



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

JEANNE C. WONG :
: Petitioner : Case No. M-0759:1
: (Decertification Petition)
: v. :
: AMHERST SUPPORT STAFF :
ASSOCIATION, NEA-NEW HAMPSHIRE: Respondent :

AMHERST SUPPORT STAFF :
ASSOCIATION, NEA-NEW HAMPSHIRE: Case No. M-0759:2
: (Unfair Labor Practice)
Complainant :
: v. : Decision No. 2000-045
: AMHERST SCHOOL DISTRICT :
Respondent :

APPEARANCES

Representing Jeanne C. Wong, Petitioner:

Jeanne C. Wong

Representing Amherst Support Staff Association/NEA-NH:

James Allmendinger, Esq., Counsel

Representing Amherst School District:

Thomas J. Flygare, Esq., Counsel

Also appearing:

Richard Lalley, SAU 39
 Susan S. Stitt, SAU 39
 Philip G. Pratt, UniServ Director, NEA
 Donna LeBlanc, ASSA
 Kathleen Parkhurst, ASSA
 Millie Thibeault, ASSA
 Mary Mortimer, ASSA
 Karen Haskins

BACKGROUND

Jeanne C. Wong, petitioner, filed a Petition for Decertification on November 8, 1999, seeking the removal of the Amherst Support Staff Association (Association) as the certified bargaining agent for employees in the job categories of teaching assistants, secretaries and food service workers employed by the Amherst School District (District). The Association was accorded exclusive status as the certified bargaining agent by a certification issued by the PELRB on June 25, 1999, following a bargaining agent election in which the union prevailed by a one (1) vote margin, said election having subsequently been appealed to the New Hampshire Supreme Court with that appeal denied on October 4, 1999. (Docket No. 99-430)

The Amherst Support Staff Association responded to the filing of the Petition for Decertification by filing unfair labor practice (ULP) charges against the Amherst School District on November 23, 1999 alleging violations of RSA 273-A:5 I (a), (b), (c) and (e) resulting from the District's restraining and coercing employees by placing conditions on the outcome of the bargaining agent election, by refusing to bargain, and by encouraging the filing of the decertification petition. The District then filed its answer to the ULP on December 8, 1999. Both matters were then consolidated for hearing by the PELRB. After a requested continuance by the parties, these matters were heard by the PELRB on February 22, 2000, April 6, 2000 and May 9, 2000. Mid-term to these proceedings, the District filed a Motion to Dismiss and Order an Election on March 2, 2000. The Association filed its objections to that motion on March 9, 2000.

At the conclusion of the proceedings before the PELRB, the parties agreed to file post-hearing briefs on or before May 26, 2000. Both sets of briefs were timely filed on May 26, 2000 at which time the record was closed.

FINDINGS OF FACT

1. The Amherst School District, by virtue of its employment of teaching assistants, secretaries and food service workers, is a "public employer" within the meaning of RSA 273-A:1 X.
2. The Amherst Support Staff Association, NEA-New Hampshire is the duly certified bargaining agent for teaching assistants, secretaries and food service workers employed by the Amherst School District and has been so certified since on or about June 25, 1999 when the certification and order to negotiate was issued.
3. The Petition for Decertification filed on November 8, 1999, was accompanied by a sufficient showing of interest under Rule PUB 301.01 (f).
4. The history pre-dating the filing of the Petition for Decertification on November 8, 1999, includes the bargaining agent election held on January 12, 1999, an appeal filed by the District on January 15, 1999, the PELRB hearing on that appeal held on March 18, 1999, the PELRB's affirmance of the election results in its Decision No. 1999-032 dated May 12, 1999, the District's Motion for Reconsideration filed May 27, 1999, the Association's objections thereto filed on June 11, 1999, the PELRB's denial of the Motion for Reconsideration in Decision No. 1999-059 dated June 21, 1999, issuance of the PELRB Certification of Representative and Order to Negotiate dated June 25, 1999, the District's appeal to the New Hampshire Supreme Court on July 20, 1999 (Docket No. 99-430) and the Court's declining to accept that appeal on October 4, 1999. The first bargaining sessions occurred in November of 1999. UniServ Director Philip Pratt testified it required three sessions for the Association to present its 23 pages of proposals and to develop proposed wage figures. The negotiations process continued thereafter, with the parties having participated in both mediation and fact finding prior to the third and final day of hearing in this case on May 9, 2000.
5. Within the confines of the six months prior to the filing of the ULP referenced in RSA 273-A:6 VII but before the Supreme Court declined to accept the appeal

