NH Supreme Court affirmed this decision on 09-14-2014 (NH Supreme Court Case No. 2013-0497)

STATE OF NEW HAMPSHIRE

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME Local 2715, Hillsborough County Nursing Home Employees

v.

Hillsborough County Nursing Home

&

Hillsborough County Nursing Home

v.

AFSCME Local 2715, Hillsborough County Nursing Home Employees

Case No. G-0049-27 & Case No. G-0049-28
(Consolidated Cases)

Decision No. 2013-031

Appearances:

Karen E. Clemens, Esq. for the AFSCME Local 2715, Hillsborough County Nursing Home Employees

Carolyn M. Kirby, Esq. for the Hillsborough County Nursing Home

Background:

In Case No. G-0049-27, the AFSCME Local 2715, Hillsborough County Nursing Home Employees (Union) filed an unfair labor practice complaint on February 22, 2012 claiming that the Hillsborough County Nursing Home (County) violated RSA 273-A:4[1] and RSA 273-A:5, I (a), (b), (e), (g), and (h)[2] when it refused to arbitrate several grievances. The Union requests that the PELRB find that the County committed an unfair labor practice and order the County (1) to provide to the

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[1] RSA 273-A:4 requires that every collective bargaining agreement contain workable grievance procedures.

[2] RSA 273-A:5, I provides that it shall be "a prohibited practice for any public employer: (a) To restrain, coerce or otherwise interfere with its employees in the exercise of the rights ..; (b) To dominate or to interfere in the formation or administration of any employee organization;.. (e) To refuse to negotiate in good faith with the exclusive representative of a bargaining unit ..; (g) To fail to comply with this chapter or any rule adopted under this chapter; (h) To breach a collective bargaining agreement ..."

PELRB its notice of assent to the appointment of an arbitrator, (2) to cease and desist from interfering with its employees in the exercise of the rights conferred by RSA 273-A, (3) to bargain in good faith, (4) to post the findings of the PELRB for 30 days, and (5) to make the Union whole for all costs and expenses incurred to pursue this matter. The County denies the charges and claims, among other things, that the Union failed to comply with the grievance procedure set forth in the parties' collective bargaining agreement (CBA). The County requests that the PELRB dismiss the charges.

In Case No. G-0049-28, the County filed an unfair labor practice complaint on May 31, 2012 claiming that the Union violated RSA 273-A:4 and RSA 273-A:5, II (a), (d), (f), and (g)[3] when it made wrongful demands to arbitrate grievances that are procedurally non-arbitrable and/or have been waived. The County requests that the PELRB find, among other things, that the Union committed an unfair labor practice. The Union denies the charges.

These cases were consolidated for the purposes of hearing and decision, see PELRB Decision No. 2012-140, and the hearing was conducted on August 2, 2012 at the PELRB offices in Concord. The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. The parties filed post-hearing briefs and the decision is as follows.

Findings of Fact

1. The County is a public employer within the meaning of RSA 273-A:1, X.

2. The Union is an employee organization certified as the exclusive representative of certain employees of the County Nursing Home.

3. The Union and the County are parties to a CBA that expires on June 30, 2013.

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[3] RSA 273-A:5, II provides that it shall be "a prohibited practice for the exclusive representative of any public employee: (a) To restrain, coerce or otherwise interfere with public employees in the exercise of their rights ..; (d) To refuse to negotiate in good faith with the public employer;.. (f) To breach a collective bargaining agreement;.. (g) To fail to comply with this chapter or any rule adopted hereunder."

4. The parties' CBA contains a grievance procedure (Article 16) consisting of four steps: Step 1 – immediate supervisor (oral discussion); Step 2 – Administrator; Step 3 – Commissioners; and Step 4 – final and binding arbitration. The Article 16 grievance procedure provides as follows:

> (a) The employee involved and the Union's shop steward shall first discuss the grievance with the grievant's immediate supervisor who shall render a decision concerning the grievance within two (2) workdays:
>
> (b) If the grievant is not satisfied with the disposition of his grievance, or if no decision has been reached within two (2) workdays after discussing the matter with the grievant's supervisor, the grievant and the Union's shop steward shall present the grievance in writing, stating the date of the alleged offense and the nature of the grievance (including the Contract provision involved) to the Administrator who shall render a decision within four (4) workdays from the date the written grievance was presented. A grievance must be reduced to writing in the form set forth above and presented to the Administrator within ten (10) workdays of the date of the event, which gives rise to the alleged grievance or the grievance shall be deemed waived.
>
> (c) If the grievant is not satisfied with the disposition of his grievance by the Administrator or if no decision has been rendered within four (4) workdays after filing the same with said Administrator, the grievant and the Union's shop steward may file the written grievance with the Commissioners who shall meet with the grievant and the Union's representatives. The grievant and/or the Union must present the written grievance to the Commissioners within five (5) workdays after the Administrator's decision has been reported, or if none, within nine (9) workdays after the date of the meeting with the Administrator or the grievance will be deemed waived.
>
> (d) If the Union is not satisfied with the disposition of the grievance by the Commissioners or if no decision has been rendered by the Commissioners within said three (3) workdays, the Union may submit a written request to the New Hampshire Public Employees Labor Relations Board to appoint an arbitrator to resolve said grievance within ten (10) workdays after the meeting at which time the Commissioners considered such grievance. If the Union fails to submit such written request for the appointment of an arbitrator to the New Hampshire Public Employee Labor Relations Board within said ten (10) workdays, the grievance shall be deemed waived.

See Joint Exhibit 1.

5. Article 16.1 of the CBA defines a grievance "as a complaint or claim by an employee or group of employees in the bargaining unit or the Union specifying the names of the bargaining unit employees involved, the date(s) of the alleged offense(s) and the specific Contract

provision(s) involved which arises under and during the terms of the Agreement." See Joint Exhibit 1.

6. Article 16.4 of the CBA provides as follows:

> If the grievance is not reported and/or processed within the time limits set forth above, the matter shall be deemed waived and no further action will be taken with respect to such grievance unless both parties mutually agree to an extension of said time limits.

See Joint Exhibit 1.

7. On June 24, 2011 the Board of Commissioners sent "reduction in force" letters to certain nursing home employees, including Patricia Perkins, Diana Maurice, and Joan Gendron, informing them that their positions will be terminated effective August 1, 2011. The letters provide in part as follows:

> In an effort to provide you as much notice as possible we are informing you that your position with Hillsborough County will end effective the close of business on August 1, 2011. Our action is directly related to the lack of funding necessary to maintain our workforce. We wish to assure you that your termination is not related to your job performance but we do not anticipate this layoff situation changing in the foreseeable future and consider it permanent...

See County Exhibit 1.

8. County Nursing Home Administrator Bruce Moorehead met with the Union's representatives on July 7, 2011 to discuss the elimination of some positions and the application of contractual bumping rights. See Union Exhibit 1.

9. On July 7, 2011 Mr. Moorehead informed Ms. Perkins and Ms. Maurice that, as of August 2, 2011, they will be moving into a full time activity aide position within the activities department and will be required to work alternating weekends and some holidays. He also informed Ms. Gendron that she will be moving from a full time to a part time switchboard/security position within the business office/administration department as of August 2, 2011. He invited employees to let him know by July 13, 2011 if there were any mistakes and copied the Union on these communications. See Union Exhibit 1 & County Exhibit 2.

10. On July 12, 2011 Mr. Moorehead received Ms. Gendron's response to his July 7, 2011 letter. She stated: "I had agreed to the 30 hour part-time position. Also, what hours and days would I work?" See Union Exhibit 2.

11. On July 12, 2011 Mr. Moorehead received a letter from Ms. Perkins and Ms. Maurice which stated as follows:

> We do not agree with working every other weekend and some holidays. We were grandfathered in. August 1, 2011 was our date in first letter when our jobs would be eliminated. What hours will We [sic] be working?

See Union Exhibit 3.

12. On July 15, 2011 Mr. Moorehead responded to Mr. Gendron as follows:

> Please be advised that, as I mentioned when we met, your hours as a part-time employee are not guaranteed. I would suggest that you discuss your hours and your days of work with Mrs. Morin, as she will be putting together a revised schedule to reflect the decrease in switchboard hours of coverage.

