State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Tamworth Educational Support Personnel Association/NEA-NH Complainant v. Tamworth School District Respondent	*	Case No: E-0025-1 Decision No. 2007-026

APPEARANCES

Representing Tamworth Educational Support Personnel:
James Allmendinger, Esq., NEA New Hampshire

Representing Tamworth School District:
Mark Broth, Esq., Devine, Millimet & Branch, P.A.

BACKGROUND

The Tamworth Educational Support Personnel Association/NEA-NH ("TESPA") filed an unfair labor practice complaint on May 24, 2006 alleging that the Tamworth School District ("the District") violated RSA 273-A:5 I (a), (c), (d) and (h) by terminating head cook Margaret DeLong. According to TESPA, the Tamworth School Board upheld SAU #13 Superintendent Gwen Poirer's recommendation to dismiss Ms. DeLong based upon an auditor's report recommending that a long-standing practice of employee's "special purchases" from School District food and equipment vendors be stopped. The Union claims that Ms. DeLong is President of TESPA and an outspoken advocate for her association's members, that in the past she has filed contentious grievances and challenged the school Superintendent over a wage payment issue. The Association contends that Ms. DeLong was in fact terminated because of these activities.

The District filed its answer on June 7, 2006 and denies it has committed an unfair labor practice. The District asserts that the Superintendent's termination recommendation was based in part upon certain findings by an auditor and that Ms. DeLong's termination occurred some time after her involvement in certain grievances filed by the Union.

On August 18, 2006 the Association filed a motion to amend its complaint, seeking to add a claim that the District violated RSA 273-A:5, I (g) or the collective bargaining agreement ("CBA") between the parties by dismissing Ms. DeLong without just cause.

The District filed its objection to the Association's motion to amend on August 31, 2006. Among other things, the District asserts that the applicable CBA does not have a just cause standard and that past practice does not establish a just cause standard. The District also claims the PELRB cannot infer a just cause standard where it is otherwise not part of the CBA. The District also contends that under Article II of the CBA the District has the right to "suspend, discharge or take other disciplinary action against employees in accordance with this agreement."

Because the hearing originally scheduled for September 7, 2006 did not go forward due to the unavailability of a District witness for medical reasons, the motion to amend remained pending until November 22, 2006. At that time the hearing officer conducted a telephonic conference with counsel, and thereafter issued an order granting the motion as follows:

> Pursuant to Admin. Rule Pub 201.04 the Union's motion to amend is granted. The Union is required to prove all elements of the just cause claim added by this amendment. In particular, the Union must establish that a just cause standard applies in this case. The decision to grant the motion to amend is not a finding that the District's decision to terminate Ms. DeLong was subject to a just cause standard.

PELRB Decision No. 2006-212 (November 22, 2006).

On November 29, 2006 the District filed a Motion to Dismiss TESPA's just cause claim, essentially arguing that TESPA cannot establish that a just cause standard applies in this case. TESPA filed its objection on November 30, 2006. The PELRB conducted a hearing on November 30, 2006 at the PELRB offices, Concord, New Hampshire. The record was held open until January 5, 2007 to allow the parties to file briefs, which both parties have done. Additionally, on January 2, 2007 TESPA filed an Interlocutory Motion for Rehearing. The District submitted its objection to this motion on January 4, 2007.

FINDINGS OF FACT

1. The Tamworth School District ("the District") is a "public employer" within the meaning of RSA 273-A.

2. The Tamworth Educational Support Personnel Association/NEA-NH ("TESPA") is an employee organization that represents certain employees of the Kenneth A. Brett School in Tamworth for the purposes of collective bargaining pursuant to RSA 273-A.

3. Margaret DeLong was formerly employed as head cook at the Kenneth A. Brett School. She is a member of the TESPA and has served as TESPA President.

