

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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UNIVERSITY SYSTEM OF NEW HAMPSHIRE		*
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Petitioner		*
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v.		*
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AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS		*
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Respondent		*
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AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS		*
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Petitioner		*
		*
v.		*
		*
UNIVERSITY SYSTEM OF NEW HAMPSHIRE		*
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Respondent		*
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CASE NO. U-0613:12

CASE NO. U-0613:13

DECISION NO. 2000-054

REPRESENTATIVES

For the University System of New Hampshire (University of New Hampshire):
William G. Meserve., Esq.
Ronald F. Rodgers, Esq.

For the American Association of University Professors - UNH:
Glen R. Milner, Esq.
John Krupski, Esq.

BACKGROUND

The University System of New Hampshire filed unfair labor practice charges on January 26, 2000 alleging breach of contract pursuant to RSA 273-A: 5 II (e) and that the American Association of University Professors undertook certain actions including a "strike vote" and other actions directed towards soliciting members for picket duty. The

American Association of University Professors generally denied that the actions alleged by the University System violate the provisions of RSA 273-A:5 (e) or RSA 273-A:13 and further answered that any actions alleged to have been undertaken constituted a lawful exercise of rights of free speech and freedom of association.

Thereafter, the Association filed unfair labor practice charges on February 10, 2000, pursuant to RSA 273-A:5 I (a), (d), (e) and (g) alleging that actions of the University System in filing its complaint with the PELRB constitutes an attempt to restrain, coerce or otherwise interfere with the Association members in the exercise of rights conferred by RSA 273-A and the above referenced constitutional rights of free speech and association. Also, in its complaint the Association alleges that the relief sought by the University System constitutes an attempt to improperly dominate or interfere in the formation or administration of an employee organization in violation of RSA 273-A:5, I(b).

The primary relief sought by both parties in these two actions consists of each party seeking cease and desist orders to issue against the other. The University further requests relief in the form of an immediate order compelling the Association to undertake certain public acts that would result in the withdrawal of any previous orders, directions, requests or suggestions to any persons consistent with the University System's allegations of actions related to a strike or other job action.

After participation at a Pre-Hearing Conference, the parties agreed to submit their claims to the Board without an evidenciary hearing. Instead, this case was submitted upon their respective pleadings, Their respective Motions for Summary Judgement, supportive Memoranda of Law, and an Agreed Statement of Facts with Joint Exhibits. Each submitted a single affidavit. The affidavit submitted by the USNH was that of William J. Farrell, Chancellor. The affidavit submitted by the AAUP-UNH was that of Professor Christopher Balling, President of the union. The Board considered all of these submissions and deliberated the parties' respective claims. It found as follows:

PARTIES' STIPULATED FACTS

The facts appearing below were jointly submitted by agreement of the parties. The Board hereby incorporates them into this decision as its "Findings of Fact" in this matter.

1. The University System of New Hampshire ("USNH") was established and made body politic and corporate by RSA 187-A:1. USNH's main purpose is to provide a well-coordinated system of public higher education in New Hampshire. USNH consists of the University of New Hampshire ("UNH"), Plymouth State College, Keene College and the University System College of Life Long Learning. It is a "public employer" as defined in RSA 273-A:1X. USNH's address is "University System of New Hampshire, Dunlap Center, Durham, New Hampshire 03824-3545.

2. The American Association of University Professors, University of New Hampshire Chapter ("AAUP-UNH") is the duly certified bargaining agent for all full-time tenure-track faculty at UNH. Its address is: 328 Nesmith Hall, Durham, New Hampshire 03824. As employees of UNH, the members of AAUP-UNH are "public employees" within the meaning of RSA 273-A:1IX.
3. AAUP-UNH and USNH are parties to a collective bargaining agreement (the "Agreement") that fixes the rates of pay, rules and working conditions for the approximately 620 full-time tenure-track faculty of UNH. A copy of the Agreement is on file with the PELRB.
4. The Agreement became effective on July 1, 1995. Article 22 of the Agreement provides that it "shall continue in full force and effect until midnight, June 30, 1998 and shall be automatically renewed from year to year thereafter unless at least 120 days prior to any expiration date either party notifies the other in writing by registered mail of its desire to terminate or amend the Agreement. In the event that such notice is given, negotiations shall begin not later than ninety (90) days prior to the expiration date."
5. In January, 1998, AAUP-UNH orally notified USNH of its desire to negotiate a new collective bargaining agreement. USNH accepted this oral notice to begin negotiations and the parties then entered into formal negotiations on or about March 6, 1998.
6. During the period between March 6, 1998 and September 11, 1998, representatives of USNH and AAUP-UNH met formally on over fourteen occasions in an effort to negotiate terms of a successor collective bargaining agreement. When they reached an impasse, the parties then participated twice in mediation and once in fact-finding in accordance with the procedures set forth in RSA 273-A:12. They also have participated in further formal meetings and several informal meetings between representatives of the parties. To date, these various efforts have been unsuccessful in resolving the parties' disagreements, but discussions have continued between them.
7. In the course of negotiations, the Chairman of the USNH Board of Trustees and other representatives of USNH have stated that the costs of a settlement with AAUP-UNH will have a greater monetary impact than the extension of the benefits of such an agreement to the members of the bargaining unit alone, for adjustments will then have to be made to compensation and benefits packages for numerous other employees of the UNH System in order to treat them equitably.

