



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Winchester Teachers Association,
NEA-New Hampshire

Complainant

v.

Winchester School Board

Respondent

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Case No. T-0317-7

Decision No. 2001-109

APPEARANCES

Representing Winchester Teachers Association, NEA-NH:

James Allmendinger, Esq.

Representing Winchester School Board:

Douglas S. Hatfield, Esq.

Also appearing:

Colleen Duquette, Winchester School Board
Margaret Sullivan, Winchester School Board
Mary E. Gaul, UniServ Director, NEA-New Hampshire
Rick Durkee, Winchester Teachers Association

BACKGROUND

The Winchester Teachers Association, NEA-New Hampshire ("Association") filed unfair labor practice (ULP) charges on April 2, 2001 against the Winchester School Board ("Board") alleging violations of RSA 273-A:5 I (a), (c), (g), (h) and (i) resulting from failure to bargain, unilateral implementation of an evaluation system, and failure to advise a computer teacher, who was also chair of the Association's bargaining team, of a "grandfathering" alternative for obtaining certification in that specialty. The Winchester School Board filed its answer on April 11, 2001 after which a pre-hearing conference was scheduled for May 9, 2001, continued at the request of the parties, and then rescheduled and held on May 14, 2001. Decision No. 2001-036.

The pre-hearing order set June 21, 2001 as a hearing date, a date from which the Board by its letter of May 23, 2001, sought and obtained a continuance to July 10, 2001. Decision No. 2001-043. The Board then filed a Motion to Dismiss on June 4, 2001. The Association filed an objection to that motion on June 13, 2001 whereupon the Board filed an addendum to its motion on July 3, 2001. In the meantime, the Association, citing issues with witnesses, filed its own motion for a continuance until "late August or early September." The July 10th hearing date was postponed and this matter was set for hearing on September 11, 2001. The hearing required a second day which was held on September 25, 2001 after which the parties were given until October 16, 2001 to file post-hearing memoranda which were duly filed on or before that date.

FINDINGS OF FACT

1. The Winchester School Board employs teachers and other personnel in the operation of the Winchester School District and, thus, is a "public employer" within the meaning of RSA 273-A:1 X.
2. The Winchester Teachers Association, NEA-New Hampshire is the duly certified bargaining agent for "all full-time teachers, assistant principals, librarians, and any new employees who instruct or teach at least three-fifths of the school day and whose position is not administrative."
3. Richard Durkee has been a full-time teacher employed in Winchester since 1988 where he was/is certified as a physical education teacher. Notwithstanding this certification, Durkee routinely taught computer and/or computer science courses, for which he was not certified prior to the fact pattern of this case. He was also chair of the teachers' negotiating committee for the successor contract for which negotiations began on June 14, 2000.
4. On or about August 1, 1999, administrative rule ED 507.22, providing for the certification of "computer technology educators," became effective. According to Colleen Duquette, currently chair and formerly a member of the Winchester School Board, that board then directed Superintendent Curtis Cardine to be sure that all teachers employed in Winchester were properly certified.
5. Information about the importance and necessity of proper certifications was initially passed to affected teachers informally, by specialty rather than by supervisory channels. Bev Trabucco, technology coordinator for the Hinsdale and Winchester School Districts, was aware that Durkee had taught for a sufficient number of years so that he could apply for his computer technology certification under "grandfathering" provisions, described in detail in Association Exhibit No. 2 and commonly referred to in these proceedings as "Alternative 4." Trabucco spoke to Durkee about this option in September of 1999 but thought no more about it until June of 2000 when she was prompted by Terry Stephano at the SAU office to prepare her (Trabucco's) own package in order to be "grandfathered."

By September or October of 2000, Trabucco gave Durkee certain forms which showed which skills he must exhibit in order to receive his computer certification.