4. Since 2005 Ms. DeLong has been involved with the filing and prosecution of four grievances. The grievances are reflected in District Exhibit 2 (the "NH Retirement System grievance"), District Exhibit 3 (the "docked pay vs. allocated sick leave grievance"), District Exhibit 4 (the "absentee report form grievance"), and District Exhibit 5 and Union Exhibits 17-26 (the "extra time worked grievance")(collectively the "DeLong grievances").

5. The NH Retirement System grievance was granted as reflected in a February 10, 2005 letter from SAU #13 Superintendent Gwen Poirier.

6. The docked pay vs. allocated sick leave grievance was resolved against the grievant in 2006. The District, acting through Superintendent Poirier, reasoned that employees may not elect to take docked pay in lieu of available sick time or personal leave, and that employees may not take un-paid time off at their discretion. Superintendent Poirier stated in her January 5, 2006 letter to Ms. DeLong that she viewed this grievance as "frivolous." The Superintendent stated that "there is no provision dictating that employees are able to take time off at their discretion." See District Exhibit 3.

7. The portion of the absentee report form grievance concerning the provisions of reasons for personal days was resolved in part in favor of the grievant. The portion concerning timesheets was resolved by principal DeSousa's agreement that employees must initial any changes made to their timesheets. The portion concerning completion of absentee reports was resolved against the grievant.

8. The extra time worked grievance in which Ms. DeLong sought one hour of pay for attending a presentation concerning possible alternatives to the current health insurance benefit plan was resolved against Ms. DeLong. The District reasoned that Ms. DeLong had not been required to attend the presentation as part of her duties as head cook but she had been invited to attend in her capacity as president of TESPA.

9. Since at least 1991, employees and staff at the Kenneth A. Brett School were allowed to make purchases from District food vendors. These were known as "special purchases" and were limited to food items, although Ms. DeLong also purchased non-food items such as ink jet cartridges and a file cabinet.

10. As part of her duties as head cook Ms. DeLong placed the orders for kitchen items with vendors, and she placed orders for special purchases as well, making no distinction to the vendor between the two kinds of orders. Accordingly, vendor invoices did not distinguish between the two kinds of orders.

11. When Ms. DeLong received vendor invoices that reflected special purchases she approved them for payment by the District, and the District in fact paid such vendor invoices, regardless of whether employees had paid for any special purchases included in the order.

12. Ms. DeLong also tracked amounts due from employees for special purchases. She also had control over how and when she paid or reimbursed the District for her own special purchases. However, Ms. DeLong's system of record keeping was somewhat informal and not completely understandable to a third party except upon careful scrutiny. These circumstances in fact made the District's reconstruction of the more recent history of special purchases (and payments) overly time consuming and at times somewhat confusing.

13. In June 2005, Superintendent Poirier, prompted by an invoice to District vendors that included an order for venison which she suspected was not served at school, had a telephone conversation with Ms. DeLong and learned for the first time about special purchases. Superintendent Poirier was satisfied by the information provided by Ms. DeLong and did not pursue the matter further. However, Ms. DeLong did not inform Superintendent Poirier that she did not require employees to immediately pay for special purchases received. The evidence in the case established that in fact some employees, including Ms. DeLong, were allowed to pay for special purchases over time even though the District paid the underlying invoices in full when presented.

14. In January 2006 the subject of special purchases again came to Superintendent Poirier's attention when she discovered that Ms. DeLong had purchased a file cabinet directly from a vendor. Unlike food purchases, any furniture purchases require a purchase order signed by the school principal, and Ms. DeLong had not followed this procedure.

15. On February 9, 2006 Superintendent Poirier wrote to an accounting and auditing firm requesting an audit of the Tamworth School District Food Service Program. District Exhibit 8. On February 15, 2006 Superintendent Poirier requested that Ms. DeLong produce the last two years worth of records concerning the Food Service purchases for the auditors. In response Ms. DeLong produced all kitchen records since 1991. There was no single record dealing exclusively with special purchases.

