



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

University System of New Hampshire and University of New Hampshire

v.

University of New Hampshire Chapter of American Association of University Professors

Case No. E-0082-4
Decision No. 2010-123

Appearances:

Andrea K. Johnstone, Esq. , Bernstein Shur, P.A., Manchester, New Hampshire for the Complainant.

John S. Krupski, Esq., Molan, Milner & Krupski, PLLC, Concord, New Hampshire for the Respondent.

Background:

On March 9, 2010 the University System of New Hampshire and University of New Hampshire (USNH) filed a complaint against the University of New Hampshire Chapter of American Association of University Professors (AAUP). According to the USNH, the AAUP improperly promoted a boycott of the 2010 summer school program and urged bargaining unit employees to refrain from volunteering to teach in the summer school program. The USNH claims the AAUP has committed unfair labor practices in violation of RSA 273-A:5, II (e) and RSA 273-A:13 by engaging in a strike or other form of job action and also violated RSA 273-A:5, II (f) by breaching Article 20 of the parties' collective bargaining agreement.

The AAUP denies the charges, arguing among other things that bargaining unit employees have no obligation to participate in voluntary non-essential governmental activities like the USNH 2010 summer school program, that the USNH 2010 summer school program can take place without the participation of bargaining unit employees, and that the AAUP and bargaining unit employees have not otherwise engaged in a strike or job action in violation of RSA 273-A:13 or violated the parties' collective bargaining agreement.

On March 10, 2010 the USNH obtained a restraining order from the Strafford County Superior Court in ex parte proceedings. *See* RSA 273-A:13 ("A public employer shall be entitled to petition the superior court for a temporary restraining order, pending a final order of the board under RSA 273-A:6 for a strike or other form of job action in violation of the provisions of this chapter..."). The parties subsequently resolved the superior court proceedings by agreement, and the USNH no longer seeks a cease and desist order as bargaining unit employees are in fact participating in the USNH 2010 summer school program as expected and the AAUP supports this course of action.

Despite these circumstances the USNH still requests a decision from the PELRB on the merits of its claims. The parties waived a formal evidentiary hearing and instead filed briefs, affidavits, and exhibits and accordingly the board has made its decision on the basis of these written submissions.

Findings of Fact

1. The USNH is a public employer within the meaning of RSA 273-A:1 et. seq.
2. The AAUP is the certified exclusive representative for certain employees (faculty) of the USNH.

3. Article 20 of the parties' collective bargaining agreement provides that:

The AAUP agrees that strikes and other forms of job action 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.

4. On December 4, 2009 the AAUP voted to boycott the USNH 2010 summer school if mediation did not result in a collective bargaining agreement between the parties. On January 15, 2010 Chris Balling, a long time bargaining unit employee and past president of the AAUP, issued an email to the bargaining unit notifying them that the boycott would proceed and outlining alternative compensation arrangements to replace lost income. There were similar boycott planning communications on January 19 and February 10, 2010 on behalf of the AAUP to bargaining unit employees.

5. The AAUP caused the following publication to appear in the student newspaper on February 23, 2010 and also in posters the AAUP placed on campus on March 5, 2010:

SUMMER SCHOOL BOYCOTT

The UNH Faculty will boycott the 2010 summer session...A similar boycott was undertaken in 1997, resulting in a significant reduction in the number of summer courses taught. In addition, some courses that were offered were staffed by under qualified instructors. For that reason, we strongly recommend that students investigate summer course offerings at other institutions well in advance.

6. The AAUP previously threatened a similar boycott of the USNH summer school in 1997. In 2000 the AAUP boycotted the USNH summer school program, but only approximately a dozen faculty members actually participated.

7. The USNH 2009 summer school program generated approximate gross revenue of \$5.8 million. A majority of the students who enroll in the summer school are in UNH degree programs, and summer school is also well attended by local non-degree students. In 2009

bargaining unit faculty taught 46% of the summer school sections, and in 2007 and 2008 they taught a similar percentage.

8. The parties' collective bargaining agreement provides a compensation schedule for bargaining unit employees who teach summer school but does not expressly provide that bargaining unit employees are required to serve as instructors in the summer school program. Most bargaining unit employees are employed during the traditional nine month academic year (September through May), although some are formally employed and paid on a twelve month basis. Non-bargaining unit employees teach slightly more than half of summer school sections. The USNH can unilaterally cancel almost all summer school sections or classes.