on October 4, 1999, there was considerable advocate activity by the parties notwithstanding that the case was in an appeal-pending mode between June 21, 1999 and October 4, 1999. On May 10, 1999, two days before Decision No. 1999-032, the Superintendent communicated by memo to the bargaining unit employees (Assn. Ex. No. 23) to advise them of his inquiry of the PELRB as to the status of the District's election appeal. In that document, the Superintendent also took the opportunity to tell unit members of the options if the PELRB were to order a new election and what would happen if the voters voted for or against retaining the certified bargaining agent, especially as these results would impact the 1999-2000 salary schedule. UniServ Director Pratt took issue with this communication by letter to Supt. Lalley on July 23, 1999 (Assn. Ex. No. 32). On May 26, 1999, labor counsel faxed "regulations governing decertification" to the Superintendent (Assn. Ex. No. 24). On June 2, 1999, Lalley and the Support Staff Committee, which purported to be a joint labor-management study and input committee formed on and after May 12, 1998 at the initiative of the Superintendent and Assistant Superintendent (Assn. Ex. Nos. 1 and 2), met and discussed such issues as status of the Association's organizing efforts, the District's motion for reconsideration and Lalley's permission to the Committee that they "could contract the school district's attorney to discuss the matter." (Assn. Ex. No. 10).

6. Karen Haskins, a special education teacher with more than twenty years employment in Amherst, testified that she supported a decertification election. She was a member of the Support Staff Committee and authored the minutes of its meetings in May, 1998 (Assn. Ex. No. 11), October, 1998 (Assn. Ex. No. 12), November, 1998 (Assn. Ex. No. 15), December, 1998 (Assn. Ex. No. 18), and June, 1999 (Assn. Ex. No. 25), the last of which contained a "survey" asking support staff if they (1) planned to join the Union, (2) would be willing to serve as an officer or committee member or (3) did not plan to join the Union. According to Lalley's memo of June 9, 1999, to Pratt, Lalley suggested the concept of such a survey (Assn. Ex. No. 27) to wit:

After a recent AEA/ASB meeting on health insurance ended, you and I discussed the Amherst support staff situation. I mentioned input I'm receiving that

would suggest interest in unionizing is less than it was in January when the close vote resulted. You suggested the possibility of sending out union membership applications, and if the response was low, there might be little reason to push forward. Since the validity of the election is in limbo, I suggested sending out a survey that would not require people to officially sign up for a union (that officially does not exist while under appeal) but would allow them to express their preference.

On June 2nd I met with the Amherst Support Staff Committee I've been meeting with since last June. I briefed them on the district's motion for reconsideration of the PELRB decision, and relayed the conversation you and I had. I indicated that if the Committee wished to get a sense of the staff (as you and I had discussed) then they would contact the school district's attorney to discuss the matter. I left the meeting at that point. Within the next few days I received a copy of the survey and the news update support staff received. Today, I received a copy of the memo you sent to all support staff.

Haskins never published the results of that survey because she considered the response to have been inadequate. She did, however, provide a copy to Pratt, by mail, in the summer of 1999 (Assn. Ex. No. 49). Pratt's testimony confirmed its receipt, disavowed any association with it and disputed the results which differed considerably from a survey which he had conducted. (Assn. Ex. No. 29 and District Ex. No. 1.) By June 8, 1999, Nancy Yevick, also a member of the Support Staff Committee, sent a memo to the support staff describing the survey as a "straw poll," saying it did not originate with the District and indicating that Haskins, before she sent out the poll, "spoke with the attorney handling the case for the District to make sure it was legal." (Assn. Ex. No. 28.) This flurry of activity caused Lalley to send copies of his memo of June 9th to Pratt (Assn. Ex. No. 27) to Support Staff Committee members Haskins, Wong, Hanners, Yevick, Mortimer, Cole and Simoneau (Assn. Ex. No. 30) with his handwritten annotations. According to Haskins, there were no more Support Staff Committee meetings after the "straw poll" of Assn. Ex. No. 25.

7. In an undated memo generated in August or September of 1999 (Assn. Ex. No. 34), the Organizing Committee of the Association communicated with all support staff employees and explained nine options which they believed were available to the Association. Rather than proceeding to another election, they concluded

that "we should wait for the supreme court to make a decision the District's appeal." On September 30, 1999, Lalley, wrote a four-page rebuttal to Assn. Ex. No. 34 and distributed it to support staff employees (Assn. Ex. No. 35). In it he expressed "sadness and regret" upon reading Assn. Ex. No. 34 and "disappointed...by the 25 to 24 vote on January 12th to unionize." He also stated that the school board was disappointed in this vote to unionize but that unnegotiated salary increases would be paid for FY 1999-2000, retroactive to the starting date of the respective individual contracts, because increases "are warranted" and because a delay in implementation "will make it more difficult...to gain voter approval under the collective bargaining statutes" in future years. The memo closes with a question, "...then why not pursue a new election which would take place soon?"