8. In the absence of a new collective bargaining agreement, the parties have continued to adhere to the terms of the existing Agreement, and have treated it as if it were still in full force and effect. For example, since July 1, 1998, AAUP-UNH has filed several grievances with USNH, and those grievances have all be processed in accordance with the grievance procedure set forth in Article 9 of the Agreement.
9. The Agreement contains a provision relating to strikes or lockouts. Article 20 specifically states: The AAUP agrees that strikes and other forms of job actions are unlawful. The AAUP agrees that it shall not directly or indirectly encourage, sanction or condone any activities by members of the unit in violation of this Article. In the event of a prohibited strike or other job action, the AAUP agrees to use every reasonable effort to actively inform members of the unit of the illegality of such activity and of the Association's opposition to such activity.
10. On or about September 22, 1999, the members of the AAUP-UNH voted to authorize AAUP-UNH to call a strike if its Executive Committee concluded that a strike is necessary. At least twice before, during the negotiation of the collective bargaining agreement that is currently in effect, the AAUP-UNH asked its members to participate in a strike authorization vote. The parties submitted, as Exhibit A, true copies of the 1996 and 1997 AAUP-UNH notices of those strike authorization votes. On these previous occasions, USNH received no indication that any further preparations for a strike were being taken, however, other than receiving notice late in the negotiations that if a settlement was not reached by a certain Friday, a strike would commence on the following Monday. As of the present date, the AAUP-UNH has never actually conducted a strike.
11. Since adopting its September 22, 1999 strike authorization vote, the AAUP-UNH has recruited faculty for picketing duty in the event of a strike. The parties agree that the notice entitled "AAUP-Preparations for a Strike" that was submitted as part of the record, Exhibit B, is a true copy of a notice that appeared on the AAUP-UNH website.
12. A hardcopy of an e-mail authored by Ludwig C. Balling, the President of AAUP-UNH, on or about December 17, 1999 was submitted as Exhibit C. This e-mail was circulated by Mr. Balling to AAUP members.
13. A copy of an e-mail, authored by Ludwig C. Billing on or about December 19, 1999 was submitted as Exhibit D. This e-mail was circulated by Mr. Balling to AAUP members.
14. On January 18, 2000, classes commenced for the second semester at UNH.

15. Early in the week of January 17, 2000, representatives of USNH met and talked on the telephone with representatives of AAUP-UNH in informal negotiating sessions. As part of those discussions, representatives of AAUP-UNH agreed that they would not go out on strike prior to Monday, January 24, 2000. While the parties now disagree over precisely what was said to whom in the course of those discussions with respect to a no-strike commitment, they do agree that after negotiations appeared to have stalled, counsel for the AAUP-NH told counsel for USNH that the AAUP-UNH would make no no-strike commitment that extended beyond January 24, 2000.
16. On Friday, January 21, 2000, after first notifying counsel for AAUP-UNH, USNH filed a Verified Petition for Temporary Restraining Order and Preliminary and Permanent Injunction Pursuant to RSA 273-A:13 and related papers with the Strafford County Superior Court. Upon representation by counsel for AAUP-UNH that it would not engage in any strike or other form of job action prior to a hearing on USNH's request for a preliminary injunction, USNH agreed not to ask the Court to enter a temporary restraining order.
17. On January 24, 2000, USNH filed an unfair labor practice charge (ULP) with the Public Employee Labor Relations Board. That ULP was assigned Case No. U- 0613:12.
18. On February 2, 2000, the Strafford County Superior Court held a hearing on the USNH request for a preliminary injunction. At that hearing, at which affidavits and offers of proof were submitted but no live testimony was taken, AAUP-UNH's counsel represented to the Court that AAUP-UNH would not strike or engage in other job action prior to a final order of the PELRB. In light of that stipulation, the Superior Court concluded that USNH's petition for injunctive relief had become moot. *See Order in University System of NH v. American Assoc. of University Prof.*, No. 00-E-018 (Strafford County, February 7, 2000), submitted as Exhibit E.
19. On February 10, 2000, AAUP-UNH filed an unfair labor practice charge (ULP) against the USNH with the Public Employee Labor Relations Board. This ULP was assigned Case No. U-0613:13.

