



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<sup>1</sup> 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,

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<sup>1</sup> 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).<sup>2</sup>
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.

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<sup>2</sup> 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 is 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."<sup>3</sup> *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.

<sup>3</sup> 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 (1<sup>st</sup> 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.<sup>4</sup> 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

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<sup>4</sup> 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 2<sup>nd</sup> day of March, 2006.



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Peter C. Phillips, Esq.  
Hearing Officer

Distribution:

Randall Vehar, Esq.

Warren D. Atlas, Esq.