

Weingarten rights and other matters in connection with a pending disciplinary matter. The complainants also contend the termination violated the implied covenant of good faith and fair dealing contained in the parties' collective bargaining agreement. The complainants have withdrawn the claim that the termination was in retaliation for Ms. Blake's long union history and activity stemming from her 30 years of employment.

The complainants request that the PELRB: 1) reinstate Ms. Blake with full back pay and benefits and make the complainants whole; 2) order the State to cease and desist from such behavior in the future; and 3) issue such other orders as necessary to protect the interests of the charging parties.

The State filed its answer and a motion to dismiss on April 15, 2008. The State denies the charge and contends that Ms. Blake was dismissed for misconduct associated with her work, including conducting personal business during work hours, shutting down her computer early and ceasing to do work prior to the end of the business day, and getting involved in confidential personnel matters during work hours that were none of her concern. The State asserts that Ms. Blake was not a union steward or counselor during her part time employment, and that the State was unaware of her status as a union member.

The board conducted a hearing on the complaint on June 3, 2008 at the offices of the Public Employee Labor Relations Board in Concord. The parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. At the parties' request, the record was held open until June 24, 2008 to allow the parties to file post-hearing briefs. Both parties filed their briefs on June 24, 2008 and the record is now closed. The parties' joint stipulations appear as findings of fact 3-11, set forth below.

FINDINGS OF FACT

1. The State of New Hampshire, Department of Safety is a public employer within the meaning of RSA 273-A:1, X.

2. The State Employees Association of New Hampshire, Inc. is the board certified exclusive bargaining representative of certain employees of the State of New Hampshire Department of Safety, including Pamela Blake.

3. On December 27, 1976, according to State records, Ms. Blake began employment with the State at the Department of Administrative Services (DAS) full-time.

4. On September 8, 1989, Ms. Blake transferred from DAS to the NH Department of Safety (DOS) full-time as an Accountant II.

5. On October 1 2006, Ms. Blake retired with over thirty years of State service. She retired as an Accountant II.

6. Before Ms. Blake retired, Virginia Beecher, Director of the Division of Motor Vehicles (DMV), DOS, had agreed to hire Ms. Blake part-time after her retirement from her full-time DOS job.

7. On October 31, 2006, according to State records, Ms. Blake was re-hired part-time by DMV, DOS.

8. According to State records, Ms. Blake never received any disciplinary action during her full-time employment.

9. Ms. Blake was not disciplined at DOS in her part-time position, until the termination.

10. Ms. Blake, during her thirty years of full-time DOS employment, was a very active SEA member e.g., Board of Director; Councilor; Chapter 23 President; and Chapter 23 Steward.

11. On October 1, 2007, Kelly Brudniak orally terminated Ms. Blake from her part-time position.

12. As a part time employee Ms. Blake initially worked 3 days per week, then 4 days per week. Because of budgetary constraints, Ms. Blake's hours were reduced to 2 days per week shortly before October, 2007. During the time period immediately preceding her October 1, 2007 termination, Ms. Blake was advised by her supervisors that she could apply for a position in a sub-station if she desired more hours. The current status of Ms. Blake's former position is unclear.

13. During her part time employment Ms. Blake's regular hours were 8:15 a.m. to 4:15 p.m. She sometimes shut down her computer before 4:15 p.m. to attend to filing or other matters. On one occasion her husband visited her at the office for approximately 10 minutes to discuss a problem concerning their son. A supervisor observed the encounter and tapped her watch, which Ms. Blake understood to mean she needed to conclude her conversation with her husband, which she did. She didn't take her regular break to make up for the time spent talking with her husband. On another occasion she received and took a cell phone call, which she understood was inappropriate and on her own she approached and told her supervisor, Karen Patterson, that she understood this.

14. There are times when other Department of Safety employees engage in non-work related discussions.

15. Erin Dubreuil was a probationary employee at the Department of Safety in

September, 2007. Her work station was next to Ms. Blake's, and the two employees' proximity to each other was such that they could easily see each other and overhear each other.

16. Sometime in September, 2007 Ms. Dubreuil's supervisor raised two job performance issues with her. One concerned Ms. Dubreuil's tardiness to work and another a telephone call with her boyfriend that was overheard by a co-worker(s) and considered objectionable because of some sexual references.

17. According to Ms. Dubreuil, she was asked by her supervisor to prepare a letter concerning the two incidents to provide her side of the story. Ms. Dubreuil asked another co-worker to proof her letter, and this co-worker suggested that Ms. Blake review the letter given her knowledge about union matters.

18. Ms. Blake reviewed the letter and according to Ms. Dubreuil commented that in substance it was appropriate for her to be vulgar in her written response if her supervisor's description of the situation employed similar vulgarities. Ms. Blake recalled that she briefly reviewed the letter, returned it, and said, in substance, that it was quite a letter. This encounter between Ms. Dubreuil and Ms. Blake lasted for less than 10 minutes and occurred while at Ms. Blake's workstation. At this time, or in a subsequent discussion with Ms. Dubreuil a few days later, Ms. Blake also explained to Ms. Dubreuil her right to have someone present at a disciplinary meeting with her supervisors as well as the difference between a memo of counsel and a letter of warning, the fact that she was a probationary employee, and the fact that she couldn't appeal two letters of reprimand in lieu of termination.

19. Ms. Dubreuil proceeded to meet with attorney Sherri Kelloway, an attorney with the Division of Motor Vehicles, and Kelly Brudniak, her supervisor on Friday. According to Ms. Dubreuil, attorney Kelloway and Ms. Brudniak presented the two letters of reprimand in lieu of

termination option, and told her that she should contact the State Employees Association with questions. They also told her she could talk with anyone else about the matter.