8. On October 7, 1999, three days after disposition by the State Supreme Court (Finding No. 3, above), Lalley sent a memo to the support staff (Assn. Ex. No. 38) in which he observed that "the School District is required by law to negotiate in good faith with a certified bargaining unit...I have been advised that a new election could be called if 30% or more of the support staff petition the PELRB."
9. On October 14, 1999, Petitioner Wong wrote a memo to the support staff at the Middle School, according to the handwritten notations to Assn. Ex. No. 39. She told the recipients that "at this time it is legal to request a new election." She also spoke to the issue of the potential dues structure, namely, "we have been unable to get definite figures, but the teachers' annual dues are in excess of \$500, local and national." Attached to the memo was a "ballot" which was entitled "Request for New Election" which Wong sought to have the recipients complete and return to her. By memo of October 19, 1999, the Support Staff Organizing Committee sent a memo to the support staff announcing that the approved dues rate for the 1999-2000 school year would be \$153 for full time, \$90 for half-time and \$63 for quarter-time employees. (Assn. Ex. Nos. 37 and 40.)
10. On October 28, 1999, Kathy Parkhurst sent the support staff a memo (Assn. Ex. No. 42) entitled "Union Dues Clarification". It read:

Just a clarification regarding Union Dues. The dues we are asked to pay this year, \$153.00 for full time employees, is half of the regular dues. This amount has been sent for this year only (our first year). Next year, and each succeeding year, we will need to pay the full amount. Based on this year's dues, it would be \$306.00.

When asked about this memo during her testimony, Parkhurst said it had been typed by Ann Marie Lalley, spouse of the superintendent and a bargaining unit member, who asked her, Parkhurst, to send it over her name because some of the support staff was confused about what the dues might be in the future. (See also Assn. Ex. No. 44) On or about November 3, 1999, Parkhurst received a handwritten note (Assn. Ex. No. 43) from the Superintendent inquiring about Assn. Ex. No. 42, to wit:

11-3-99

Kathy,

Is it true that you did not send out a clarification on union dues for 1999-00 & 2000-01 even though you knew some people were confused? If so, is this any way to represent your constituency?

Rick

A subsequent conversation between the Superintendent and Parkhurst about this communication was described by Parkhurst as being "short and curt." This was followed by a memo from the Support Staff Bargaining Committee to the Association on November 8, 1999 reporting on bargaining status and seeking input on issues deemed important to unit members. A copy of that memo was corrected for spelling and punctuation errors by Lalley and returned to Pratt. (Assn. Ex. No. 44A.)

11. Mary Mortimer, a 5th grade clerical aide and member of the Support Staff Committee, attended a meeting of that committee on June 2, 1999 (Assn. Ex. No. 25) and took notes of that meeting (Assn. Ex. No. 25A) in which she wrote "check with Flygare attorney." Referring to this entry during her testimony, Mortimer reported that Lalley had offered the services of labor counsel Flygare to help draft "papers" if the employees wanted to pursue decertification. Unit employees interested in decertification were also invited to contact Flygare on school telephones during

school hours should they have any questions. Flygare's services were also offered to help draft the survey to determine the level of union participation by unit members, also confirmed in Lalley's memo of June 9, 1999, paragraph 3 (Assn. Ex. Nos. 27 and 30). Wong confirmed that she did consult with Flygare before sending her October 14, 1999 memo (Assn. Ex. No. 39) and that she had obtained forms from Flygare by fax. On cross-examination during his testimony on April 6, 2000, Lalley said the District would have paid any bill presented by Flygare for services to Wong or for other inquiries made of him; however, Lalley did not recall if any such bill had ever been presented.

DECISION AND ORDER

This case comes to us as an unusual amalgam of a decertification petition which evoked an unfair labor practice as the responsive pleading. Because the Association agreed to proceed on the ULP first in the hearing before us, we, too, will address the merits of the ULP before addressing the petition.

The ULP, filed as the equivalent of a "blocking charge" to the decertification petition, asserts that certain conduct on behalf of the employer restrained, coerced and interfered with the exercise of rights under Chapter 273-A, interfered in the formation of an employee organization and, after certification of the Association on June 25, 1999, refused to bargain in good faith with the exclusive bargaining agent, these activities being in violation of RSA 273-A:5 I (a), (b) and (e), respectively. The Association had the burden to prevail on these allegations by a preponderance of the evidence. When we review the complained of conduct, we believe it has met that burden.