16. At the end of February 2006, the Superintendent held a meeting with Ms. DeLong concerning the audit. Also present were Peter Miller, a NEA representative, and attorney Jay Boynton, acting as town counsel. Ms. DeLong was told that she was

being placed on paid administrative leave pending the outcome of the audit, a fact confirmed by letter. District Exhibit 9.

17. The auditor's final report is dated March 6, 2006. The report stated that "in at least one instance, the food service director (Ms. DeLong) had taken approximately six months to reimburse the School District for some purchases." The report also states that "because of the incomplete and confusing way in which these purchases have been recorded, we are not able to give clear assurance that all 'special order' purchases have been reimbursed, or that they haven't been overpaid." The report recommends the immediate prohibition of "the purchase of any goods or services for individuals from the School District's accounts." District Exhibit 10.

18. District Exhibits 7, 11 and 13 relate to some of Ms. DeLong's special purchases and reflect her delay in making payment, as referenced in the auditor's report.

19. By letter dated March 7, 2006 Superintendent Poirier notified Ms. DeLong that "[a]s a result of the Auditor's Report dated March 6, 2006 (a copy of which is attached, (sic) I have decided to recommend your dismissal and to schedule a hearing before the Tamworth School Board." District Exhibit 16.

20. In order to make a decision on Ms. DeLong's employment status the Tamworth School Board conducted a hearing on April 5 and April 10, 2006. See TESPA Exhibits 27 and 28. The School Board issued its written decision terminating Ms. DeLong's employment on April 11, 2006, stating as reasons Ms. DeLong's record keeping and Ms. DeLong's delay in making payment for her own special purchases.

21. The Tamworth School Board did not apply a "just cause" standard when deciding whether to terminate Ms. DeLong's employment. Ms. DeLong, who was represented by attorney Allmendinger at the School Board hearings, did not argue to the School Board that it must apply a just cause standard when deciding whether to terminate Ms. DeLong.

22. TESPA did not bring a just cause claim in this case at the time it filed its complaint with the PELRB on May 24, 2006 and did not seek to add such a claim until August 18, 2006.

23. At the hearing in this case, the parties stipulated that the Collective Bargaining Agreement does not contain a just cause provision with respect to employee terminations.

24. In its offer of proof concerning just cause, TESPA described the experience of one employee, referred to as "NS," to support its argument that just cause is binding upon the parties to the CBA by virtue of past practice. This offer of proof concerning NS did not establish that NS' employment status was determined on

the basis of just cause and in fact the offer of proof was vague as to precisely what happened and why in the case of NS.

25. In its offer of proof concerning just cause TESPA also relied on the October and November 2005 statements and positions of the District's negotiating team concerning TESPA's effort to obtain a written just cause provision in the current CBA which immediately followed the one in effect during the events in this case. Two of the three members of the District's team were new, and did not negotiate the CBA at issue in this case (District Exhibit 1). The positions of the District negotiating team are contained in TESPA Exhibit 30, and references to just cause appear at pages 6, 8, and 16 of the Exhibit.

26. The evidence concerning contract negotiations demonstrates a lack of an agreement or understanding concerning just cause. The District resisted TESPA's efforts to have a just cause provision included in the current CBA in negotiation by suggesting the subject was already covered, first in Article XV, then in the grievance procedure, then in labor law. In fact, a just cause provision is not contained in the provisions cited by the District during negotiations. See District Exhibit 1.

DECISION AND ORDER

JURISDICTION

The PELRB has primary jurisdiction of all violations of RSA 273-A:5. RSA 273-A:6 I. PELRB jurisdiction is proper in this case as TESPA has alleged violations of different provisions of RSA 273-A:5.

DISCUSSION

The first matter for consideration is TESPA's Interlocutory Motion for Rehearing.[1] We will review in some detail the proceedings which culminated in the order about which TESPA now complains.

