



**State of New Hampshire**  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

---

Hillsboro-Deering Support Staff AFT-NH, Local 6219, AFL-CIO	*	
	*	
Complainant	*	
v.	*	Case No. E-0031-1
	*	
Hillsboro-Deering School District	*	
	*	Decision No. 2007-091
Respondent	*	
	*	

---

APPEARANCES

Representing Hillsboro-Deering Support Staff AFT-CIO Local 6219:  
Emmanuel Krasner, Esq., Krasner Law Office, Farmington, New Hampshire

Representing Hillsboro-Deering School District:  
Edward M. Kaplan, Esq., Sulloway & Hollis, PLLC, Concord, New Hampshire

BACKGROUND

Hillsboro-Deering Support Staff AFT-NH, Local 6219 (the “Union”) filed unfair practice charges on November 30, 2006. The Union claims the Hillsboro-Deering School District (the “District”) violated RSA 273-A:5 (a) and (c) by harassing and intimidating Kelly D’Errico for her union activities. The Union requests that the PELRB: 1) Find that the District has committed an Unfair Labor Practice within the meaning of RSA 273-A; 2) Order the District to cease and desist from such actions; 3) Award the Union all costs and attorney’s fees; and 4) Grant such other and further relief as may be just.

The District filed its answer on December 20, 2006 and denies that it committed an unfair labor practice. The District also filed a Motion to Require Clarification of Charge and Motion to Stay and Hold this Matter in Abeyance Pending Completion of the Parties’ Arbitration Proceedings. The District subsequently filed a Motion to Dismiss.

The District's Motion to Require Clarification of Charge and Motion to Stay were addressed in a pre-hearing order, see PELRB Decision No. 2007-012. Pursuant to that pre-hearing order, the Union filed the "Complaining Party's Specifications, and a second pre-hearing conference was held which resulted in PELRB Decision No. 2007-018. As reflected in this decision, the parties have agreed that:

1. The allegations contained in paragraphs 4, 19, 24, 27-28, 31-32, 34-36, 39-44 of the Complaining Party's Specifications are to be stricken and no evidence received concerning the allegations in those paragraphs except that the Union may offer the documents referenced in paragraphs 24 and 31, the Union may offer the already issued Arbitration Decision, and the parties' shall stipulate that "There is now a pending arbitration concerning interactions between Ms. D'Errico and Principal Ingram which took place in May 2006, arising from a grievance filed by the Union;"

2. The Union may seek to provide more information to the Board concerning the subject matter of a pending arbitration, but not the merits of the parties' respective positions as to the matters in arbitration; and

3. Paragraphs 11-12, and 21 of the Complaining Party's Specifications are to be stricken and, in their place, the following stipulations are to be submitted by the parties: a) "Between May 3, 2005 and September 9, 2005 the Union filed three unfair labor practice complaints and the District filed one unfair labor practice complaint. All four complaints resolved by agreement"; and b) "In September, 2005 Kelly D'Errico opposed a domestic partner health insurance benefit under consideration by the School Board because in her view it would benefit the most highly paid members of the District at a time when there were attempts to cut pay and benefits for the lower paid employees of the District."

The other allegations in the Complaining Party's Specifications remain in dispute and are restated in their entirety as paragraphs 5-a through 5-p of the February 5, 2007 pre-hearing order, PELRB Decision No. 2007-018. The board deferred action on the District's Motion to Dismiss pending its receipt of evidence at the hearing on the merits.

A hearing was held on February 13, 2007 at the PELRB offices in Concord, at which time the board received evidence in the form of testimony, exhibits, and stipulations. The written stipulations are set forth below as Findings of Fact 1-13. The record was held open until March 15, 2007 to allow the parties to file briefs and to allow the Union to obtain and file a trial deposition of Amy Nadeau, all of which were timely filed.