DECISION AND ORDER

This case demonstrates the arduous and protracted path that labor relations in New Hampshire must traverse under the present legislative scheme which neither compels binding arbitration nor permits strikes by public employees. These parties have stopped at every oasis along this long statutory path. They have paused and lingered for two years of negotiations and informal meetings. They have paused and participated in

two mediation sessions conducted by outside experts. They have paused and presented their unresolved issues before an objective fact-finder. Throughout, the parties have continued, by all manner, to advocate their positions privately and publicly and to communicate between themselves. Having no oases left from which to draw sustenance, having exhausted all present methods of resolution, and most other pools of trust having evaporated along the way, little encouraged the parties to stay the course, or at least stay the path, on which they had crawled for many months. It is, then, in this environment that the Board examines the parties' respective claims.

The first issue addressed is whether or not the actions of the AAUP-NH that are complained of are prohibited by statute. The Public Employee Labor Relations Act provides that, "Strikes and other forms of job action by public employees are hereby declared to be unlawful." RSA 273-A:13. Further, the statute provides that it is a prohibited labor practice for the exclusive representative of any public employee, in this instance, the AAUP-UNH, "To engage in a strike of other form of job action" RSA 273-A:5 II (e). Indeed, the courts have found strikes and job actions that constitute a withholding of services to be illegal. See City of Manchester v. Manchester Firefighters Association, 120 N.H. 230, 430 A.2d 577 (1980), (involving "sick-outs"). The Act also appears to manifest the General Court's recognition that if a strike or such other forms of job action that result in a withholding of services should take place, the public employer is allowed, "immediate access to an equity court." *Id.*, at 234. The proof of the functionality of the legislative scheme has, indeed, already been shown in the instant case as USNH-UNH had sought and received a hearing in the Strafford Superior Court seeking injunctive relief.

Examining the Agreed Statement of Facts that the parties submitted, we do not find that a strike occurred or that any other form of job action involving the withholding of services occurred. Posturing and preparing, or in the vernacular, "sabre rattling" in the present environment and between these parties does not rise to the level of illegality necessary to constitute a violation of RSA 273-A:13 or RSA 273-A:5 II(e) on the part of the AAUP-UNH.

We next direct our attention to the existing collective bargaining agreement between the parties to determine whether or not the actions of the AAUP-UNH amount to a breach of its agreement with the USNH-UNH. If an exclusive representative of any public employee does breach its collective bargaining agreement, then it has violated a separate provision of the statute, namely RSA 273-A:5 II(f). Article 20 of the existing CBA addresses obligations of strike avoidance by the AAUP-UNH. Finding No. 9.

In the Appeal of Timberlane Reg. School Bd., 142 N.H. 830, 834, 713 A.2d 988, 990 (1998) the Court eliminated any confusion as to whether CBA's were treated differently before the law than other contracts, finding that "Collective bargaining agreements are construed in the same manner as other contracts.". CBA's must, then, abide by basic contract tenets such as good faith performance. Hence, our review of the CBA begins with the language of their written contract, and in that examination we attempt to determine the parties' intent by looking at the agreement taken as a whole and construing its terms according to their common meaning. See BankEast v. Michalenoick,

