



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

American Association of University Professors
UNH Chapter

Complainant

v.

University System of New Hampshire

Respondent

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Case No: U-0613-16

Decision No. 2007-039

APEARANCES

For The Petitioner:

John S. Krupski, Esq.; Cook & Molan, P.A., Concord, N.H.

For the Respondent:

Andrea K. Johnstone, Esq., Bernstein Shur, Manchester, N.H.
Ronald F. Rodgers, Esq., General Counsel, University System of New Hampshire

BACKGROUND

The American Association of University Professors, UNH Chapter ("Association") filed an unfair labor practice complaint on October 6, 2006 alleging that the University System of New Hampshire ("University") undertook conduct in violation of RSA 273-A:5, I (e) by publishing an October 3, 2006 e-mail to the UNH community, including members of the bargaining unit. The email (which was sent by J. Bonnie Newman, Interim President and Bruce L. Mallory, Provost and Executive Vice President) was sent after the parties reached impasse on Friday, September 29, 2006. Among other things the email contains information concerning the parties' respective positions on unresolved matters. After the Association filed this complaint the University issued a second email on October 10, 2006 in which a specific issue raised in the complaint is addressed and explained. On October 18, 2006 the Association filed a motion to amend petition based on the content of this second email, the amendment was allowed by the

Board. The Association asserts that as a result of these two emails the University has engaged in direct dealing and violated the provisions of RSA 273-A:5, I (e). The University denies that it has engaged in direct dealing and states that the direct communications via e-mail with employees did not constitute an unfair labor practice.

A pre-hearing conference was conducted between the parties on December 12, 2006 at the PELRB offices, Concord, New Hampshire. Thereafter, following the granting of a joint request for a continuance, a hearing on the merits of the Association's complaint was conducted on January 4, 2007. At that time both parties were present and represented by counsel. Each party had the opportunity to present evidence by direct examination and cross-examination of witnesses as well as through submission of exhibits. Pursuant to a pre-hearing order, counsel for both parties submitted a "Joint Stipulation" representing their agreement to certain facts that appear below as the Board's Findings of Fact #1-6.

FINDINGS OF FACT

1. The University of New Hampshire Chapter of the American Association of University Professors (AAUP) is the certified bargaining representative of certain employees of the University System of New Hampshire, University of New Hampshire, pursuant to the order of the Public Employee Labor Relations Board on August 8, 1991. (Case No. U-0613)
2. The University System of New Hampshire Board of Trustees, University of New Hampshire (UNH) is a public employer as that term is defined in RSA 273-A:1.
3. UNH and AAUP are presently parties to a collective bargaining agreement that provides, among others, a "Duration Clause". (See Joint Exhibit 1 Art 22)
4. The AAUP and UNH have been engaged in collective bargaining negotiations which reached an impasse prior to October 3, 2006.
5. On Tuesday, October 3, 2006, a message was issued by electronic mail to the UNH community which includes members of the bargaining unit. The subject of the electronic mail was entitled "Faculty Contract Negotiations". (See Joint Exhibit 2)
6. On October 10, 2006, J. Bonnie Newman, Interim President, and Bruce L. Mallory, Provost and Executive Vice President, issued a second e-mail which was sent to "UNH AAUP Bargaining Unit Faculty Members." (See Joint Exhibit 3)

7. The parties' current negotiations continued from February of 2006 until on or about September 26, 2006 at which time they ended at impasse and the two parties publicly announced on October 2, 2006 that they had declared impasse.

8. One of the issues unresolved at the time of impasse related to the existence of a salary structure and the basis upon which that structure would stand, distinguished by the parties as either an "equity" or "merit" basis or an "across the board" basis.

9. The existence of these competing bases had been a debated subject for a long time and the issue was generally "known on campus."

10. The information contained within the University e-mail dated October 2, 2006 and distributed by campus e-mail on October 3, 2006 (See Joint Exhibit 3) relating to the salary structure is accurate, but did not make reference to "salary floors."

11. Among other points made in the University's October 3, 2006 e-mail the University describes what its prior proposals were to the Association at the time of impasse.

12. Mr. Bruce Mallory is the Provost and Executive Vice President of the University and credibly testified that there was no University intent to engage in negotiations with individual members of the bargaining unit nor interfere with the Union's role as exclusive representative by issuing the October 3, 2006 e-mail, despite language appearing after the text of the e-mail memorandum as a "trailer."

13. At the end of the e-mail document disbursed on October 3, 2006 was a legend, referred to by some in internet parlance, as a "trailer", that is a preprogrammed computer e-mail default feature that imprints additional text to the specifically composed text of each e-mail that is generated from the sender's computer. (See Joint Exhibit 2)

14. The Union president, Professor Dale Barkey, did testify that he received a "few inquiries" from members who believed that the October 3, 2006 e-mail was "inappropriate."

15. The content of the University's October 10, 2006 e-mail communication was specifically addressed to bargaining unit members in response an issue raised by the Union in its complaint of October 6, 2006 and was an attempt by the University to clarify its earlier e-mail because of

the effect attached to the "trailer" language that accompanied the text of its first e-mail.

DECISION AND ORDER

JURISDICTION

The Public Employee Labor Relations Act (RSA 273-A) provides that the PELRB has primary jurisdiction to adjudicate claims between the duly elected "exclusive representative" of a certified bargaining unit comprised of public employees, as that designation is applied in RSA 273-A:10, and a "public employer" as defined in RSA 273-A:1,I. (See RSA 273-A:6,I).