See Union Exhibit 5 and County Exhibit 3 (c).

13. On July 15, 2011 Mr. Moorehead responded to Ms. Perkins and Ms. Maurice as follows:

> ...[P]ursuant to our meeting on July 7, 2011, it is management's position that "grandfathering" does not apply to the position you are bumping in to. Additionally, I have not seen any documentation, which has been requested, that the "grandfathering" claim is part of the collective bargaining agreement (CBA).
>
> Please contact Mrs. Greswell, Activities Director, for your initial schedule, subsequent schedules, and unit assignment.

See Union Exhibit 4 and 6 and County Exhibit 3 (a) and (b).

14. On July 20, 2011 Activities Director Ann Creswell sent Nursing Home employee Pamela Bennett a new schedule and informed her that her "days off are now Thursdays" and work hours are 12:00 p.m. to 8 p.m. Ann Creswell is Ms. Bennett's immediate supervisor. See Union Exhibit 7.

15. On July 20, 2011 Union President Paula Martel filed with the Nursing Home

Administration (Mr. Moorehead) written grievances on behalf of Ms. Perkins, Ms. Gendron, and Ms. Maurice. Mr. Moorehead is not Ms. Perkins', Ms. Gendron's, or Ms. Maurice's immediate supervisor. See Joint Exhibit 2 and County Exhibit 6.

16. According to Ms. Martel, she filed the Perkins, Gendron, and Maurice grievances with Mr. Moorhead, and not with employees' immediate supervisors, because the "reduction in force"/employee transfer letters were issued by Mr. Moorhead and not by immediate supervisors.

17. The grievance filed on behalf of Ms. Perkins involves the change in her work schedule and asserts a violation of Article V of the CBA and past practice ("grandfathering"). The statement of the facts provides as follows: "Pat Perkins has never worked weekends or holidays. She was hired this way around 30 years ago even when Depts. merged and separated." As a remedy, the Union requested that Ms. Perkins be made whole. See Joint Exhibit 2.

18. The grievance filed on behalf of Ms. Gendron involves reduction of her work hours from 40 to 30 and alleges a violation of Article V and all related articles of the CBA. The statement of facts provides as follows:

> 30 hour position (Mike Cote) on [sic] reduced from 40. 6-15-11 paper given to Union Rep Carol Luska on where budget would be reduced. We agreed at meeting with Bruce Moorehead Joe Macarone July 7, 2011 [sic] for Mike to go into Housekeeping and Joan Gendron would go into 30 hour position.

As a remedy, the Union requested that Ms. Gendron be assigned 30 hours and be made whole. See Joint Exhibit 2.

19. The grievance filed on behalf of Ms. Maurice involves the change to her work schedule and alleges a violation of Article V of the CBA and past practice ("grandfathering"). The statement of facts provides as follows: "Diana Maurice has never worked weekends or holidays. She was hired this way around 30 years ago even when depts. merged and separated." As a remedy, the Union requested that Ms. Maurice be made whole. See Joint Exhibit 2.

20. On July 25, 2011 Mr. Moorehead sent letters regarding the Maurice, Gendron, and

Perkins grievances, filed on July 20, 2011, to Union President Paula Martel. The letters provide in part as follows:

> [P]ursuant to Article XVI, specifically 16.1 (a) – *the employee involved and the Union's shop steward shall first discuss the grievance with the grievant's immediate supervisor who shall render a decision concerning the grievance within two (2) workdays* ... to my knowledge this did not occur.
>
> I am requesting that you please follow Step I of the grievance procedure, as indicated in the CBA, prior to forwarding the grievance at my level.

See Union Exhibit 8-10 and County Exhibit 4 (emphasis in original).

21. The Union President also filed a written grievance on behalf of Ms. Bennett on July 25, 2011 with her immediate supervisor Ann Creswell. In the statement of grievance, the Union alleged a violation of Article VI and all other relevant articles of the CBA. The statement of facts provides as follows:

> As of Aug 1, 2011 Pam has received a schedule for 12-8. She was bumped from her regular time and day off. Linda Little and any other Employee hired per diem has less seniority as Pam was hired Full time from day one.