20. The following Thursday Ms. Dubreuil was scheduled to attend another meeting for the purpose of signing the two letters of reprimand. She had already decided that she would sign the letters because she was prepared to do whatever was necessary in order to keep her job. However, she decided to talk with Ms. Blake about having someone else present at the meeting. Ms. Blake told her she should contact the union, specifically Jeannie Hibbard Bickford, a union steward at the Division of Motor Vehicles, or Deb Rule, an SEA staff representative.

21. Ultimately Ms. Dubreuil contacted Jeannie Hibbard Bickford to say that she wanted someone to sit in with her at the Thursday meeting where she planned to sign the two letters of reprimand. Ms. Rule was contacted, and because of Ms. Rule's unavailability another SEA staff representative accompanied Ms. Dubreuil to the Thursday meeting.

22. Ms. Blake never led Ms. Dubreuil to believe that she was a union steward for the SEA or that she was advising her as someone with an official union capacity or role. Ms. Dubreuil never believed Ms. Blake was a union steward, and Ms. Dubreuil initiated contact with Ms. Blake on both occasions because Ms. Blake's former and extensive involvement with the union was common knowledge among some of Ms. Blake's co-workers.

23. Ms. Blake's supervisors did not raise any job performance problems or issues with her before October 1, 2007. On that date Ms. Blake attended a meeting with Karen Patterson, her immediate supervisor, and Kelly Brudniak, Ms. Patterson's supervisor. Ms. Blake was asked if she had spent time with a co-worker discussing SEA business. When Ms. Blake acknowledged that she had she was told she had not been hired to do SEA work. When Ms. Blake asked if she was being fired she was told she was. Ms. Patterson and Ms. Brudniak

then went on to mention the time of Ms. Blake's computer shut down as another reason for her termination.

DECISION SUMMARY

The board finds that the complainants have not established by a preponderance of the evidence that Pamela Blake's discharge was motivated by a desire to frustrate union activity. The board also finds that the complainants' claim based upon the implied covenant of good faith and fair dealing is without merit because to be viable such a claim has to meet the requirements applicable to a "wrongful termination" claim. However, the board's jurisdiction does not extend to the adjudication of wrongful termination claims and even if it did the record in this case is insufficient to sustain such a claim. Therefore, the complainants' claim that the State committed an unfair labor practice in violation of RSA 273-A:5, I (a) and (c) is dismissed.

JURISDICTION:

Pursuant to RSA 273-A:6 I, the PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5. *Appeal of State Employees Association of New Hampshire, Inc.*, 139 N.H. 441, 444 (1995).

DISCUSSION:

In *Appeal of Prof. Firefighters of E. Derry*, 138 N.H. 142 (1993), 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 the complainants have failed to prove, by a preponderance of the evidence, that the State's actions were motivated by a "desire to frustrate union activity." This is because the board interprets the "desire to frustrate union activity" standard to require stronger evidence of the employer's "desire" to frustrate union activity and a stronger showing of protected union activity than was submitted into the record in this case.

Ms. Blake was not acting in a union capacity during her conversations with Ms. Dubreuil but instead was having a conversation in her status as a co-employee. Ms. Blake does not contend otherwise, and Ms. Dubreuil did not understand that Ms. Blake was acting as a union representative. Instead, she was providing Ms. Dubreuil with the benefit of her 30 years experience as a State employee. The evidence also suggests that the State was not even aware that Ms. Blake was a union member during her part time employment.

At the time in question, Ms. Dubreuil was not a public employee for the purposes of RSA 273-A on account of her probationary status. *See* RSA 273-A:1, IX (d). Since Ms. Dubreuil was not a public employee for purposes of RSA 273-A, she was not a member of a bargaining unit represented by the State Employees' Association. The board acknowledges that both the State and the State Employee's Association treated Ms. Dubreuil as an RSA 273-A public employee, but that treatment does not alter Ms. Dubreuil's legal status under the statute.

Further, even assuming that Ms. Dubreuil was a member of the bargaining unit, a conversation between two employees who belong to a bargaining unit does not constitute union activity simply because the subject of the conversation is a pending disciplinary matter. The board also takes into account the fact that when Ms. Dubreuil's supervisors presented her with

the 2 letters of reprimand in lieu of termination option they told Ms. Dubreuil that she should contact the State Employee Association with any questions and that she could speak with anyone else about the matter. These Statements are inconsistent with a desire to frustrate union activity.

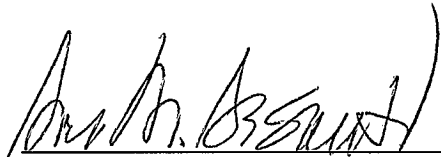
Because of these facts and circumstances, the board finds the complainants have failed to show, by a preponderance of the evidence, that the State's treatment of Ms. Blake was motivated by a desire to frustrate union activity.

The complainants also contend that the State breached the implied covenant of good faith and fair dealing that is part of the parties' collective bargaining agreement when it terminated Ms. Blake's employment. The board finds that such a claim is controlled by the standards applicable to wrongful termination claims as set forth in cases such as *Centronics Corp. v. Genicom Corp.*, 132 N.H. 133 (1989). The adjudication of wrongful termination claims arising under *Centronics* and the authorities cited therein is beyond the jurisdiction of this agency.

In accordance with the foregoing the complaint is dismissed.

It is so ordered.

Signed this 13th day of August, 2008.


Doris M. Desautel, Alternate Chair

By unanimous vote. Alternate Chair Doris M. Desautel presiding with Board Members E. Vincent Hall and James M. O'Mara also voting.

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