



**STATE OF NEW HAMPSHIRE**  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**Allenstown Paraprofessional Association, NEA-NH**

v.

**Allenstown School District, SAU #53**

**Case No. E-0117-1**  
**Decision No. 2012-097**

**Appearances:** J. Joseph McKittrick, Esq., McKittrick Law Offices  
North Hampton, New Hampshire for the Complainant

Kathleen C. Peahl, Esq., Wadleigh, Starr, Peters, PLLC  
Manchester, New Hampshire for the Respondent

**Background:**

The Association filed an unfair labor practice complaint claiming that the District violated RSA 273-A:5, I (a), (b), (d), and (h) because it allegedly discriminated against and discharged an employee in retaliation for filing a grievance and voicing other complaints under various State and Federal Statutes. The Union requests that the PELRB find that the District has violated the provisions of RSA 273-A.

The District denies the charges and moves to dismiss on the grounds that the PELRB does not have jurisdiction over the claims of violation of Federal and State statutes other than RSA 273-A; that the complaint does not satisfy the requirements of Pub 201.02 (b); and that the complaint fails to assert any violation over which the PELRB would have jurisdiction.

In PELRB Decision 2011-170 the PELRB granted the District's motion to dismiss in part, ruling as follows:

The District's motion to dismiss Association claims based upon alleged violations of the American's with Disability Act, violations of free speech rights in criticizing the

administration, violations of RSA 275:56 relative to employee access to personnel files, and violations of an implied just cause standard is granted. *See Tamworth Educational Support Personnel Association/NEA-NH v. Tamworth School District*, PELRB Decision No. 2007-026 (declining to imply just cause standard in collective bargaining agreement)(affirmed on appeal, NH Supreme Court Case No. 2007-0339); and *Jeffrey T. Clay v. Newmarket Teachers' Association and Newmarket School District*, PELRB Decision No. 2010-130 (dismissing RSA 91-A, RSA 189:13 and/or RSA 189:14-a claims due to lack of jurisdiction)(summarily affirmed on appeal, NH Supreme Court Case No. 2010-0599). Additionally, evidence concerning such alleged violations is not relevant to the claim that the District improperly discriminated against and discharged an employee in retaliation for filing a grievance in violation of RSA 273-A:5, I (a), (b) or (d).

In PELRB Decision 2011-187 the board acted upon the Union's motion for reconsideration as follows:

This hearing in this matter is being rescheduled<sup>1</sup> and the case will be heard by a hearing officer. The Association's motion for reconsideration is denied subject to the following. During the course of the adjudicatory hearing the hearing officer shall determine as necessary whether any employee complaints relating to alleged violations of the American's with Disability Act (ADA), violations of free speech rights in criticizing the administration, or violations of RSA 275:56 relative to employee access to personnel files are relevant to the charge that the District violated RSA 273-A:5, I (a), (b) or (d) and improperly retaliated or discriminated against an employee for exercising rights and/or engaging in activity protected under RSA 273-A. However, the Board's prior order that proof of violations of such laws does not constitute a violation of RSA 273-A remains unchanged.

An adjudicatory hearing was held on July 18, 2011 at which time the parties were provided with the opportunity to present testimony and exhibits. Both parties filed post-hearing briefs, and the decision in this matter is as follows.

### **Findings of Fact**

1. The Allenstown Paraprofessional Association, NEA-NH (Association) is the certified exclusive representative of certain District employees, including Shelley Jolicoeur, an Educational Assistant until the termination of her employment in March, 2011. In general, Educational Assistants are part of the special education department and they support the teacher and help students in a group setting or by working one on one with individual students.

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<sup>1</sup> The Union had moved to continue and reschedule the adjudicatory hearing date prior to the filing of its motion for reconsideration.