As a remedy, the Union requested that Ms. Bennett be "placed in correct time and day off" and be made whole. See Joint Exhibit 2.

22. According to Ms. Martel, she filed the Bennett grievance with Ms. Creswell, and not Mr. Moorehead, because it was Ms. Creswell who gave Ms. Bennett a letter explaining the changes to her schedule and other terms of employment.

23. On July 25, 2011 Ms. Creswell sent Ms. Bennett the following message:

> The only day that has changed is Thursdays and your hours as of Aug. 1st 12-8. I received a copy of your grievance today. First of all, Linda Little started working here on 11/19/2005, as a full time employee.
> You came aboard on 3/13/2007 as a full time employee.
> Linda did go per diem for 6 months, only. Still with the six months per diem stretch she still has more seniority than you. I have notified Paula [Martel] also.

See Union Exhibit 7.

24. On July 26, 2011 Mr. Moorehead sent the following letter to Ms. Bennett:

> As you are aware, Hillsborough County Nursing Home is unfortunately being required to reduce its workforce, which is affecting the activities department and your position within the department.
>
> As a result of the bumping provision, outlined in Article VI of the AFSCME CBA, it is necessary to change your hours of work from 10am-6pm to 12pm-8pm. Please be advised that, unless there are any unanticipated changes, this will become your new schedule effective August 2, 2011...

See Union Exhibit 11 and County Exhibit 5.

25. Mr. Moorehead met with Union's representatives, including Staff Representative Joe Macarone and Ms. Martel, on July 27, 2011. See Union Exhibit 12. At the meeting, Mr. Macarone proposed that the parties utilize a federal mediator to resolve the grievances in order to avoid arbitration. The parties' CBA does not address the subject of federal mediation. Mr. Moorehead told the Union's representatives that he would need to consult with the County legal counsel, Attorney Carolyn Kirby. Mr. Macarone proposed a "freeze" of grievance procedure deadlines to allow the County time to consult with Attorney Kirby. Mr. Moorehead did not object, or otherwise respond, to the proposal to freeze deadlines.

26. On August 1, 2011 Mr. Moorehead sent the following message to County Administrator Gregory Wenger:

> Greg: Joe Maccarone et al and I met on 7/27 and we agreed to schedule the W. Pelchat grievance, in front of the BOC [Board of Commissioners], on Wednesday September 21, 2011 at 9:00AM. Please let me know if this does not work on the Board's end.

Mr. Wenger responded that he would plan the Commissioners September 21, 2011 meeting on the Pelchat grievance. Mr. Wenger's responsibilities include scheduling of grievance hearings at the Commissioners level. See Union Exhibit 12.

27. On August 3, 2011 Mr. Macarone sent a message to Mr. Moorehead inquiring as to whether Mr. Moorehead has spoken with Attorney Kirby regarding the Union's proposal to use a federal mediator to resolve grievances. Mr. Moorehead responded as follows: "I would prefer to not use a mediator as I feel the contract language is pretty clear." See Union Exhibit 12 and County

Exhibit 7. According to Mr. Macarone, he understood from Mr. Moorehead's response that the Union could go ahead with the grievances at the step at which they were placed on hold.

28. On August 9, 2011 Ms. Martel sent the following communication regarding grievances to Mr. Wenger:

> We needed to amend dates as to [sic] it was frozen deciding on whether to use a Federal Mediator. Carolyn Kirby said no so our time just started ticking again. Please call with any questions regarding these 7 grievances.

See Union Exhibit 13. The "7 grievances" to which Ms. Martel referred included the Maurice, Gendron, Perkins, and Bennett grievances.

29. On August 11, 2011 Mr. Moorehead denied the Bennett grievance stating in part as follows:

> ... Please be advised that I am not in agreement that time frames were frozen after having a discussion regarding a Federal Mediator.
> On July 25, 2011, the date of this grievance, you cannot claim that a contract provision was violated as Ms. Bennett had not changed her hours of work by that day, which means this grievance is not ripe.
> Based on the above, and the fact that there have been no violations of the CBA, I hereby deny this grievance...

See County Exhibit 9.

30. On September 2, 2011 Ms. Martel sent Mr. Wenger a request that 7 grievances be heard at the Commissioners level and asked him to schedule the grievances for October 5 or October 12, 2011. See Union Exhibit 14.