On or about June 2, 1999 as reflected in Lalley's memo to Pratt of June 9, 1999 (Decision Ex. No. 10), the Superintendent offered access to the District's attorney for any questions the committee attendees might have about obtaining a "sense of the staff" towards the Association (Finding No. 6). This overture occurred approximately twenty days after the Board's decision on the election appeal (Decision No. 1999-032), within a week after the District had requested reconsideration on May 27, 1999 and before that motion was denied on June 21, 1999 (Decision No. 1999-059).

By June 8, 1999, Yevick (Finding No. 6) had taken advantage of that offer. Lalley had asked for and received decertification

By June 8, 1999, Yevick (Finding No. 6) had taken advantage of that offer. Lalley had asked for and received decertification materials from the District's counsel as early as May 26, 1999. (Finding No. 5 and Assn. Ex. No. 24.) On September 30, 1999, Lalley wrote a four-page memo (Assn. Ex. No. 35) which he sent to all support staff employees encouraging them to support a new election on the question of the Association's status. While such a communication might have been appropriate in the heat of the organizational campaign prior to the bargaining agent election held on January 12, 1999, it, on its face, was inappropriate after the PELRB issued the certification on June 25, 1999 and begins a course of conduct which interferes with employee rights under RSA 273-A and which interferes with the administration of an employee organization since the Association was then certified. (See Finding No. 7)

Lalley's support for another election again occurred on October 7, 1999, three days after the Supreme Court declined the District's appeal from the PELRB decision, when he again suggested that a 30% showing could cause another election to be held. (Finding No. 8 and Assn. Ex. No. 38.) By the end of the month (Finding No. 10), Kathy Parkhurst, a secretary and bargaining unit member, received a memo typed by Anne Marie Lalley, also a secretary and bargaining unit member, which Ann Marie asked Parkhurst to circulate to rectify any confusion about Association dues. (Finding No. 10) Several days later, by memo dated November 3, 1999, Parkhurst received a handwritten note from Supt. Lalley questioning her on how she sent out "a clarification on union dues" and asking "is this any way to represent your constituency?" (Assn. Ex. Nos. 42, 43, 44.) This inquiry, coming from the executive head of the District after the Supreme Court's disposition on October 4, 1999, to a bargaining unit member about something which is exclusively bargaining unit/bargaining agent business, violates the prohibition imposed on public employers that they shall not restrain, coerce or otherwise interfere with employees exercising their rights and shall not dominate or interfere in the administration of any employee organization. Likewise, it was an inappropriate example of direct dealing inasmuch as the Association was the certified bargaining agent when this occurred. For example, a public employer cannot "by pass an exclusive representative" and call a meeting of members of a certified bargaining unit in order to discuss hours and conditions of employment. Salem Association of Food Service Personnel v. Paul O. Johnson, Supt., SAU No. 57, Decision No. 1990-003 (January 10, 1990). "Together, RSA 273-A:1, XI; 3:I and :5, I (e) compel the school board to negotiate wages in good faith with the association's exclusive representative...Dealing directly with employees is generally forbidden." Appeal of

Franklin Education Association, 136 NH 322, 335 (1992). Likewise, an "employer cannot take advantage of an employment environment to communicate with employees on these matters which are outside their job responsibilities." Fall Mountain Teachers Association v. Fall Mountain School Board, Decision No. 1997-118 (December 19, 1997).

Public employees seeking to organize under RSA 273-A are statutorily protected from an employer's actions to "restrain, coerce or otherwise interfere" with them in this process. Under similar standards imposed by the National Labor Relations Act, as amended, the "well settled" test has been that interference, restraint and coercion do not turn on the employer's motive but whether the employer's actions "tend to interfere with the free exercise of rights" under the act. See Developing Labor Law, 3rd Ed., p.76 quoting American Freightways, 124 NLRB 146 (1959). The cumulative effect of the District's efforts have "tended to interfere" not only with the Association's status as the certified bargaining agent but also with its ability to engage in meaningful negotiations in order to produce a labor agreement, as was evident from the history of negotiations between June 25, 1999 and October 4, 1999.

We have not measured the individual effects of the Superintendent's communications; they cannot be so quantified. "If the overall effect...create[d] an atmosphere of fear by portraying the selection of a bargaining agent as 'futile' and the 'economic hazards' as 'inevitable,' free choice may be rendered impossible." Developing Labor Law, 3rd Ed., p.108. Under NLRB v. Gissel Packing, 242 NLRB 539 (1979), "an employer is free only to tell 'what he reasonably believes will be the likely consequences of unionization that are outside his control...'" (Emphasis added.) The budgetary and funding process in Amherst was within the control of what the superintendent recommended. Moreover, "the promise or grant of benefits to stifle...an organizational campaign may be unlawful interference even though no strings are explicitly attached." Developing Labor Law, 3rd Ed., p. 115 quoting Medo Photo Supply v. NLRB, 321 US 678 (1944).