2. The District is a public employer as that term is defined by RSA 273-A:1, IX.
3. The District and the Union are parties to a collective bargaining agreement covering the period July 1, 2010 to June 30, 2013 (CBA).
4. The CBA does not provide for progressive discipline of employees, and does not contain a "just cause" or similar provision providing that employees like Ms. Jolicoeur can only be terminated as employees for just cause.
5. Some time prior to the 2010-2011 school year Ms. Jolicoeur suffered injuries in a motorcycle accident. Consistent with her Doctor's advice she was subject to some physical limitations (Association Exhibits 1,2). For the 2010-2011 school year she was assigned to work with an autistic student at a District elementary school. This student had a tendency to act out in a sometimes physical and violent way.
6. Ms. Jolicoeur accepted this employment assignment and prior to the start of the 2010-2011 school year participated in a one day crisis prevention intervention (CPI) training which addressed the de-escalation of student situations. Ms. Jolicoeur did not have prior experience working with autistic students and she had not otherwise received any specialized training or education addressing how to safely work with autistic students with behavior issues. She did not file a grievance over her position assignment for the 2010-2011 school year.
7. The District did have in place certain protocols for employees to follow in the event of student based incidents in which additional assistance is required. Immediate and primary assistance in such situations is provided by a response team protocol. Response team members carry communication devices and they respond to student incidents in order to de-escalate and control the situation and environment.
8. Ms. Jolicoeur had reservations about her ability to effectively handle particular situations that might arise during the course of her work as an Educational Assistant assigned to an autistic

student, and her concern and reservations appeared to increase as the school year progressed. Ms. Jolicoeur was unhappy and appeared at times to have been overwhelmed by her assignment to work with an autistic student.

9. In September there were two student incidents addressed by the response team. Immediately after the second incident on September 30, Ms. Jolicoeur left her class room and went to the office to complain to Special Education Director Anthony Blinn. At the time Ms. Jolicoeur was upset, and in response to Mr. Blinn's instruction to return to the class, she declined, stating she would only return when she knew her co-worker was alright.

10. As reflected in Association Exhibit 5, a meeting was held on October 5, 2010 at Ms. Jolicoeur's request to discuss matters relating to the September incidents. Attendees included some members of the leadership team (Principal Lynn Allen, Assistant Principal Joe Vignola, and Special Education Director Anthony Blinn). Several of Ms. Jolicoeur's co-workers were also in attendance. At this meeting Ms. Jolicoeur expressed her belief that working conditions were unsafe and better strategies were necessary to address and control certain situations, her belief that there was a lack of trust among co-employees in the building, her belief that Principal Allen was not approachable and was unavailable, her general discontent with her position, her unhappiness that the meeting had not been held on the day she asked for it (September 30) but instead was held five days later, and her complaint that Superintendent Peter Warburton was not in attendance. Ms. Jolicoeur's complaints and concerns relating to response team protocol and autistic students in general were matters that were also being raised by other District employees, something which Principal acknowledged she was aware of and was working to address.

11. Near the end of the meeting, Principal Allen advised that the leadership team (leadership team members are Superintendent Warburton, Principal Allen, Assistant Superintendent Bickford, Assistant Superintendent Sherman, and Special Education Director Blinn) would get

back to Ms. Jolicoeur subsequently. At some point during this meeting or during this general time period Principal Allen also told Ms. Jolicoeur that the administration was about to present a plan to the school board relating to autistic students but she (Principal Allen) could not discuss in more detail given pending school board review.

12. On October 22, 2010 Ms. Jolicoeur suffered a neck injury while engaging with the autistic student under her supervision. She was sitting behind the student when he threw his head back and struck her on the chin, causing her head to be thrown back. See Association Exhibit 6 (Workers' Compensation Medical Form, which on October 26, 2010 approved return to work with modification). Ms. Jolicoeur was placed on administrative leave since at the time Principal Allen believed more information was needed; according to Principal Allen she knew there were students Ms. Jolicoeur could not work with but she was uncertain about what students she (Ms. Jolicoeur) could work with. The administrative leave was not a disciplinary action and District officials explained as much to her, although Ms. Jolicoeur remained upset about her status.