31. On September 16, 2011 Mr. Wenger responded to Ms. Martel as follows:

> We have the Perchant [sic] grievance on the Board's agenda for next Wednesday, September 21st. I anticipate that as this is the only Grievance to be heard it will go forward at the head of the agenda at approximately 9:00 A.M. ...
> With respect to the pending grievance I would ask that we discuss the scheduling of those when everyone is together on Wednesday...

See Union Exhibit 15.

32. On September 21, 2011 Mr. Moorehead and Mr. Wenger met with Mr. Macarone. At that meeting, there was a discussion regarding Step 3 of the grievance procedure and the status of

the grievances. Mr. Macarone informed Mr. Moorehead that he would withdraw the pending grievances and refile them. Mr. Moorehead responded that if Mr. Macarone wants to refile grievances, he can "go ahead." Mr. Moorehead also told Mr. Macarone that it was too late to refile.

33. On October 7, 2011 the Union resubmitted with the County Business Office the grievances on behalf of Ms. Maurice, Ms. Perkins, Ms. Gendron, and Ms. Bennett. On October 12, 2011 Mr. Moorehead denied these grievances stating in part as follows:

> As you are aware, the AFSCME Collective Bargaining Agreement (CBA), Article 16.1b, last sentence, reads: 'A grievance must be reduced to writing in the form set forth above and presented to the Administrator within ten (10) workdays of the date of the event which gives rise to this alleged grievance or the grievance shall be deemed waived.' Since the date of the event was August 2, 2011, and over two (2) months have passed since that event, I must consider this grievance waived as the outlined time parameters were exceeded.
>
> Additionally, I do not feel that Article V, or any other provisions of the CBA were violated by management.
>
> Based on the above, this grievance is hereby denied.

See Union Exhibits 16-19.

34. On January 11, 2012 the Board of Commissioners held a hearing on the grievances. The grievances were denied on January 24, 2012.

35. On January 23, 2012 the Union sent to Mr. Moorehead the Request for Appointment of Arbitrator forms for the Bennett, Maurice, Gendron, and Perkins grievances, signed by the Union, requesting him to sign and return the forms for filing with the PELRB.[4] See Union Exhibit 21-24.

36. On January 30, 2012 the Union sent the County a reminder that it had not yet received signed copies of the request forms from the County. In response, Attorney Kirby stated as follows:

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[4] The PELRB maintains a list of neutral third parties per RSA 273-A:2, V. Public employers and exclusive representatives, like the County and the Union here, may, by agreement, utilize this list and the PELRB neutral appointment process to select a grievance arbitrator.

> Hillsborough County won't be signing off on the request to appoint arbitrators at this time.
> The County's records show that the grievances were not processed in accordance with the time frames outlined in the CBA.
> Under Article 16.1 (b) and 16.4 of the CBA the grievances are waived.
> If you have different information, let me know and we'll consider it. To the extent Joe Maccarone is relying on a theory that the arbitrator can determine the timeliness, if he could forward some law to that effect we'd consider that too. I'd prefer to not file a ULP or cross claim but there is some concern with violations of RSA 273-A:4 and 5.

See Union Exhibit 25.

Decision and Order

Decision Summary:

The County committed an unfair labor practice in violation of RSA 273-A:5, I (e) and (h) when it refused to participate in grievance arbitration. The parties' CBA provides for a final and binding arbitration of grievances and questions of procedural arbitrability must be decided by an arbitrator. Accordingly, the County's claim that the Union committed an unfair labor practice by wrongfully demanding arbitration is dismissed and the County is ordered, among other things, to cease and desist from violating the parties' CBA and to participate in grievance arbitration.

Jurisdiction:

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, *see* RSA 273-A:6.

Discussion:

The Union claims that the County committed an unfair labor practice when it refused to assent to the appointment of arbitrator by the PELRB thereby refusing to participate in arbitration process required under the parties' CBA. The County denies this charge and claims that the Union committed an unfair labor practice when it filed a wrongful demand to arbitrate because the Union's grievances were not filed within the time limits set forth in the parties' CBA and were not filed at the correct step of the grievance procedure.