## FINDINGS OF FACT

1. The Hillsboro-Deering School District, hereinafter "the District," is a public employer in the State of New Hampshire.
2. The Hillsboro-Deering Support Staff, AFT, AFL-CIO Local #6219, hereinafter "the Union," is the collective bargaining representative of the members of the bargaining unit.
3. Kelly D'Errico has been President of the Union since March, 2003.
4. The parties were operating under a collective Bargaining Agreement which expired June 30, 2004. The parties reached a tentative agreement on a successor agreement on December 9, 2003. The agreement was presented to the March, 2004, School District meeting and defeated by seven votes.
5. Dr. Barbara Baker was hired as a permanent Superintendent, and the Board created a new negotiating team. The first meeting of the parties occurred November 16, 2004.
6. Ms. D'Errico spoke out during negotiations and at public hearings where negotiations, the school budget, or implementation of new programs were discussed. She publicly compared the raises being offered to support staff unit members with the generous increases in salary given to administrative personnel. She called attention to the expenditures the District was making in implementing new programs.
7. On April 28, 2005, Kelly D'Errico, acting as President of the Union, filed a grievance on behalf of Pat Adams, a bargaining unit member. The issue was the placement of Ms. Adams on the seniority list. The grievance was eventually resolved in Ms. Adams' favor.
8. On September 17, 2005, the Union membership met and issued a vote of no confidence in the School Board. A press release to that effect was sent out to the local media.
9. On December 19, 2005, Kelly D'Errico represented the cafeteria workers at the grievance hearing which was held before the School Board. She asked that the hearing be held in public.
10. On December 28, 2005, the parties, through mediation, reached a tentative agreement on a collective bargaining contract which would be presented to the voters at the March, 2006, School District meeting.

11. Between May 3, 2005, and September 9, 2005, the Union filed three Unfair Labor Practice Complaints and the District filed one Unfair Labor Practice Complaint. All four Complaints were resolved by agreement.
12. In September, 2005, Kelly D'Errico opposed a domestic partner health insurance benefit under consideration by the School Board because, in her view, it would benefit the most highly paid members of the District at a time when attempts were being made to cut pay and benefits for the lower paid employees in the District.
13. There is now a pending arbitration concerning interactions between Ms. D'Errico and Principal Ingram which took place in May, 2006, arising from a grievance filed by the Union.
14. In February, 2005 Ms. D'Errico's office was assigned to Donna Stafford, who works as a college admissions and financial aid specialist at the high school. Ms. D'Errico, the secretary to the high school principal, claimed she was moved because of her union status and activity. The District claims the office change facilitated Donna Stafford's ability to conduct confidential meetings with students and parents and improved her access to secretarial support.
15. In July, 2005 Ms. D'Errico and Dr. Baker, the District superintendent, held a meeting to discuss three pending grievances. During this meeting Dr. Baker told Ms. D'Errico that "you may not like the way that I run the district, but I'm the one in charge." A July 31, 2005 letter by Ms. D'Errico expresses her belief that "it was a very good and productive meeting." See District Exhibit One.
16. In November of 2005, Amy Nadeau, an outside auditor, was reviewing certain accounting issues with business manager Lisa Braiterman. Ms. Braiterman asked principal Ingram and Ms. D'Errico to join her and Ms. Nadeau and the group proceeded to discuss some issues related to Ms. D'Errico's accounting records, and Ms. Braiterman asked Ms. D'Errico a number of questions. It was Ms. Nadeau's impression that Ms. Braiterman was unduly harsh in her questioning of Ms. D'Errico and that Ms. D'Errico was overwhelmed by the situation.
17. In June of 2006, at the behest of Superintendent Baker, principal Ingram instituted schedule adjustments to extend phone coverage at the end of the school day from 3:30 to 4:00 p.m. He involved administrators like himself as well as the two administration secretaries, including Ms. D'Errico. Ms. D'Errico normally worked until 3:30 p.m., but she worked a different schedule twice in order to answer the phones until 4:00 p.m. Thereafter, Ms. D'Errico was not scheduled to answer the phones until 4:00 p.m.
18. The Union did not elicit on direct examination of its witnesses any evidence concerning the parking space matter and principal Ingram's response to Ms. D'Errico's criticisms of the administration. The board only heard evidence on these issues after the District delved into them on cross-examination.