138 N.H. 367, 369, 639 A.2d 272, 273 (1994). Article 20, a fair reading of the language used would lead the reader to believe that the AAUP would indeed not “directly or indirectly encourage, sanction or condone” member activities in strikes or other job actions. Webster’s New World Dictionary of the American Language, Second College Edition, at 460 (1980) defines the word “encourage” as a verb “1. to give courage, hope, or confidence to; embolden; hearten 2. to give support to; be favorable to.” In this instance of AAUP activity, the association admits that it voted the authority to its Executive Committee to call a strike, and asked its members to participate in a strike authorization vote twice. Its president transmitted e-mail messages to help recruit faculty for picketing duty, provided directions on how members could sign up, and mollified concerns some members had raised about such activity. In the president’s e-mail of December 19, 1999 he acknowledges that “A strike by public employees in N.H. is an unfair labor practice,” he tells his colleagues that “there is no reason for faculty to worry about liability for participating in a strike.”, and informs his colleagues that other AAUP Chapters from other colleges had promised to send supporting picketers “to stand with us”. While such messages as these may exemplify leadership and good planning in the Association president, we think it qualifies as activity designed to encourage a strike or other job action. Such actions, we think, also qualify as conduct that “sanctions” a strike or other job action as that word is commonly understood in that context and also defined, by Webster’s as “a) to ratify or confirm b) to authorize or permit;”. *Id.* at 1259

In New Hampshire, the implied good faith obligation imposed upon all contracting parties includes a traditional duty of care to refrain from misrepresentation insofar as any representation is intended to induce, and is material to, another party’s decision to enter into a contract in justifiable reliance upon it.” Centronics Corp. v. Genicom Corp., 132 N.H. 133, 139 (1989). In that same case which explored the implied obligation of good faith in contracts themselves, our court expressed the belief that New Hampshire cases are consonant with the view that the obligation of good faith excludes behavior that is inconsistent with common standards of fairness and reasonableness, “and with the parties’ agreed-upon common purposes and justified expectations,” quoting Summers,⁶⁷ Cornell L. Rev. at 820, 826.

We believe that the USNH-UNH agreed to the language in this Article 20 of the CBA because it believed that the AAUP-UNH activities referred to above would be prohibited by that Article. We believe that the AAUP-UNH agreed to the language in this Article 20 of the CBA to pledge that same prohibition, or if not, to allow such language to remain to induce the USNH-UNH to believe that such a pledge had been made and thereby did have the effect of inducing the USNH-UNH to sign the CBA believing it had received that pledge.

Therefore, while we do not find that the activities of the AAUP-UNH violated the strike prohibition contained in RSA 273-A:13, as no strike or other job action had yet occurred, we do find that the AAUP-UNH did contract to refrain from admitted activities which do not require the actual strike or other job action itself from being initiated. A breach of Article 20 has been committed by the AAUP, and in turn, that breach constituted an improper labor practice on its part violative of RSA 273-A:5 II (f).

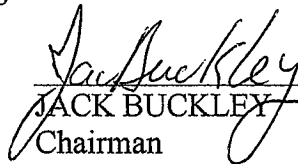
We are also asked in this matter to consider the cross-complaint of the AAUP-UNH that the USNH-UNH committed an improper labor practice in violation of our governing statute when it filed its complaint as already discussed above. The AAUP-UNH alleges that the USNH-UNH filing constituted an attempt to, among other things, restrain, coerce or otherwise interfere with its employees in the exercise of rights conferred by the statute. RSA-A:5 I(a). The PELRB has primary jurisdiction of all claims of improper labor practices. RSA 273-A:6. If a party believes that another party has committed an improper labor practice, it must come here. Our determination, above, that the actions undertaken by the AAUP-UNH constituted an improper labor practice simply puts the USNH-UNH in the position of a complainant before the PELRB whereupon the PELRB must carry out its statutory task of making a determination if alleged actions do constitute an improper labor practice. We have. It was the actions of the AAUP-UNH that caused the filing of the complaint by the USNH-UNH and its filing of the complaint is not found to have been an improper labor practice under RSA 273-A:5 I(a) or any other subsection of that provision as contained in the AAUP-UNH complaint.

While we find that the AAUP-UNH breached its own CBA, specifically that portion of Article 20 raised above, we are not convinced that either party has suffered or is about to suffer irreparable harm. We are not convinced that the public health, safety or welfare is at sufficient risk, nor are we of the opinion that a cease and desist order is necessary on any other grounds

Lastly, the AAUP-UNH raises the constitutional issues of free speech and freedom of association before this quasi-judicial body. Since our analysis and determination is one based upon a contract breach and the USNH-UNH standing as a legitimate complainant, and in light of our denial to issue a cease and desist order, we do not extend our analysis to the application of constitutional documents to this case.

So ordered.

Signed this 27th day of June, 2000



JACK BUCKLEY
Chairman

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