13. Ms. Jolicoeur returned to work in November with a new work assignment, consistent with the notation on the Workers' Compensation Medical Form. See Association Exhibit 6 and Joint Exhibit 9. Under her new schedule she was to work from approximately 8:00 a.m. to noon at the elementary school and from noon to 2:30 p.m. at the middle school. She was no longer assigned to work with an autistic student but she objected to her middle school duties, preferring to spend her entire work day at the elementary school.

14. Ms. Jolicoeur filed a grievance about her assignment to the middle school for a portion of her work day. See Joint Exhibits 5,6,7,8. By early 2011 the District had denied Ms. Jolicoeur's grievance but indicated her current work assignment could be subject to further review in the event of a change in her medical status. Ms. Jolicoeur did not pursue the grievance any further.

15. On February 17, 2011 Ms. Jolicoeur notified Mr. Blinn that she would like to attend a workshop about creating successful classroom teams. In response, Mr. Blinn advised that attendance remained to be determined. See Association Exhibits 9 and 10.

16. At 3:36 p.m. on Wednesday, February 23, 2011 Ms. Jolicoeur sent an email to Principal Allen asking to review her personnel file. Principal Allen responded that evening and proposed that she review the file that Friday at lunch. Early the next morning Ms. Jolicoeur arrived at Principal Allen's office, rejected any proposed scheduled times to review her file later, and demanded immediate access and review. Thereupon Principal Allen adjusted her schedule in order to provide Ms. Jolicoeur with immediate file review in a manner that avoided any further escalation or conflict. Ms. Jolicoeur reviewed the file for a few minutes and left. See District's Exhibits 1 and 2.

17. From September 2010 through 2011, during times when Ms. Jolicoeur had interactions with administrators as referenced in these findings, she engaged with administrators in an aggressive, loud, and sometimes highly emotional manner. She exhibited a lack of respect for administrators in her personal interactions with them. She had difficulty reconciling her workplace responsibilities with her personal needs and her opinions about how certain school operations should occur. In this regard, she had difficulty accepting the authority and discretion of administrators in certain areas, and she became confrontational and difficult when expressing her views about such matters.

18. Over the February, 2011 break the leadership team (members are Superintendent Warburton, Principal Allen, Assistant Superintendent Bickford, Assistant Superintendent Sherman, and Special Education Director Blinn) met and reached a consensus that termination of Ms. Jolicoeur's employment was appropriate. According to Principal Allen, Ms. Jolicoeur's conduct was not conducive to a positive school climate, and she had a tendency to place her

needs above all others, including the student's, in a manner that was inappropriate. Superintendent Warburton made the final termination decision, and Ms. Jolicoeur was notified on March 9, 2011, with an effective employment end date of March 24, 2011. See Joint Exhibit 2. The District did not immediately provide Ms. Jolicoeur with an explanation for the termination of her employment.

19. Ms. Jolicoeur was not a member of the Association until the 2010-2011 school year, and she was not active in union related activity during the course of her employment.

### **Decision and Order**

#### **Decision Summary:**

By prior order (PELRB Decision 2011-170) a number of the Association's claims were dismissed. As to the remaining statutory claims, the collective bargaining agreement does not provide for progressive discipline, and it does not provide that employees can only be disciplined or have their employment terminated for just cause. Since a review of the record indicates there is insufficient evidence to support the Association's claim that the District's termination of Shelly Jolicoeur's employment constituted a violation of RSA 273-A:5, I (a), (b), (d), or (h) the Association's requests for relief are denied and the complaint is dismissed.