The primary purpose of the arbitration process is "expeditious and economical dispute resolution." See *Appeal of the City of Manchester*, 153 N.H. 289, 295-96 (2006). While, under RSA 273-A:6, I, the PELRB has primary jurisdiction of all unfair labor practice claims alleging violations of RSA 273-A:5, "it does not generally have jurisdiction to interpret the CBA when the CBA provides for final binding arbitration. Absent specific language to the contrary in the CBA, however, the PELRB is empowered to determine as a threshold matter whether a specific dispute falls within the scope of the CBA." *Appeal of the City of Manchester*, supra, 153 N.H. at 293 (citations omitted). The New Hampshire Supreme Court has adopted four principles to guide the PELRB in determining whether a dispute is arbitrable under an arbitration clause in a CBA:

> (1) arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit ...; (2) unless the parties clearly state otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator; (3) a court should not rule on the merits of the parties['] underlying claims when deciding whether they agreed to arbitrate; and (4) under the "positive assurance" standard, when a CBA contains an arbitration clause, a presumption of arbitrability exists, and in the absence of any express provision excluding a particular grievance from arbitration,.. only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail ...

Appeal of the City of Manchester, 144 N.H. 386, 388 (1999). The Supreme Court explained that "[a]llowing an employee to contravene the underlying purpose of arbitration, by raising *a substantive issue* before the PELRB after agreeing to submit it to final and binding arbitration under the CBA, would not be in accord with the legislative purpose of RSA chapter 273-A." *Appeal of the City of Manchester*, supra, 153 N.H. at 295-96 (emphasis added; citation omitted). In cases involving questions of substantive arbitrability,[5] the primary function of the PELRB "is simply to determine whether or not [a party] raised a colorable issue of contract interpretation without deciding it on the merits" and to determine whether the parties have agreed to arbitrate a particular

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[5] "Substantive arbitrability refers to whether a dispute involves a subject matter that the parties have contractually agreed to submit to arbitration." *Local 285, Service Employees International Union, AFL-CIO, v. Nonotuck Resource Associates, Inc.*, 64 F.3d 735, 739 (1st Cir. 1995).

matter. See *Appeal of the City of Manchester*, supra, 144 N.H. at 388 (internal quotation marks omitted). Procedural arbitrability, on the other hand, concerns such issues as "whether grievance procedures or some part of them apply to a particular dispute, whether such procedures have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate." See *John Wiley & Sons v. Livingston*, 376 U.S. 543, 557 (1964).

In these consolidated cases, the County claims that the grievances are non-arbitrable because they were filed after the contractual deadline and at the wrong step of the grievance procedure and not because they are outside the scope of the CBA. These claims concern procedural, not substantive, arbitrability. The County further argues that the PELRB and not the arbitrator must decide the issue of procedural arbitability. The County's argument is unpersuasive for the following reasons.

The New Hampshire Supreme Court has previously addressed the issue of procedural arbitrability in the context of CBA interpretation. Rejecting a party's argument that the arbitration board exceeded its powers because it considered the grievances that were not submitted on time under the terms of the CBA, the Supreme Court stated as follows:

> [I]t is difficult to see why procedural questions in handling grievances should not be as arbitrable as questions on the merits... [T]he separation of procedure for preliminary issues from procedure for ruling on the merits does not serve any useful purpose. The sounder rule in our opinion is that *preliminary and procedural matters relating to processing of grievances are questions for the arbitrator to decide*."

Southwestern New Hampshire Transportation Co., Inc. & a. v. Roland Durham & a., 102 N.H. 169, 177-78 (1959) (emphasis added). Similarly, in *John Wiley & Sons, Inc. v. Livingston,* the United States Supreme Court held that "'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." Supra, 376 U.S. at 557. The Court reasoned as follows:

> Doubt whether grievance procedures or some part of them apply to a particular dispute, whether such procedures have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be

> answered without consideration of the merits of the dispute which is presented for arbitration... It would be a curious rule which required that intertwined issues of "substance" and "procedure" growing out of a single dispute and raising the same questions on the same facts had to be carved up between two different forums, one deciding after the other. Neither logic nor considerations of policy compel such a result.

