



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

JEFFREY T. CLAY

CASE NO. E-0092-2

v.

DECISION NO. 2010-027

NEWMARKET TEACHERS ASSOCIATION
And NEWMARKET SCHOOL DISTRICT

PRE-HEARING MEMORANDUM AND ORDER

Date of Conference: February 4, 2010 at the PELRB in Concord.

Appearances: Jeffrey T. Clay

James F. Allmendinger, Esq.
Newmarket Teachers' Association, NEA-New Hampshire

Barbara Loughman, Esq.
Maureen Pomeroy, Esq.
Newmarket School District

Background:

Jeffrey T. Clay filed an unfair labor practice complaint on December 24, 2009. In general he complains about the June, 2009 termination of his employment as a teacher in the Newmarket School District. He contends that the District and Association conspired to terminate his employment as retribution for filing grievances and also discriminated against him for not being a dues paying member of the Association. Mr. Clay also claims that the Association has failed to fulfill its obligations to represent him in its capacity as the exclusive representative of

bargaining unit employees. He claims that the District's actions violate RSA 273-A:5, I (a), (b), (c), (d), (g) and (h) and the Association's actions violate RSA 273-A:5, II (a), (c), (f) and (g).

The District generally denies the charges in the complaint. The District has raised a number of specific defenses, which include that it properly terminated Mr. Clay's employment in accordance with the procedures set forth in RSA 189:13; that the PELRB does not have jurisdiction to consider whether the District's actions were proper under RSA 189:13; that its conduct was otherwise proper; that Mr. Clay has failed to allege facts sufficient to state a claim under the provisions of RSA 273-A:5, I; that he has failed to exhaust remedies available under the collective bargaining agreement; that his claims are barred by res judicata; that the PELRB does not have jurisdiction over any claims maintained under RSA 275-E; and that the complaint is untimely under the 6 month limitation period set forth in RSA 273-A:6, VII.

The Association generally denies the charges and asserts that it represented Mr. Clay as required by law and contract, did not deny Mr. Clay representation on the basis of financial considerations, and did not aid or conspire with the school district in disciplining Mr. Clay. Additionally, the Association claims the complaint is untimely under the 6 month limitation period set forth in RSA 273-A:6, VII; that Mr. Clay failed to exhaust his remedies, that Mr. Clay was represented by counsel of his own choosing in his dismissal hearing and is therefore bound by that decision absent an appeal to the Superior Court under RSA 189:14.

ISSUES FOR DETERMINATION BY THE BOARD

1. Whether the District improperly terminated Mr. Clay's employment in violation of RSA 273-A:5, I (a), (b), (c), (d), (g) or (h)?
2. Whether any of Mr. Clay's claims against the District fail for the reasons stated in the District's pleadings and referenced in part earlier in this pre-hearing order?

3. Whether the Association improperly conspired with the District to terminate Mr. Clay's employment or improperly failed to provide Mr. Clay with representation in violation of RSA 273-A:5, II (a), (c), (f) or (g)?

4. Whether any of Mr. Clay's claims against the Association fail for the reasons stated in the Association's pleadings and referenced in part earlier in this pre-hearing order?

WITNESSES

For the Complainant, Jeffrey T. Clay:

1. Linda Albright
2. Chris Andriski
3. Deborah Brooks
4. Cliff Chase
5. Jeffrey Clay
6. James Fabiano
7. Chris Gamache
8. Mark LaRoach
9. Mark Levitt
10. Kathy Murphy
11. Janice Murray
12. Nancy Pagnotta
13. Dave Williams

For Newmarket School District:

1. Chris Andriski
2. Dave Williams
3. Chris O'Callahan
4. Pat Ballantyne
5. Kathy Murphy
6. Noel Jost Coq
7. Nancy Pagnotta
8. Nancy Winterbottom
9. Janice Murray
10. Kathi Al-Darraj
11. Mark LaRoach

For the Newmarket Teachers' Association/NEA-NH:

1. Nancy Pagnotta
2. John Bridal

3. Linda Albright
4. James Fabiano
5. Janice Murray
6. Richard Courtney
7. Peter Miller
8. Donna Christman
9. Steven Sacks

Both parties reserve the right to amend their List of Witnesses in conformity with the schedule contained in the DECISION SECTION appearing at the conclusion of this order or, upon proper showing, later with reasonable notice to the other party. It is understood that each party may rely on the representations of the other party that witnesses appearing on their respective list will be available at the hearing.