19. There was no clear explanation as to why Ms. D'Errico parked in a student space and there was no connection between the student's placement of the note on the windshield of Ms. D'Errico's car and any action or inaction of District representatives.
20. Ms. D'Errico's criticism of the administration stemmed from the principal and vice principal's unavailability to discipline two students Ms. D'Errico brought to the office. By the time the administrators were able to respond Ms. D'Errico had already released the two students. She then proceeded to criticize the administrators in front of parents and students in the central office. Principal Ingram informed Ms. D'Errico that her behavior was improper and asked her to refrain from such conduct.
21. When meeting times were being considered for an insurance committee Ms. D'Errico informed Ms. Braiterman that she was not available to meet after school. It was contemplated that the meetings would take place after school to accommodate other meeting attendees, including Kathy Pepper, a teacher in the Hopkington Schools. After some discussion, and at Ms. Braiterman's suggestion, it was arranged for Diana Levesque, the Union Vice President, to attend the meetings in place of Ms. D'Errico. Ultimately meetings were scheduled during and after school hours and Kathy Pepper attended meetings during both times.
22. At the end of November, 2006 the parties participated in arbitration. On the Monday before the Thursday arbitration, Terri Donovan, an attorney representing the Union, contacted superintendent Baker, principal Ingram and Union members about the appearance of certain school employees at the arbitration. Although he was representing the District in the arbitration, attorney Kaplan was not contacted about this witness attendance.
23. On the Wednesday before the Thursday arbitration, Union vice president Diana Levesque contacted attorney Donovan to advise that the District was questioning its obligation under the parties' collective bargaining agreement to pay employees who are absent from work in order to participate as a witness at arbitration. Ms. Levesque's concern was based on statements of business manager Lisa Braiterman. Attorney Donovan issued subpoenas and also copied attorney Kaplan with email on the subject. See District Exhibit Two. Initially attorney Kaplan agreed with Ms. Braiterman but he changed his mind after attorney Donovan brought Article 6.3.3 of the parties' collective bargaining agreement to his attention. Ultimately, the involved employees were able to appear as witnesses at arbitration without loss of pay.

## 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 the Union has alleged violations of different provisions of RSA 273-A:5.

### DISCUSSION

The Union filed its complaint under RSA 273-A:5 (a) and (c). RSA 273-A:5 provides in part that “it shall be a prohibited practice for any public employer: (a) to restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter...and (c) to discriminate in the hiring or tenure, or the terms and conditions of employment of its employees for the purpose of encouraging or discouraging membership in any employee organization.”

The board first addresses the District’s Motion to Dismiss and the Union’s argument in its brief that the incidents at issue in this case constitute one cumulative unfair labor practice spanning a period of approximately 22 months. The District seeks dismissal of all evidence relating to events transpiring more than 6 months prior to the filing of the complaint pursuant to RSA 273-A:6, VII, which provides that “the board shall summarily dismiss any complaint of an alleged violation of RSA 273-A:5 which occurred more than 6 months prior to the filing of the complaint with the body having original jurisdiction of that complaint.” The District asks the board to follow the holding in *Machinists Local Lodge No. 1424 v. NLRB*, 362 U.S. 411 (1960). Although *Machinists* generally supports the proposition that earlier evidence in this case should be dismissed as time barred, it also holds that evidence of earlier events may be utilized to “shed light on the true character of matters occurring within the limitations period” and may be submitted for that limited purpose.

The Union contends that consideration of the earlier evidence on the merits, and not merely the use of such earlier evidence to “shed light,” is justified by the law applicable to constructive discharge and hostile work environment claims. The Union argues that when considered collectively the evidence proves that the District created a hostile work environment for Ms. D’Errico which constituted one continuous violation of RSA 273-A:5 (a) and (c).

The law of constructive discharge is part of New Hampshire’s common law wrongful termination jurisprudence:

[t]o succeed on such a claim, a plaintiff must prove: (1) [that] the termination of employment was motivated by bad faith, retaliation or malice; and (2) that she was terminated for performing an act that public policy would encourage or for refusing to do something that public policy would condemn. The termination element of the claim may be satisfied by proof of a constructive discharge, which occurs when an employer renders an employee's working conditions so difficult

discharge is not established by showing relatively minor abuse of an employee . . . rather, the adverse working conditions must generally be ongoing, repetitive, pervasive, and severe.

