4] I note that in proceedings before the New Hampshire Department of Human Services, Administrative Appeals Unit, the County did respond to some of the Union representative's February 14, 2005 discovery requests (Union Exhibit V) by virtue of the County representative's March 3, 2005 letter (Union Exhibit W).

unenforceable as a matter of law, not because Foote's name had been, or was about to be, placed on the nurse registry. On the other hand, the nexus in time between the December 8, 2004 issuance of the award and the December 17, 2004 HHS letter raises reasonable suspicions on the part of the Union to justify its request. Indeed, a means to otherwise impede Foote's reinstatement, despite the arbitrator's award, would be the sudden advent of the abuse registry issue. All this being said, based upon my rulings above and Ms. Foote's reinstatement I conclude that this question need not be addressed at this time and therefore defer ruling upon it unless or until the parties elect to further proceed on the so-called "reserved issues" referenced in their July 22, 2005 motion.

Finally, based upon my determinations above, I conclude that the fifth and last issue of the so-called "submitted issues" (See ¶1, E of the Parties' July 22, 2005 Joint Motion) is moot and therefore need not be addressed.

In accordance with the Board's Interim Order dated July 28, 2005 (PELRB Decision No. 2005-095), the so-called "reserved issues," as set forth in paragraph 2 of the parties' July 22, 2005 Joint Motion, shall remain in abeyance for 30 days following the issuance of the instant decision. Thereafter, the reserved issues shall be administratively dismissed unless either party files a request for further PELRB proceedings within 30 days.

It is so ordered.

Signed this 2nd day of March, 2006.

Peter C. Phillips, Esq.
Hearing Officer

Distribution:
Randall Vehar, Esq.
Warren D. Atlas, Esq.

NH Supreme Court affirmed in part, vacated in part PELRB Decision 2006-038 on 8-23-2007, Slip Op. No. 2006-525 (NH Supreme Court Case No. 2006-525)

State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

International Chemical Workers Union Council UFCW, Local 1046C Complainant v. Merrimack County Nursing Home and County of Merrimack Respondent	Case No. M-0738-9 Decision No. 2006-066

ORDER ON PARTIES' REQUESTS FOR REVIEW OF HEARING OFFICER'S DECISION

The Public Employee Labor Relations Board ("PELRB") conferred on the above captioned matter and took the following actions:

1. It considered the Complainant's request for review of the hearing officer's decision and the objections in response thereto filed by the Respondent.

2. It considered the Respondent's request for review of the hearing officer's decision and the objections in response thereto filed by the Complainant.

3. It reviewed the hearing officer's interim decision (PELRB Decision No. 2006-038), dated March 2, 2006, including all findings of fact and legal conclusions.

4. It examined the record in this matter, including the parties' joint factual stipulations and memorandums of law.

5. It approved the decision of the hearing officer and DENIED the respective requests for review filed by the Complainant and Respondent in this matter.

6. Furthermore, having reviewed the hearing officer's interim decision (PELRB Decision No. 2006-038), its own interim order dated July 26, 2005 (PELRB Decision No. 2005-095), and the record in this matter, the PELRB determined the so called "reserved issues" to be moot and therefore dismisses same.

It is so ordered.

Signed this 19TH day of April, 2006.

Bruce K. Johnson, Esq.
Alternate Chair

By unanimous decision. Alternate Chair Bruce K. Johnson, Member Richard E. Molan and Alternate Member Carol M. Granfield present and voting.

Distribution:
Randall Vehar, Esq.
Warren D. Atlas, Esq.

NH Supreme Court affirmed in part, vacated in part PELRB Decision 2006-038 on 8-23-2007, Slip Op. No. 2006-525 (NH Supreme Court Case No. 2006-525)

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

International Chemical Workers Union Council UFCW, Local 1046C Complainant v. Merrimack County Nursing Home and County of Merrimack Respondent	Case No. M-0738-9 Decision No. 2006-094

ORDER ON PARTIES' MOTIONS FOR REHEARING

The Public Employee Labor Relations Board ("PELRB") conferred on June 7, 2006 for the purpose of considering the Complainant's "Motion for Reconsideration and/or Rehearing" filed on May 18, 2006, and the Respondent's "Application for Rehearing Pursuant to Pub. 205.02" filed on May 18, 2006, and took the following actions:

1. Pursuant to RSA 541 and N.H. Admin R. Pub 205.02, it reviewed the parties' cross motions for rehearing.

2. It examined the previous decisions issued in this matter, specifically PELRB Decision Nos. 2006-038 (dated March 2, 2006) and 2006-066 (dated April 19, 2006).

3. It reviewed the previous filings of the parties, including the parties' joint factual stipulations and memorandums of law.

4. It DENIED the both parties' motions for rehearing.

It is so ordered.

Signed this 7th day of June, 2006.

Bruce K. Johnson, Esq.
Alternate Chair

By unanimous decision. Alternate Chair Bruce K. Johnson, Esquire, Member Richard E. Molan, Esquire and Alternate Member Carol M. Granfield present and voting.

Distribution:
Randall Vehar, Esq.
Warren D. Atlas, Esq.