At the start of the November 30, 2006 hearing the parties were informed on the record that the Board was inclined to receive offers of proof and legal argument concerning whether the just cause standard is part of this case. This manner of proceeding was discussed and previewed with counsel before the commencement of the formal proceeding. Both parties presented their offers of proof and legal argument. TESPA made a procedural argument that the District's motion to dismiss was untimely and should not be considered on that basis. However, this argument overlooked the fact that TESPA's motion to amend was not allowed until November 22, 2006. Also, at the time of hearing TESPA had an existing obligation to prove its claim that just cause was part of this case, irrespective of whether or not the District had filed a motion to dismiss. TESPA did not object to the Board receiving the evidence on the just cause standard via

[1] The Board makes no ruling on whether TESPA's motion is a cognizable pleading but addresses the arguments TESPA raises because it is efficient and practical to do so in the context of this decision.

offers of proof, nor did TESPA request leave to file a written brief in addition to or in lieu of legal argument.

After both parties were given a full opportunity to present their offers of proof and legal argument on the question the Board called a recess so that it could deliberate on the evidence and argument submitted by the parties. After deliberation, we issued a 2-1 decision on the record, stating as follows:

> After hearing offers of proof and legal argument concerning the petitioner's claim based upon just cause, the Board dismisses the claim. The vote is 2-1 in favor of dismissal. The parties stipulated that just cause is not part of the contract. The Board finds that the evidence is insufficient to establish just cause applies by virtue of past practice and the Board declines to find that a just cause standard is part of the contract as a matter of law. The parties shall present evidence on the claims remaining in the case.

Board members Doris Desautel and James O'Mara voted to dismiss the just cause claim on this basis, Board Member Vincent Hall dissented.

In its Interlocutory Motion TESPA claims that the Board "refused" to look at the evidence, yet the Board in fact received and considered evidence submitted by both parties via their respective offers of proof, heard legal argument, and retired for deliberations on the issue. The Board then placed its order on the record. The Board notes that its order is not as described by TESPA in its Interlocutory Motion. The ruling plainly states that just cause is not part of this case for three specific reasons, namely because: 1) the parties stipulated that just cause is not part of the contract; 2) the evidence is insufficient to establish just cause applies by virtue of past practice; and 3) the Board declines to find that a just cause standard is part of the contract as a matter of law.

TESPA suggests that the Board ruled that unwritten obligations in collective bargaining agreements are unenforceable. The Board did not make this ruling. The Board assessed the threshold question of whether or not there was a just cause standard, or obligation, to use TESPA's language, in this case, and found there was not a just cause standard or obligation, written or otherwise. The Board also notes that it was not considering whether TESPA had stated a claim upon which relief could be granted but whether TESPA had proven, through its offer of proof and argument, that a just cause standard is part of this case, either because it is part of the CBA, because it is established by past practice, or because it should otherwise be implied as a matter of law in the parties' CBA. The Board decided, on the merits, based on the evidence and argument submitted by the parties, that a just cause standard was not part of this case.

Accordingly, the Board unanimously denies TESPA's Interlocutory Motion for Rehearing. TESPA was provided with the opportunity to present its evidence and argument, on the merits, that just cause was part of this case.

With respect to the remaining issues in the case, TESPA asks the Board to find that the stated reasons for Ms. DeLong's dismissal are a pretext and that in fact Ms. DeLong was

terminated for discriminatory reasons in violation of RSA 273-A:5, I (a), (c) and (h). TESPA asks the Board to rule in its favor based upon the analytical framework contained in Appeal of Professional Firefighters of East Derry, 138 N.H. 142 (1993). In Professional Firefighters of East Derry, the court adopted the federal standard for deciding whether an employer's actions were improperly motivated by a desire to retaliate against an employee because of union activity:

> [T]o establish an unfair labor practice under federal law, the union must prove by a *preponderance of the evidence* that the discharge or elimination was motivated by a desire to frustrate union activity. The employer can meet the union's evidence of retaliatory motivation with its own evidence, as an employer's motivation is a question of fact to be determined by the board from the consideration of all the evidence. If the board finds by a preponderance of the evidence that the employer was unlawfully motivated to some degree, an employer can still avoid being adjudicated a violator of federal law by proving by a preponderance of the evidence that regardless of the unlawful motivation, the employer would have taken the same action for wholly permissible reasons.