EXHIBITS

Agreed to:

1. Collective Bargaining Agreement

For the Complainant:

1. Approved Newmarket School Board meeting minutes from 06/08/09
2. Approved School Board meeting minutes from 06/09/09
3. Approved School Board meeting minutes from 08/20/09
4. Approved School Board meeting minutes from 11/17/08
5. Letter from Superintendent LaRoach dated 08/10/09 with enclosures
6. Letter from Superintendent LaRoach dated 08/4/09 with enclosures
7. Letter from Jeff Clay dated 04/10/09 to School Board Chairman Cliff Chase
8. Letter from Chris O'Callaghan dated 06/19/07
9. Email from Kathleen Murphy to Elaine Holt dated 05/21/08
10. Written Request for June 8th and 9th hearing transcript dated 07/20/09
11. Letter from Barbara Loughman dated 06/04/09
12. 02/15/2008 Level I – Grievance Letter RE: Teacher Observ. by Dept. Chairs
13. 02/19/2008 Level I – Principal Response RE: Teacher Observ. by Dept. Chairs
14. 03/07/2008 Level II – Grievance Letter RE: Letter of Admonishment
15. 03/10/2008 Level II – Grievance Letter RE: Teacher Observ. by Dept. Chairs
16. 03/19/2008 Level II – Grievance Letter RE: NTA Interference
17. 03/19/2008 Level II – Superintendent Response RE: Teacher Observ. by Dept. Chairs
18. 03/25/2008 Level III – Grievance Letter RE: Teacher Observ. by Dept. Chairs

19. 03/28/2008 Level II – Superintendent Response RE: NTA Interference
20. 03/20/2008 Level III – School Board Response RE: Teacher Observ. by Dept. Chairs
21. 03/31/2008 Level II – NTA Response RE: NTA Interference
22. 03/31/2008 Level I – Grievance Letter RE: NTA Interference
23. 04/10/2008 Level III – Grievance Letter (by NTA) RE: Teacher Observ. by Dept. Chairs
24. 04/10/2008 Level III – Grievance Letter (by NTA) RE: Teacher Observ by Dept. Chairs
25. 04/10/2008 Level III – Grievance Record RE: Teacher Observ. by Dept. Chairs
26. 05/08/2008 Level II – Superintendent Response RE: Letter of Admonishment
27. 05/12/2008 Level II – Superintendent Response RE: Letter of Admonishment
28. 05/12/2008 Level II – Superintendent Response RE: NTA Interference
29. 05/16/2008 Level III – School Board Response RE: Teacher Observ. by Dept. Chairs
30. 09/02/2008 Level I – Grievance Letter RE: Teacher Duties beyond 186 Days
31. 10/09/2008 Level I – Principal Response RE: Teacher Complaint Investigation
32. 10/09/2008 Level I – Principal Response RE: Assignment of 6th Class
33. 10/16/2008 Level I – Principal Response RE: Disciplinary Minutes
34. 10/20/2008 Level II – Grievance Letter RE: Teacher Duties beyond 186 Days
35. 10/20/2008 Level II – Grievance Letter RE: Assignment of 6th Class
36. 10/20/2008 Level II – Grievance Letter RE: Disciplinary Minutes
37. 10/27/2008 Level II – Superintendent Response RE: Teacher Duties beyond 186 Days
38. 10/27/2008 Level II – Superintendent Response RE: Teacher Complaint Investigation
39. 10/27/2008 Level II – Superintendent Response RE: Assignment of 6th Class
40. 10/27/2008 Level II – Superintendent Response RE: Disciplinary Minutes
41. 11/03/2008 Level I – Grievance Letter RE: Discipline Through Mail
42. 11/06/2008 Level I – Principal Response RE: Discipline Through Mail
43. 11/06/2008 Level I – Principal Response RE: Sick Leave
44. 12/04/2008 Level III – School Board Response RE: Teacher Duties beyond 186 Days
45. 12/04/2008 Level III – School Board Response RE: Teacher Complaint Investigation
46. 12/04/2008 Level III – School Board Response RE: Assignment of 6th Class
47. 12/12/2008 Level IV – NTA Response RE: Request to Advance to Level IV
48. 04/13/2009 Level I – Grievance Letter RE: Discipline Through Mail
49. 04/13/2009 Level I – Grievance Letter RE: Investigation Violation
50. 04/20/2009 Level I – Principal Response RE: Discipline Through Mail
51. 04/20/2009 Level I – Principal Response RE: Investigation Violation
52. 04/21/2009 Level II – Grievance Letter RE: Discipline Through Mail
53. 04/21/2009 Level II – Grievance Letter RE: Investigation Violation
54. 04/21/2009 Level II – NTA Response RE: Letter Refusing to Process
55. 05/31/2009 Level II – Superintendent RE: Discipline Through Mail
56. 05/31/2009 Level II – Superintendent RE: Investigation Violation