*Lacasse v. Spaulding Youth Ctr.*, 154 N.H. 246, 248-49 (2006)(quotations and citations omitted).

The Union also relies upon the analysis applied in Title VII hostile work environment claims, which are a type of unlawful discrimination claim filed under federal law, 42 U.S.C. §2000. The Union cites *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) to support its argument. Under *National Railroad*, a hostile work environment claim is “different in kind” from claims based upon discrete acts because “their very nature involves repeated conduct.”

When the workplace is permeated with ‘discriminatory intimidation, ridicule, and insult’ that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment, Title VII is violated.

National Railroad, citing Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). The Supreme Court states that “[a] hostile work environment claim is comprised of a series of separate acts that collectively constitute one ‘unlawful employment practice.’” (Citing 42 U.S.C. §2000 5(e)(1)). Accordingly, the Supreme Court reasoned that as long as one act contributing to the claim takes place within the statutory period, the “entire time period of the hostile environment may be considered by a court for the purposes of determining liability.”

The board finds that there are legally significant distinctions between constructive discharge and hostile work environment claims on the one hand and unfair labor practice claims adjudicated by this agency on the other which preclude the board from adopting the interpretation of RSA 273-A:6 urged by the Union. The jurisdiction of this agency is limited to the consideration of unfair labor practices derived from the express statutory provisions of RSA 273-A. The agency does not have jurisdiction over claims derived from the common law or from other statutes, and the board finds that the Union’s complaint in this case is not the equivalent of a state law constructive wrongful termination claim brought under a constructive discharge theory nor of a federal Title VII hostile work environment claim. In these circumstances, the board is not persuaded that it should apply the statute of limitations in the manner urged by the Union.

Accordingly, the District’s Motion to Dismiss is granted in part, as the board will not consider in this case whether any of the incidents which occurred more than six months prior to the filing of the complaint constituted an unfair labor practice, either when viewed individually, collectively with each other, or collectively with the events which transpired within six months of the filing of the complaint. The board does find, however, that it is appropriate in this case for the Union to use such earlier evidence for the limited purpose of trying to “shed light on the true character of matters occurring within the limitations period.”

At the pre-hearing conference the parties identified six specific incidents which occurred within six months of the filing of the complaint and which serve as the basis for the charge. These are:

1. June, 2006: Principal Jon Ingram's June, 2006 actions whereby the work schedule was changed to require Ms. D'Errico, Karen Gerard, and administrators to take turns staying an extra 30 minutes to answer the telephone;
2. Fall 2006: Principal Ingram's comments to Ms. D'Errico concerning her negative statements about administrators;
3. Fall 2006: Discussions and interactions with Principal Ingram and Assistant Principal Yacopucci concerning a student parking space;
4. October 2006: The scheduling of insurance committee meetings during the afternoon due to Kathy Pepper's schedule;
5. November 2006: Discussions concerning witness appearances for arbitration proceedings and whether the District interfered with witness attendance; and
6. November 2006: The District's communication of a settlement proposal concerning one of the arbitration proceedings.

In Appeal of Professional Firefighters of East 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).

Although there was no discharge or elimination at issue with respect to Ms. D'Errico, Professional Firefighters provides useful guidance as to the Union's burden of proof in this case. In the context of this case, the Union must prove by a preponderance of the evidence that the District harassed and intimidated Ms. D'Errico, that the District did so because of Ms. D'Errico's union status or union activities, and that the District thereby violated RSA 273-A:5, I (a) or (c).

The board begins with the sixth incident, which is the claim that in November, 2006 the District committed an unfair labor practice by communicating a settlement proposal concerning an arbitration proceeding. This claim was resolved in the District's favor at hearing when the Board sustained the District's objection to evidence concerning this claim. It is axiomatic that parties to disputes which give rise to grievances such as the one which resulted in the arbitration decision marked as Petitioner Exhibit 13 in this case should freely engage in efforts to resolve the underlying dispute by agreement. The general rule that evidence of settlement discussions, including the exchange of settlement offers and demands, is not relevant nor admissible in adjudicatory proceedings is applicable to the present proceedings. The board believes it would establish an unfortunate precedent to find that the communication of a settlement offer in connection with a contested proceeding constitutes a violation of RSA 273-A:5.