Id. See also *Local 285, Service Employees International Union, AFL-CIO, v. Nonotuck Resource Associates, Inc.*, 64 F.3d 735, 740 (1st Cir. 1995) ("because the role of a reviewing court is only to determine whether the subject matter of the dispute is arbitrable under the agreement, and not to rule on the merits of the dispute, and because procedural questions are often inextricably bound up with the merits of the dispute, procedural questions should be decided by the arbitrator along with the merits") (citing *John Wiley & Sons, Inc. v. Livingston,* supra, 376 U.S. at 557). The rule that procedural questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator finds ample support in other jurisdictions. See, e.g., *Local 285, Service Employees International Union, AFL-CIO, v. Nonotuck Resource Associates, Inc.*, supra, 64 F.3d at 740 (timeliness of grievance is procedural question for arbitrator to decide); *Smith Barney Shearson, Inc. v. Boone*, 47 F.3d 750, 753 (5th Cir. 1995); *Bechtel Constr., Inc. v. Laborers' Int'l Union*, 812 F.2d 750, 753 (1st Cir. 1987) (failure to submit grievance to committee, as required by step grievance procedure, is "a classic question of 'procedural arbitrability' for the arbitrator to decide"). *Beer Sales Drivers, Local 744 v. Metropolitan Distribs.*, Inc., 763 F.2d 300, 302-03 (7th Cir. 1985) (union's alleged failure to submit its members' grievances within time limitation specified in agreement is issue of procedural arbitrability for arbitrator).[6]

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[6] See also, e.g., *Denhardt v. Trailways, Inc.*, 767 F.2d 687, 689 (10th Cir. 1985) (dispute as to employer's compliance with time limit for conducting hearing is procedural matter for arbitrator); *Nursing Home & Hosp. Union 434 v. Sky Vue Terrace, Inc.*, 759 F.2d 1094, 1097 (3d Cir. 1985) ("the law is clear that matters of procedural arbitrability, such as time limits, are to be left for the arbitrator"); *Automotive, Petroleum & Allied Indus. Employees Union, Local 618 v. Town & Country Ford, Inc.*, 709 F.2d 509 (8th Cir. 1983) (whether grievance was barred from arbitration due to union's alleged failure to submit complaint to employer within five days from notice of discharge, as required by agreement, is question of procedural arbitrability for arbitrator); *Hospital & Inst. Workers Union Local 250 v. Marshal Hale Memorial Hosp.*, 647 F.2d 38, 40-41 (9th Cir. 1981) (alleged noncompliance with timing requirements of multiple step procedure is question for the arbitrator); *United Rubber, Cork, Linoleum & Plastic Workers v. Interco, Inc.*, 415 F.2d 1208, 1210 (8th Cir. 1969) (arbitration ordered despite union's failure to file arbitration within 90 days).

In this case, it is undisputed that the parties' CBA contains a grievance procedure that provides for final and binding arbitration. It is also undisputed that the County refused to participate in grievance arbitration. As stated above, preliminary and procedural matters relating to processing of grievances are questions for the arbitrator to decide. Therefore, the County breached the parties' CBA when it refused to sign an assent for an appointment of arbitrator form and, thereby, refused to participate in arbitration on the subject grievances.

For the foregoing reasons, the County committed an unfair labor practice in violation of RSA 273-A:5, I (e) and (h). The evidence is insufficient to prove the Union's claims that the County violated RSA 273-A:5, I (a), (b), and/or (g) and these claims are dismissed. Accordingly, the County shall cease and desist from violating the parties' CBA and RSA 273-A and shall provide to the PELRB its notice of assent to the appointment of an arbitrator and shall otherwise participate in the contractual arbitration process to resolve the disputed grievances. The County shall post this decision for 30 days at locations where affected employees work.

Lastly, based on the record and the law, the County failed to prove that the Union committed an unfair labor practice in violation of RSA 273-A:4 and RSA 273-A:5, II (a), (d), (f), and/or (g) by wrongfully demanding arbitration of non-arbitrable grievances. Accordingly, the County's complaint against the Union is dismissed.

So ordered.

February 15, 2013

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Staff Counsel/Hearing Officer

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