57. 06/01/2009 Level III – School Board Response RE: Discipline Through Mail
58. 06/01/2009 Level III – School Board Response RE: Investigation Violation

For Newmarket School District:

1. Exhibit 1: March 17, 2009 Field Trip Permission Form
2. Exhibit 2: April 10, 2009 Letter of Reprimand
3. Exhibit 3: April 22, 2009 Handwritten Meeting Notes
4. Exhibit 4: April 23, 2009 Meeting Notes
5. Exhibit 5: April 24, 2009 Letter of Reprimand
6. Exhibit 6: April 10, 2007 Memorandum/Savanna Incident
7. Exhibit 7: June 14, 2007 Roots and Shoots Emails
8. Exhibit 8: June 20, 2007 Jost-Coq Email to Principal Brooks
9. Exhibit 9: October 8, 2008 Meeting RE: Kaitlyn G.
10. Exhibit 10: January 16, 2007 Email Regarding Intelligent Design
11. Exhibit 11: Updated Global Warming Debate Memos
12. Exhibit 12: February 15, 2007 Letter of Reprimand
13. Exhibit 13: March 3, 2008 Letter of Reprimand
14. Exhibit 14: March 22, 2007 Email from Nancy Pagnotta/Field Trip
15. Exhibit 15: March 21, 2008 Emails RE: Use of School Email System
16. Exhibit 16: March 21, 2007 Email RE: Suspended Student
17. Exhibit 17: June 19, 2007 Email RE: Suspended Student
18. Exhibit 18: September 2008 Letters Regarding Curriculum
19. Exhibit 19: State of New Hampshire Health Education Curriculum Guidelines
20. Exhibit 20: April 21, 2009 Email to Superintendent
21. Exhibit 21: April 22, 2009 Email to Superintendent
22. Exhibit 22: September Emails Regarding Teacher Authority
23. Exhibit 23: April 21, 2009 Email
24. Exhibit 24: April 28, 2009 Removal Letter
25. Exhibit 25: Collective Bargaining Agreement
26. Exhibit 26: Teacher Supervision and Assistance Model
27. Exhibit 27: Staff Teacher Handbook
28. Exhibit 28: Board Policies
29. Exhibit 29: January 5, 2007 Observation Reports
30. Exhibit 30: May 25, 2007 Observation Report
31. Exhibit 31: School Board's June 26, 2009 Notice of Decision
32. Exhibit 32: August 4, 2009 Letter to Mr. Clay from Mr. LaRoach
33. Exhibit 33: Addendum to School Board Decision

For Newmarket Teachers' Association/NEA-NH:

1. Excerpts from prior Newmarket collective bargaining agreements dating from 1982-2007

Both parties reserve the right to amend their List of Exhibits in conformity with the schedule contained in the DECISION SECTION appearing at the conclusion of this order or, upon proper showing, later with reasonable notice to the other party. Copies of all exhibits are to be submitted to the presiding officer in accordance with Pub 203.02. It is understood that each party may rely on the representations of the other party that the exhibits listed above will be available at the hearing.