6. Thomas Warner is the Technology Director for SAU 38. By the Fall of 2000, he, too, spoke to Durkee about the computer certification, but under a longer, more detailed and more time consuming process, commonly referred to in these proceedings as "Alternative 3." In the course of his duties, Warner learned from Judith Fillion, Director of the Division of Program Support at the N.H. Department of Education (DOE) that too many computer teachers had missed the June 30, 2000 deadline (Assn. Exhibit No. 2, Item "D") to use the Alternate 4 process in order to achieve certification, thus those time lines were extended. Warner also contacted Supt. Cardine directly and asked him to write a letter so that Durkee might still avail himself of using Alternative 4 to obtain his certification. According to Warner, the Alternative 4 process consisted primarily of a letter from the applying teacher's superintendent and an application which shows the teacher-applicant's experience, background and subject area specialties in computer technology. He contrasted this to Alternative 3 which includes an application process inclusive of a letter of intent and a transcript review (ED 505.03), demonstration of competency and an appearance before and assessment by a review board. Fillion called this the "rigorous route." According to Durkee, his preparation for the Alternative 3 process (Assn. Exhibit No. 11) took 40 to 45 hours to prepare, contrasted to the Alternative 4 process which required only ten hours of preparation time.
7. On or about September 13, 2000, Asst. Supt. Margaret Sullivan wrote the "Certification Department" of DOE seeking to employ Durkee under a "Permission to Employ" or "PTE" (see ED 504.04) for SY 2000-2001 and endorsed a permission form on 9/15/2000, the same form which was later signed by Fillion and dated 05/22/01. (Dist. Exhibit No. 1 and Assn. Exhibit No. 7.) In Sullivan's September 13th letter, she suggested that Durkee "may be pursuing Alternative III for N.H. certification...to teach Computer Education." Sullivan followed up with a letter to Durkee on October 3, 2000 which enclosed an "Application for Certification," and advised him that he needed to "submit official transcripts and an \$80 application fee," suggesting, again, the Alternative 3 process. On October 24, 2000, Sullivan wrote another letter to Durkee telling him that New Hampshire DOE had notified her that he had not yet applied "for N.H. Certification in the area in which you are teaching," and that he must be so certified by June 30, 2001 in order to be offered another individual teaching contract. (Dist. Exhibit No. 1)
8. By October 30, 2000, Cardine had received Warner's message and had written the requisite letter (Assn. Exhibit No. 3) to Fillion seeking assistance in getting Durkee certified. Likewise, on October 30, 2000, Durkee sent Fillion a letter, a self-assessment and a \$10 check to process his request under Alternative 4. (Assn. Exhibit No. 4.) Thereafter, the Winchester School Board met, drafted a letter which was signed by Laura Aivaliotis, the then chair, and then given to

Sullivan to deliver to Cardine. That letter, delivered to Cardine on November 9, 2000, told him that the "Winchester School Board formally directs you to write a retraction to Judith Fillion at the Department of Education regarding your letter concerning Rick Durkee." (Assn. Exhibit No. 1.) Sullivan testified that she now knows Alternative 4 certification would have been available for Durkee at that time; however, she was unaware of that option in November of 2000. On November 13, 2000, Cardine wrote to Fillion confirming his earlier voice mail requesting that she not act on his request relating to Durkee. He noted that, "The Board and Mrs. Sullivan have made it very clear that they do not want a special waiver in this case as the instructor had ample opportunity to rectify his certification." (Assn. Exhibit No. 12.) By a separate letter of the same date, Cardine reported his retraction to the Board. (Assn. Exhibit No. 9.) His last correspondence in this sequence was on November 14, 2000, directed to Durkee, and said, "The State Department of Education's Certification Office is waiting for you to apply for certification under Alternative 3 as you have been directed to by Mrs. Sullivan and the Winchester Board." (Assn. Exhibit No. 10.)

9. Judith Fillion, identified above, testified that Durkee had made an inquiry of DOE about certification under Alternative 4 and that the department had "typically approved" extensions, after June 30, 2001, if the superintendent would certify that notice of the "grandfathering" option under Alternative 4 had not been given to staff. Cardine essentially made such a representation in his letter of October 30, 2000 (Assn. Exhibit No. 3). Fillion acknowledged that Durkee could have "been done" with certification under Alternative 4 if someone had "signed off" for him in October or November of 2000, as Cardine had done and later retracted.
10. Margaret Sullivan, prior to being Assistant Superintendent in Winchester, was a curriculum consultant for DOE from 1987-91, a time during which she knew and worked with Fillion and others in that department. She testified that she signed Durkee's "Permission to Employ" (PTE) form (Assn. Exhibit No. 7) on September 15, 2000, yet this form exists in two additional versions. One version, (Assn. Exhibit No. 13,) with a variation in disclosed endorsements, was dated generally "9/2000" and never appears to have been signed by a DOE representative. Assn. Exhibit No. 7, signed by Fillion, exists in two forms: one with the date redacted (Assn. Exhibit No. 8) and a second, in Fillion's handwriting, showing a date of "05/22/01," a date which Fillion acknowledged. Fillion observed that Sullivan's use of a PTE form for Durkee's employment in 2000-2001 would bar the use of that methodology for SY 2001-2002. Meanwhile, Sullivan explained the undated version of the PTE (Assn. Exhibit No. 8) as having been "cleaned up" at her directive to her secretary so that exhibits would be neater for use in these proceedings. Similar handwritten notes or fax dates were not "cleared up," however, on documents relating to employees Jillson, Naso and Wrobel in District Exhibit No. 1.
11. According to Sullivan, she did not discover that Durkee's PTE was unsigned by a representative of DOE until the pre-hearing proceedings in this case on May 14,