In this case, the Union has complained that the State's actions related to a petition for certification violated prohibitions contained within RSA 273-A:5,I. The PELRB has sole original jurisdiction to adjudicate claims of unfair labor practices committed by a public employer or an exclusive bargaining representative certified under RSA 273-A:8. Under the authority of RSA 273-A:6 we accept jurisdiction of the Union's complaint alleging violations of § A:5, I (e) the statute.

DISCUSSION

The University System of New Hampshire, the named respondent, is a public employer as defined under RSA 273-A:1, X. The Association is a certified exclusive representative as defined in that same provision of the statute at § A:1, IX. Each, since they hold these respective positions in the context of labor relations, have a reciprocal obligation to bargain with each other in good faith as provided in RSA 273-A:3, which provides in relevant part:

[i]t is the obligation of the public employer and the employee organization certified by the board as the exclusive representative of the bargaining unit to negotiate in good faith. 'Good faith' negotiation involves meeting at reasonable times and places in an effort to reach agreement on the terms of employment . . .

If a public employer violates its obligations to do so it may be subject, as the University is in the instant matter, to allegations that it has engaged in a prohibited labor relations practice as provided for in RSA 273-A:5, I(e). The Court has stated, in *Appeal of Franklin Education Association, NEA-New Hampshire*, 136, N.H. 332, 335-336 (1992), that it interpreted this requirement to mean that,

the [public employer] must not only negotiate with the association's exclusive representative, but also refrain from negotiating with anyone other than the association's exclusive

representative. Dealing directly with employees is generally forbidden, because it seriously compromises the negotiating process and frustrates the purpose of the statutes quoted above.[citations omitted]. If an employer can negotiate directly with its employees, then the statute's purpose of requiring collective bargaining is thwarted.

When evaluating allegations of "direct dealing" we examine the facts to determine the nature of the alleged direct communication and the extent of alleged dealing that would equate with a breach of the party's obligation to bargain in good faith. As to the communication, we look to a combination of factors to guide us, including but not limited to (1) the medium used; (2) the frequency of communication; (3) the timing of the communication; and, (4) the intent of the party generating the communication, to the extent it can be ascertained.

As to the matter of "dealing" aspect, we also look to a combination of factors including but not limited to (1) the contents of the communication; (2) the audience to whom the communication is directed; (3) the extent to which the contents express an intent to interfere with the representative's right to exclusively represent the bargaining unit members; and (4) the effect of the communication upon members of the bargaining unit. To those general factors, since this case presents a situation involving negotiations between the parties, we also have examined the extent to which the parties' negotiations are affected.

In the matter before us the University disbursed an e-mail addressed to the entire university community. This single e-mail communication, which formed the basis of the Union's initial complaint, reached members of the bargaining unit because faculty addresses are included among the addressees for communications directed to the entire "university community." This October 3, 2006 e-mail was sent after the parties' negotiations had failed and impasse had been jointly declared. Mr. Mallory credibly testified that the intent of the mailing was to inform the entire university community of the status of faculty negotiations because of its importance to the operation of the university. The October 10, 2006 e-mail that formed the basis for the Union's amendment also was issued after negotiations had ended in impasse and after the Union filed a complaint with the PELRB on October 6, 2006. We also believe that this was a good faith effort by the University to correct, what would be understood upon a fair reading of the first e-mail, to have been an inadvertent oversight in allowing the customary "trailer" language to accompany the text of the original e-mail.

Turning our analysis to an examination of the direct dealing alleged in the Union complaint, we find that the contents of the initial e-mail were factual and discussed the University's proposals in the past tense, and to the extent that any legitimate claim has been raised, makes no promise nor offer of future benefits. It was sent to a university wide audience, a portion of which consisted of bargaining unit members.

The so-called "trailer" language of that e-mail reads as follows:

Reply to the sender for more information or comments about the subject or content of this message. But please do not send 'unsubscribe' requests by replying to this message.

For more information about this mailing list please see:
<http://listproc.unh.edu/Announcements/special.html>

Or if you do not have access to the web, *forward * this message to:

List.Admin @ unh.edu
Along with your questions or concerns.

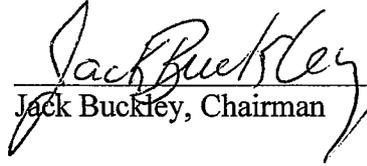
No bargaining unit member responded to the University as a result of this e-mail to either engage in negotiations or for any other purpose. The Union leadership did not respond directly to the University, but did file a complaint with the PELRB on October 6, 2006. The Union president did testify that he received a "few inquiries" from members who believed that the October 3, 2006 e-mail was "inappropriate."

The University learned of the fact of the accompanying "trailer" language by receiving a copy of the Union complaint. It quickly issued a second e-mail on October 10, 2006. This one was directed only to the members of the bargaining unit and was not a university community-wide disbursement and this time with the "trailer" component, quoted above, deleted. We interpret this particular effort to have been the University's attempt to acknowledge the rights of the exclusive bargaining representative and correct any inappropriate inference taken from the disbursement of the first e-mail as well as to specifically bar any thought of dealings believed by any bargaining unit member to have been offered by someone construing the first e-mail as having invited such "back-and-forth."

Lastly, it was not shown that the negotiations between the parties or the administration or operation of the exclusive bargaining representative were impacted beyond what a reasonable person would characterize as negligible or *de minimis*. We find that the actions of the University do not rise to the level of a statutory violation and therefore dismiss the Union's complaint.

So ordered.

Signed this 30th day of March, 2007.



Jack Buckley, Chairman

By unanimous decision. Jack Buckley presiding. Members Carol M. Granfield and E. Vincent Hall present and voting.

Distribution:

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