Id. at 144-145 (emphasis in original)(citations omitted).

A review of the evidence in this case leads the Board to conclude that TESPA has failed to prove, by a preponderance of the evidence, that Ms. DeLong's discharge was in retaliation for her union activity or for some other improper motive. Some of the grievances were resolved in Ms. DeLong's favor, a circumstance that undermines TESPA's claims of anti-union bias. On balance, the tone and relationship between the parties who were dealing with the grievances did not appear unusual or inappropriate, even though at times there were obvious tensions and frustrations. To some extent that is the nature of the beast, as neither side can be expected to acquiesce to all demands or to view all demands and arguments as having merit. There was nothing so unusual in the District's conduct when dealing with the DeLong grievances that leads the Board to believe that the District was dealing with the grievances on any basis other than their merits.

TESPA has numerous complaints about Superintendent Poirier. The evidence concerning Superintendent Poirier does not establish that her behavior was unreasonable or otherwise inappropriate given the circumstances of this case. It is possible for representatives of the District to express strong opinions that particular grievances lack merit, or to react negatively to forceful demands from a Union representative, in this case Peter Miller, a UniServ Director, without being guilty of actionable anti-union bias or animus. The Board finds this to be true in this case.

The timing of the grievances relative to the commencement of the audit is a non-issue as well. Superintendent Poirier was justified in arranging for an audit given questions raised about special purchases by virtue of Ms. DeLong's file cabinet purchase. Additionally, Superintendent DeLong did not control the content or outcome of the audit, nor did she control Ms. DeLong's employment status. The auditors and the School Board were intervening actors in these areas. There is insufficient evidence that the auditors or the School Board shaped their analysis, findings, or decisions at the behest of the Superintendent in order to help her carry out retaliatory

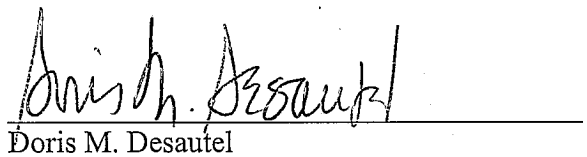
or discriminatory action against Ms. DeLong, nor did the Superintendent request the audit and make the termination recommendation because of improper motives.

The Board believes that TESPA glosses over the significance of the record keeping and payment issues cited in the School Board's written decision as the basis for its termination decision. It was not inappropriate or questionable for the School Board to be concerned about the state of Ms. DeLong's record keeping and her delays in making payments for special purchases. The evidence was clear that for periods of time Ms. DeLong was in effect using public funds as no interest loans to make purchases for her personal use. This fact did not come to light until the audit was done in 2006. Additionally, the manner in which Ms. DeLong maintained her records made it difficult for any third party to easily understand the details of special purchase transactions, including, in particular, how much was due and owing from Ms. DeLong, and it also raised questions about Ms. DeLong's ability to keep track of special purchases.

A review of the circumstances surrounding the School Board's decision to terminate Ms. DeLong's employment leads to the conclusion that the District and the School Board acted in good faith and for the stated reasons, and not for improper or illegal motives or reasons. The auditors' report focused the attention of the Superintendent and the School Board on payment and record keeping issues surrounding the special purchases program under Ms. DeLong's control and direction, matters that the School Board ultimately cited as the basis for its termination decision. The Board finds there is insufficient evidence of any impermissible nexus between the District's termination decision and Ms. DeLong's union status and union activities.

It is so ordered.

Signed this 1st day of March, 2007



Doris M. Desautel
Alternate Chair

By unanimous decision: Alternate Chair Doris M. Desautel. Members James M. O'Mara, Jr. and E. Vincent Hall present and voting.

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