2001. When Sullivan inquired of DOE why this had not happened, she was advised it was because the requisite \$25.00 fee had not been paid. Sullivan then wrote a personal check to pay Durkee's PTE fee, sent the check to DOE to the attention of "KJ" and applied for reimbursement. (Assn. Exhibit No. 15.) "KJ" then processed the payment and, by a note (Assn. Exhibit No. 4) asked "Judy" [Fillion] to sign the documentation, noting a "big problem with this person." Four other teachers with similar circumstances were handled using a requisitioned school district check to pay their fees collectively.

12. In the Spring of 2001, Sullivan had additional correspondence with Durkee. On March 30, 2001, she wrote to "R. Durkee" saying that the DOE "does not certify you for the position of your teaching assignment [therefore,] I am not able to offer you a teaching contract...for the 2001-2002 school year." Durkee was the only teacher of six so notified to be addressed without reference to his first name. (Dist. Exhibit No. 1) On May 3, 2001 Sullivan, wrote a second letter offering Durkee a job in physical education as he held this certification and a position vacancy existed. Lastly, on May 17, 2001, Sullivan wrote "Mr. Durkee," transmitting his individual teacher's contract for physical education, which Durkee conditionally accepted. He subsequently was certified in computer technology under Alternative 3 on or about June 20, 2001 and returned to teaching in that capacity for the 2001-2002 school year.
13. Both Durkee and UniServ Director Mary Gaul testified about attending a particularly "heated" and "intense" negotiating session on September 12, 2000 and a second session on September 27, 2000. Sullivan attended at least one of these sessions, the one on the 27th, if not both. Gaul recalled Durkee questioning Sullivan's veracity on September 12th; Sullivan does not recall whether she attended the meeting on September 12, does recall attending the meeting on September 27 and characterized it as "very civil." Durkee's recollection was that Sullivan did attend the September 12th meeting, that his relationship with her was "tense," and that she gave him the feeling that the "heat" of negotiations was being directed at him. Durkee recalled that he had said of Sullivan that she may have been the "district's biggest problem" in the negotiations concerning evaluations.
14. Sullivan's letter to the DOE requesting a PTE for Durkee for SY 2000-2001 was dated September 13, 2000. The PTE form, inclusive of both versions, was dated either "9/2000" or "9/15/2000." (Finding No. 10.) Both of these events occurred shortly after the negotiating session of September 12, 2000. In the instance of all other teachers requiring a PTE for SY 2000-2001, Sullivan's letters to the DOE were dated August 31, 2000. (See Driscoll, Jillson, Lathrop and Wrobel correspondence in District Exhibit No. 1.)
15. Negotiations for a successor CBA were finally concluded when Sullivan and school board members called teachers together on a subsequent, unspecified Sunday evening and came to a settlement in approximately "twenty minutes."

16. Neither Gaul nor Attorney Hatfield for the School Board participated in this effort. As part of this settlement, salaries were agreed upon and the evaluation proposal, which had been both contentious and a stumbling block, was withdrawn, leaving current contract language in place and the option of establishing a labor management task force to determine how that process would work.

DECISION AND ORDER

The chronology of events in this case brings together an extraordinary combination of actions which cannot be ignored, especially when they are considered collectively as to their impact on Richard Durkee personally and on the negotiations process in general. While there is a disparity in testimony regarding the cordiality of the September 12, 2000 negotiating session, there is no question that it occurred. While Sullivan's testimony was equivocal about attending this meeting, Gaul testified that there was "heated discussion" about the evaluation program, the future of which had yet to be resolved (see Finding Nos. 13 and 15) and that Durkee challenged Sullivan's "veracity." Gaul testified that the September 27, 2000 bargaining session was also "heated." Durkee's recollection of the September 12th negotiations was that it was an "intense meeting," that his relationship with Sullivan was "tense," and that he felt "heat" from Sullivan for the positions he was advocating.