DECISION

1. "Parties" means Mr. Clay, the District, the Association, or their counsel/representative appearing in the case. The parties shall simultaneously copy each other electronically on all filings submitted in these proceedings.
2. The parties shall prepare and file a final statement of stipulated facts on or before **March 19, 2010**.
3. The parties shall file any amendments to, or deletions from, their Witness and Exhibit lists on or before **March 1, 2010**.
4. As discussed at the pre-hearing conference, the District and Association shall file their respective motions to dismiss, if any, on or before **February 12, 2010**. Mr. Clay shall file his objection to any such motions on or before **February 19, 2010**.
5. As discussed and agreed at the pre-hearing conference, the parties shall submit all evidence to support their position in these proceedings by affidavit with the exception of testimony from witnesses who cannot reasonably be expected to cooperate in the preparation of an affidavit because they can fairly be considered an unfriendly or hostile witness. All affidavits shall be filed on or before **March 5, 2010** and shall be titled "Affidavit of (Name) filed on behalf of (Jeffrey Clay or The Association or The

District)”. Information contained within an affidavit shall be presented in numbered paragraphs in a chronological manner, shall be specific as to date, place, and individuals involved, shall reference exhibits with specificity but shall not reproduce the content of exhibits, and shall be limited to factual material to the greatest extent possible. Affidavits are not to be used to provide argument about the merits of the parties’ respective positions in these proceedings as the parties will be otherwise afforded the opportunity to provide oral or written argument during the course of the proceedings as necessary.

6. This process for submission of testimony into the record by affidavit means, for example, that Mr. Clay is not expected to submit testimony from the District Superintendent by affidavit nor are the Association and District expected to submit testimony from Mr. Clay by affidavit. However, Mr. Clay is required to submit his own testimony by affidavit, and the District and the Association are expected to submit testimony from their own witnesses, like the Superintendent or Association representatives, by affidavit.
7. At hearing all duly prepared affidavits shall be made part of the record subject to any objections any party may have to the relevance or content of any affidavit in whole or in part. All such objections shall be filed in writing on or before **March 19, 2010**.
8. As discussed and agreed at the pre-hearing conference, all parties will be provided with the opportunity to call and examine witnesses who have filed affidavits or from whom it was not possible to obtain an affidavit. For example, the District and the Association will be provided with the opportunity to cross-examine Mr. Clay as to any points they wish to make not already discussed in his affidavit and to impeach or question witness credibility as appropriate. Mr. Clay will likewise be provided with the same opportunity as to any witness whose affidavit is filed on behalf of the Association or the District.

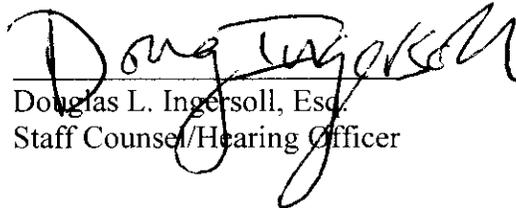
9. The District's Motion filed on **February 5, 2010**, after the completion of the pre-hearing conference, and before the preparation and issuance of this pre-hearing order, and which seeks to eliminate the submission of testimony by affidavit in this matter as discussed and agreed at the pre-hearing conference is denied.
10. The parties shall pre-mark all their respective exhibits prior to the preparation and submission of affidavits so as to allow for proper exhibit reference in the affidavits. Mr. Clay's exhibits shall be marked as "Clay Ex. 1," Clay Ex. 2" and so forth. The District Exhibits shall be marked as "District Ex. A" and the Association Exhibits as "Association Ex. A" and so forth. The parties shall have sufficient copies of their exhibits available for distribution at the hearing as required by Pub 203.02.
11. As discussed and agreed at the pre-hearing conference, counsel for the Association and the District shall prepare and issue subpoenas for their witnesses. Mr. Clay shall file a request with the PELRB under Pub 203.01 for witnesses subpoenas as necessary and the Association and District shall promptly notify the PELRB whether they will accept service of any such subpoenas.
12. Any further motions, with the exception of possible motions to dismiss, scheduled earlier in this order, shall be filed on or before March 10, 2010.

HEARING

Unless otherwise ordered as a result of the filing of any subsequent motion or for other good cause shown, the adjudicatory hearing between the parties will be held beginning at **8:30 a.m.** on **March 31, 2010** at the offices of the Public Employee Labor Relations Board in Concord. The time set aside for this hearing is 6 hours.

So ordered.

February 10, 2010


Douglas L. Ingersoll, Esq.
Staff Counsel/Hearing Officer

Distribution:

Jeffrey T. Clay

James F. Allmendinger, Esq.

Barbara Loughman, Esq.

Maureen Pomeroy, Esq.