#### **Jurisdiction:**

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

#### **Discussion:**

While it is not the role of the PELRB to substitute its judgment for that of public a employer like the District with respect to hiring and termination decisions, the PELRB does have authority to act in the event such public employer conduct violates the parties' CBA<sup>2</sup> or the

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<sup>2</sup> Although not directly germane to this case, disputes arising under a collective bargaining agreement are usually subject to the grievance process, including any provision for a final and binding decision by, for example a public

provisions of RSA 273-A cited by the Association. The statutory provisions which the Association contends were violated by the District provide as follows:

**273-A:5 Unfair Labor Practices Prohibited.**

I. 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;

(b) To dominate or to interfere in the formation or administration of any employee organization;

(d) To discharge or otherwise discriminate against any employee because he has filed a complaint, affidavit or petition, or given information or testimony under this chapter; and

(h) To breach a collective bargaining agreement.

It is evident that Ms. Jolicoeur was unhappy with her initial assignment during the 2010-2011 school year, and it may be the case that she was raising important points for the administration's (leadership team's) review and consideration with respect to protocol for managing autistic students. It is also apparent that administration officials could reasonably find the manner in which Ms. Jolicoeur conducted herself and engaged with them when raising her concerns about her situation and school operations to be unreasonably impatient, demanding, and at times discourteous and abrasive. This was so at the time of the September 30 incident and the related October 5 meeting. Ms. Jolicoeur maintained her style of engaging with administrators during the grievance process and later during her encounter with Principal Allen about her personnel file.

In this case, as was true in *Tamworth Educational Support Personnel Association/NEA-NH v. Tamworth School District*, PELRB Decision No. 2007-026 (denying termination claim brought under RSA 273-A:5, I (a), (c), (d), and (h))(affirmed on appeal, NH Supreme Court Case No. 2007-0339); and *Jeffrey T. Clay v. Newmarket Teachers' Association and Newmarket*

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employer as was true in *Appeal of Michael Silverstein*, NH Supreme Court No. 2011-012 (January 13, 2012). See also PELRB Decision No. 2010-203.

*School District*, PELRB Decision No. 2010-130 (denying termination claim brought under RSA 273-A:5, I (a), (b), (c), (d), and (g) claims)(summarily affirmed on appeal, NH Supreme Court Case No. 2010-0599), the Association's claims must be denied, and the complaint dismissed, because there is insufficient evidence to prove the alleged statutory violations.

A fair review of the record indicates there is insufficient evidence to prove that the District restrained, coerced or interfered with the exercise of any rights conferred by RSA 273-A by retaliatory action or otherwise, and therefore there is no violation of sub-part (a) of RSA 273-A:5, I. Likewise, this case has nothing to do with the formation of an employee organization, and the Association has not shown that the District interfered in its administration, so no violation of sub-part (b) of RSA 273-A:5, I has been proven. There were no proceedings or filings at the PELRB of the kind referenced in sub-part (d) of RSA 273-A:5, I until the filing of the Association's complaint in this case, a filing that occurred after Ms. Jolicoeur's employment was terminated, and therefore the Association has not shown a violation of this statutory provision either. The Association's RSA 273-A:5, I (h) claim (to breach a collective bargaining agreement) is also without merit. The Association does not contend that the District violated any express provisions of the CBA. Additionally, the District's termination of Ms. Jolicoeur's employment did not constitute a violation of the implied covenant of good faith and fair dealing implied in the parties' CBA. See *Tamworth Educational Support Personnel Association/NEA-NH v. Tamworth School District*, PELRB Decision No. 2007-026 (PELRB declined to find a just cause standard is implied in collective bargaining agreement). It may be that Ms. Jolicoeur can maintain claims in courts of general jurisdiction for alleged wrongful termination or under other theories. However, such actions are beyond the purview of this decision, and this decision offers no opinion on the likely merits of any such proceedings.

In accordance with the foregoing the Association's requests for relief are denied and the complaint is dismissed.

So ordered.

May 8, 2012

  
Douglas L. Ingersoll, Esq.  
Presiding Officer

Distribution:

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