Finally, something which we find to be most compelling is the NLRB policy as it relates to authorization cards and to which we impute even greater importance when the complained of conduct occurred after certification. The NLRB "applies a per se rule in holding that employer encouragement and assistance to employees in withdrawing authorization cards is a violation" of the proscriptions against restraining, coercing or interfering with employees exercising their rights under the NLRA which, at

Section 8(a) (1), contains language similar to the proscriptions found at RSA 273-A:5 I (a).

The foregoing complained-of conduct is violative of RSA 273-A:5 I (a) and (b). The District, its agents and employees are directed to CEASE and DESIST such conduct forthwith and shall likewise refrain from offering, paying for, allowing business hours for or providing District paid-for facilities and services which might be used by dissident bargaining unit members to decertify, or attempt to decertify, the certified bargaining agent.

The District also committed a technical violation of its obligation to bargain under RSA 273-A:3 and RSA 273-A:5 I (e) when it failed to do so between the date of the PELRB certification on June 25, 1999 and the denial of the appeal on October 4, 1999. Absent an order from a duly constituted tribunal having appropriate jurisdiction, the District had no authorization to refuse to bargain after June 25, 1999. RSA 541:18. We have since received communications from counsel that the parties have reached a tentative agreement on the terms of their first CBA but that the provisions therefor have yet to be ratified by both sides and that the contact has yet to be signed. Our remedy, then, is prospective and intended to address that period of time during which the bargaining unit members, for all practical purposes, were deprived of the services of their certified bargaining agent, namely, its efforts to negotiate, secure and execute a CBA.

"A typical remedy in cases where the employer refused to bargain with a newly-certified union is to extend the union's certification year... When the employer refuses to bargain during the certification year,* the statutory policy of promoting collective bargaining is frustrated and the employees are denied the services of their selected bargaining agent. The appropriate remedy in such a case is to construe the initial period of certification as beginning on the date the employer starts to bargain in good faith." AFSCME Council 74 v. Bangor Water Dist., Me. Lab. Rel. Bd., No. 81-15 (March 3, 1989) citing to Allstate Ins. Co., 234 NLRB 193, 194 (1978). For us to find otherwise would be contrary to public policy because such a holding would encourage multitudinous appeals, the avoidance of bargaining during those appeals and the assertion of using this hiatus period to exhaust the certification year without ever

* "Certification year" is that concept, akin to that found at RSA 273-A:10 III prohibiting a second certification election in a 12 month period, which is intended to "foster collective bargaining and stabilize industrial relations" by requiring, in the absence of unusual circumstances, that a certified union's majority status must be honored for 1 year; and a [challenge] petition filed during the 1 year period will ordinarily be barred. Developing Labor Law, 3rd Ed. p. 390.

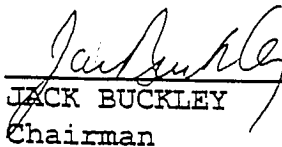
having engaged in good faith collective bargaining efforts. See Chapter 490, Laws of 1975 which speaks to the legislative intent of fostering "harmonious and cooperative relations between public employers and their employees."

Having arrived at this point, we again turn our attention to the pending petition for decertification and find it to have been untimely filed. Under Rule PUB 301.03 and 301.01, a petition for certification (or decertification) of an exclusive bargaining representative of a bargaining unit for which a collective bargaining agreement constituting a bar to election under RSA 273-A:11 I (b) presently exists shall be filed no more than 210 days and no less than 150 days prior to the budget submission date of the affected public employer in the year that agreement expires.

The pending petition for decertification is hereby DISMISSED and the Association's "certification year" is hereby extended to one year from the date the Association first made bargaining proposals to the District in November of 1999. Thus, the first opportunity to file a subsequent petition for decertification will be (1) upon the expiration of the "certification year" if there is no CBA in effect at the conclusion of the certification year or, if there then is a contract in effect, (2) upon the expiration of that CBA, as contemplated by Rule PUB 301.01 and explained in the immediately prior paragraph.

So ordered.

Signed this 19th day of JULY, 2000.



JACK BUCKLEY
Chairman

By unanimous vote. Chairman Jack Buckley presiding. Members Seymour Osman and E. Vincent Hall present and voting.