By themselves, none of the events surrounding the September 12th negotiations was unusual or uncharacteristic of advocacy in labor negotiations. It is the events which followed, however, which give us cause for concern.

On September 13, 2000, Sullivan wrote to DOE seeking permission to employ (PTE) Durkee for the 2000-2001 school year, a one-time, non-renewable option from year to year. In that letter, Sullivan reference only "Alternative III." (See Finding No. 7.) While this could be considered "in the ordinary course of business" correspondence, its timing cannot be squared with the fact that all other teachers who required DOE "Permission to Employ" certificates were the subjects of request letters prepared by Sullivan dated August 31, 2000. (Finding No. 14.)

By October 30, 2000, obviously after both the September 12th and 27th negotiating sessions, Warner had contacted Supt. Cardine (Finding No. 6) and Cardine, who was not a participant at the negotiating table, had written the requisite letter to Fillion (Assn. Exhibit No. 3), praising Durkee as "invaluable" and asking for help to have him certified as a "Computer technology educator." Copies of that letter went to Durkee, Sullivan and Warner. Coincidentally, on October 30, 2000, Durkee sent Fillion his Alternative 4 letter and five page self-assessment form, along with the requisite \$10 filing fee. (Assn. No. 4.)

Within ten days after these events, the Winchester School Board met, was informed of Cardine's action and issued an undated letter to Cardine (Assn. Exhibit No. 1) directing him "to write a retraction to Judith Fillion...regarding your letter concerning Rick Durkee." Marginal inscriptions show that Cardine received this letter, delivered by Sullivan, on November 9, 2000. (Finding No. 8.) On that same date, Cardine called DOE, spoke with Nancy Jacobs, and said that

he did not want the "extension" for Durkee. (Assn. Exhibit No. 5.) On November 13, 2000, Cardine both wrote and faxed a letter of retraction to Fillion (Assn. Exhibit No. 6 and 12.) Cardine reported that he had reviewed the file with Sullivan and the Winchester Board and concluded, "The Board and Mrs. Sullivan have made it very clear that they do not want a special waiver in this case as the instructor has had ample opportunity to rectify his certification."

In her testimony before the PELRB, Sullivan said she now knows that the Alternate 4 certification option was or should have been available to Durkee in November of 2000; however, she was unaware of that option at the time Durkee applied for it on or about October 30, 2000. Sullivan said she learned of the possibility of using the grandfathered certification process from Trabucco in March of 2001 and that she was not familiar with the DOE announcement of the Alternative 4 option in January, 2000 (Assn. Exhibit No. 2) because such communications go to the SAU/Superintendent's office. Notwithstanding this, the Alternative 4 process was known and used within the SAU and Winchester-Hinsdale because Trabucco used it for her own credentials.

Finally, Sullivan acknowledges giving her secretary instructions to "clean up" personnel records and actions related to these proceedings so that those documents might be more presentable and neater in format. (Finding No. 10.) While inconsistencies in documents were discovered and remedied by the submission of unredacted versions at and after the pre-hearing conference in this case, our review of the Durkee documentation in District Exhibit No. 1 showed it to have been "scrubbed clean" of marginal inscriptions, handwritten notations and telefax time-date data. This degree of "cleanliness" was not noted in the files of Jillson, Naso and Wrobel, also part of District Exhibit No. 1.

Inconsistencies of this number, of this gravity and with the resulting consequences on the Association's chief negotiator cannot go unnoticed. The pending complaint has asserted, *inter alia*, violations of RSA 273-A:5 I (a) and (c), pertaining to coercion and interference with rights guaranteed by Chapter 273-A and to discrimination in conditions of employment for purposes of encouraging or discouraging participation in an employee organization. These standards are not unknown to labor-management relations; they represent conceptually identical counterparts found in the National Labor Relations Act and are defined as violations of Section 8 (a) (1) and (3) thereof, respectively. "If the discrimination is motivated by an antiunion purpose and has the foreseeable effect of either encouraging or discouraging union membership, it violates section 8 (a) (3). A showing of actual encouragement or discouragement, however, is unnecessary. The [National Labor Relations] Board is empowered to draw inference from the evidence presented. If the employer's action could naturally and foreseeably have an adverse effect on employee rights, either at the time or in the future, the Board may infer encouragement or discouragement of union membership." The Developing Labor Law, 3rd Ed. (Bureau of National Affairs, 1996), pp. 190-191.