As to incidents 1-3 (phone, interaction with principal, parking), the board finds insufficient evidence that the District took action, discriminatory or otherwise, against or with respect to Ms. D'Errico in these situations because of her union status or activity. The board reaches this conclusion while taking into account the evidence of earlier interactions between the parties which occurred more than six months prior to the filing of the complaint. The first incident occurred in June, 2006 and involved schedule changes to extend phone coverage to 4:00 p.m. The schedule change was in response to a directive from the Superintendent, it was made for the legitimate and understandable reason of extending phone coverage to facilitate parents' opportunity to contact the school, and it was not specifically directed at Ms. D'Errico. Further, it appears that the practice of extended phone coverage has continued since June, 2006 without Ms. D'Errico's involvement. She was only scheduled to provide the extended coverage twice, both times in June, 2006.

The board finds that the second incident concerning principal Ingram's comments to Ms. D'Errico about her negative statements about administrators made in front of parents and other staff was not motivated by anti-union animus but by principal Ingram's desire to admonish Ms. D'Errico for what he reasonably perceived to be improper conduct.

The third incident concerning parking involved confusion as to assignment and allocation of parking spaces among staff and students. Principal Ingram had become frustrated with continuing problems concerning these parking space allocations, a circumstance that had nothing to do with Ms. D'Errico. Ms. D'Errico parked in a space reserved for students, and a student left a note on her car to that effect. There is insufficient evidence to find that the District acted or was motivated by anti-union animus with respect to the parking issue.

With respect to the fourth incident, involving the scheduling of insurance committee meetings, Ms. D'Errico voluntarily gave up her place on the insurance committee when the perceived scheduling problem arose. She was replaced, at Ms. Braiterman's suggestion, and without objection, by Union Vice President Diana Levesque. The board does not find anything improper in these scheduling activities, especially when Ms. D'Errico's replacement was the Union Vice President. Again, nothing in the "earlier evidence" leads the board to a different understanding of this event.

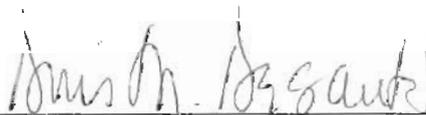
The fifth and remaining incident stems from the dispute about loss of pay for employees appearing as witnesses at the November, 2006 arbitration. The District belatedly recognized and fulfilled its obligations under Article 6.3.3 of the collective bargaining agreement, but not before causing avoidable acrimony among the parties. The board does not find that the District's mistake as to its obligations and employee rights under Article 6.3.3 of the collective bargaining agreement was in fact an effort to deprive its employees of those rights because of an anti-union animus. However, the board believes that the District has an obligation to be more conversant with the terms of the parties' collective bargaining agreement in order to avoid in the future the type of dispute that occurred in this case. Henceforth the District would be well advised to ensure, through annual training and other steps, that its administrators have a stronger working familiarity with the provisions of any collective bargaining agreement in place. Further, both parties should provide specific contract references in the future when claiming a right or asserting an obligation under the collective bargaining agreement so there can be no misunderstanding as to the basis of a claimed right or obligation.

In conclusion, the board finds the evidence is insufficient to establish, by a preponderance of all the evidence, that the six incidents which occurred with six months of the filing of the complaint constituted violations of RSA 273-A:5. The board makes this finding after taking into account the evidence of earlier incidents, none of which lead the board to a different understanding of the evidence or conclusion on the merits of the Union's claims. This is not to say that the board does not have concerns or reservations about the events which occurred prior to June, 2006 given the expectations and parameters of behavior established by RSA 273-A:5. However, for the reasons stated earlier in this decision, the board has not examined those events to determine whether the District violated the statute during the time period prior to June, 2006. As a preventive measure, this board strongly suggests it might well serve the interests of both parties to engage in an effort to establish a more harmonious workplace. The board emphasizes that in the future it will determine whether to take into account such earlier evidence on a case by case basis, as this decision is not intended to allow the submission into the record of such evidence in all similar cases in the future.

In accordance with the foregoing, the Union's complaint is dismissed.

So ordered.

Signed this 14th day of June, 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.

Distribution:

Emmanuel K... For