Decision and Order

Decision Summary:

The USNH complaint is dismissed. The USNH claims are moot on account of the AAUP's and bargaining unit employees' agreement to participate in the 2010 summer school program as usual. The board also concludes that it otherwise lacks sufficient information to make a properly informed decision given the record for decision submitted by the parties. Since the parties waived a formal adjudicatory hearing and the parties have resolved the situation to the extent where the 2010 summer school can and is proceeding in the normal manner the board concludes it is unnecessary to convene a formal adjudicatory hearing. In these circumstances the board makes no decision on the merits of the complaint.

Jurisdiction:

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5. *See* RSA 273-A:6.

Discussion:

The board has several observations which hopefully will serve to assist and guide the parties in the future administration of their collective bargaining agreement and the conduct of related bargaining. First, the board believes that the USNH summer school program does qualify as an essential function or aspect of the USNH operations, at least during the June through August time period. The summer school program is an extension or continuation of one of the USNH's primary missions, which is the provision of undergraduate and graduate education and programs. Students enrolled in USNH degree programs may take courses and earn credits during the summer school session as part of their degree program course requirements. Bargaining unit employees have regularly served as instructors during the summer school program, although an equal or greater percentage of courses are taught by non-bargaining unit employees. The summer school program is well-established, offered annually, and anticipated and expected by the faculty and student population as well as by the USNH administration.

The board also has concerns about the nature and extent of the AAUP's communications to the student population through the student newspaper and campus posters. As noted in the Finding of Facts, the AAUP communication provided as follows:

SUMMER SCHOOL BOYCOTT

The UNH Faculty will boycott the 2010 summer session...A similar boycott was undertaken in 1997, resulting in a significant reduction in the number of summer courses taught. In addition, some courses that were offered were staffed by under qualified instructors. For that reason, we strongly recommend that students investigate summer course offerings at other institutions well in advance.

In the board's view, this commentary is perilously close to an intentional and improper interference with the USNH's management right to advertise, promote, offer, direct and operate the USNH summer school program. The board doubts that the AAUP and bargaining unit

employees have the right to advocate to the USNH student population that the students should, in effect, join the AAUP and bargaining unit employees in a boycott of the summer school program.

However, the board declines to render a decision on the merits of the complaint for several reasons. The most significant reason the board declines to rule on the complaint is because the parties were able to come to an understanding which has allowed the USNH 2010 summer school program to take place as planned with the participation of bargaining unit employees. The parties are commended for reaching such an understanding, notwithstanding the events which transpired earlier this year. This circumstance has plainly rendered the alleged violation of RSA 273-A:13 moot.

The fact that summer school is proceeding as scheduled also diminishes, and likely eliminates, the need for the board to determine whether the AAUP's conduct violated Article 20 of the parties' collective bargaining agreement. Additionally, whether bargaining unit employees have an obligation to "volunteer" or participate in the summer school program is a difficult question which requires a more complete and informative record for decision than the one jointly submitted by the parties. The current arrangement concerning the participation of bargaining unit employees in USNH summer school programs has evolved over time and appears to reflect a somewhat complex arrangement and balancing of each party's interests. There is undeniably some uncertainty inherent in the current arrangement, but the parties are to blame for their failure to squarely address and resolve such uncertainties through the bargaining process.

The board concludes that it is unnecessary to convene formal adjudicatory proceedings at this juncture. As noted, the parties have, on their own, resolved the participation of bargaining

unit employees in the summer school program. The board also suspects that at this point the parties' interests would be better served if they address the nature and extent of bargaining unit employees' "obligation to volunteer" at the bargaining table. Finally, the board believes that the parties' submission of a joint record for decision in lieu of formal adjudicatory proceedings involving the presentation of evidence in the form of testimony and exhibits reflects the parties' own lack of interest in dedicating additional time and resources to the adjudication of this dispute.

Accordingly, the board makes no determination as to the merits and the USNH's unfair labor practice complaint is dismissed.

So ordered.

Signed this 30th day of June, 2010.

/s/ Jack Buckley
Jack Buckley, Chair

By unanimous decision. Chairman Jack Buckley and members Kevin E. Cash and Sanford Roberts, Esq., present and voting.

Distribution:
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