The fact pattern is cause for us to conclude that the school board, by and through its agents, engaged in retaliatory actions against Durkee and, because of his position, against the Association. In cases of this kind, the New Hampshire Supreme Court has adopted the federal standard as it applies to such violations because it "represents a well-reasoned, workable test...." Appeal of Professional Firefighters of East Derry, 138 NH 142, 145 (1993). The Court has

affirmed, "in light of the federal experience, the PELRB 'correctly placed on the union a burden to prove some minimal degree of retaliatory motivation' in order to establish an unfair labor practice." Appeal of White Mtns. Education Assn., 125 NH 771, 777 (1984). "...the Association had at least a burden to prove that retaliation was a motivating influence to some minimal degree." *Id.* We believe the fact pattern in this case has established retaliatory motivation beyond a minimal degree and by a preponderance of the evidence because of the cumulative effect and impact of the actions imposed by management after the negotiating sessions of September 12 and 27, 2000.

Measured against standards articulated in Labor and Employment Arbitration, §44.11 (1), Matthew-Bender & Co. (2001), this is a "smoking gun" case because there is "proof of the requisite intent...supplied by a statement in writing evidencing a biased state of mind by the person initiating a challenged employment decision." Cardine's letter of November 13, 2000 to Fillion (Assn. Exhibit Nos. 6 and 12) is such a document. That letter is dated some eleven months after the DOE announced the Alternate 4 methodology (Assn. Exhibit No. 2) to certify computer technology educators.

Traditional concepts in labor law, as were reiterated in White Mountains Education Association, above, have held that "establishment of a prima facie case gives rise to a rebuttable presumption that the employee was the victim of discrimination." Labor and Employment Arbitration, §44.11 (1), above. Then, the employer may rebut the presumption with competent evidence of a non-discriminatory reason or purpose for the complained-of personnel action. This case is lacking any such competent evidence as to why Durkee was channeled back into Alternative 3 when he had already secured Cardine's letter of October 30, 2000 and had sent his Alternative 4 package of that same date to Fillion. It was not until after these actions were accomplished that the Alternative 4 methodology was cancelled and recalled by Cardine at the direction of the Winchester School Board.


Since the White Mountain Education Association case was decided in 1984, the U.S. Supreme Court decided Reeves v. Sanderson Plumbing Products, 530 U.S. 133 (2000), a case of intentional age discrimination under 29 U.S.C. 621 et seq. In Reeves, the U.S. Supreme Court granted certiorari to resolve a conflict among the Circuits as to "whether a plaintiff's prima facie case of discrimination...combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision is adequate to sustain a finding of liability for intentional discrimination." 530 U.S. 140. The Court noted that the "ultimate question is whether the employer intentionally discriminated and proof that the employer's proffered reason is unpersuasive, or even obviously contrived does not necessarily establish that the plaintiff's proffered reason is correct. In other words, it is not enough...to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination" 530 U.S. 146, 147. Referring to its earlier decision in St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993), the Court said, "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination."

The combined effects of the disparity in recollections about the two negotiating sessions in September, 2000, the immediately ensuing directive to Durkee to pursue Alternate 3, the directive to the Superintendent to retract his endorsement, the "cleaning up" of Durkee's records as compared to other employees similarly situated and the availability of Alternative 4 for other employees such as Trabucco are cause for us to believe there was retaliatory motivation in this case. We need not reach the employer's knowledge of the employee's union activity, as discussed in The Developing Labor Law, (Bureau of National Affairs, 1992) p. 220, nor make any inference thereto. "Both the [National Labor Relations] Board and the Courts recognize that a finding of knowledge can be based on inferences drawn from circumstantial evidence; however, such inferences must not be entirely speculative or improbable." Durkee was openly and conspicuously a union activist as demonstrated to the fullest by his participation and leadership on the Association's negotiating team.

Accordingly, we find the actions, and their consequences, taken by the School Board against Richard Durkee to have been violative of RSA 273-A:5 I (a) and (c). The Winchester School Board is directed to CEASE and DESIST from such conduct immediately and to reimburse Richard Durkee the amount of one hundred and fifty (\$150.00) dollars, an amount represented to us as being his out-of-pocket expenses for having to compile and pay filing fees associated with Alternative 3 certification after he had already submitted an Alternative 4 package on October 30, 2000.

So ordered.

Signed this 28th day of November, 2001.


BRUCE K. JOHNSON
Alternate Chairman

By unanimous decision. Alternate Chairman Bruce K. Johnson presiding. Members Richard Roulx and E. Vincent Hall present and voting.