This order affirms PELRB Decision No. 2007-026.

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2007-0339, Appeal of the Tamworth Educational Support Personnel Association, the court on March 24, 2008, issued the following order:

The Tamworth Educational Support Personnel Association (TESPA) appeals the order of the New Hampshire Public Employee Labor Relations Board (PELRB), in which the PELRB ruled that the Tamworth School District (district) did not engage in an unfair labor practice by terminating the employment of head cook, Margaret DeLong. We affirm.

When reviewing a decision of the PELRB, we defer to its findings of fact, and, absent an erroneous ruling of law, we will not set aside its decision unless the appealing party demonstrates by a clear preponderance of the evidence that the order is unjust or unreasonable. Appeal of Merrimack County, 156 N.H. 35, 39 (2007); see also RSA 541:13 (2007). Although the PELRB's findings of fact are presumptively lawful and reasonable, we require that the record support its determinations. Id.

TESPA first argues that the PELRB erred when it declined to find that the district had agreed that "just cause" was impliedly part of the parties' collective bargaining agreement (CBA) by past practice and statements made in collective bargaining negotiations. The district agrees with TESPA "that unwritten obligations may be inferred when they arise from the reasonable construction of CBA language" and that such obligations "can be found in past practices and 'common understandings' not expressed in a [CBA]." The district contends, however, that the PELRB correctly found TESPA's evidence insufficient to establish that just cause was part of the contract. Based upon our review of the record submitted on appeal, we conclude that it did not compel the PELRB to find that the CBA impliedly included a just cause provision.

TESPA argues that the PELRB should have implied a just cause provision based upon its offer of proof regarding an employee who was reinstated after having been terminated based upon "just cause discussions." The PELRB may examine the parties' past practices and other extrinsic evidence to discern their intent where the collective bargaining agreement is ambiguous or where the evidence relates to "some incidents as to which the contract is entirely silent." Wheeler v. Nurse, 20 N.H. 220, 221 (1849); see Appeal of N.H. Dep't of Safety, 155 N.H. 201, 208-09 (2007). Under certain circumstances, custom and past practice may establish an implied term of a collective bargaining agreement. Elkouri & Elkouri, How Arbitration Works 630 (M.M. Volz & E.P. Goggin eds.,

5th ed. 1997). In Appeal of New Hampshire Department of Safety, for instance, the evidence established that the past practice at issue existed "over the course of the employment relationship" between the union and the employer. Appeal of N.H. Dep't of Safety, 155 N.H. at 210. The practice continued openly, was never modified by multiple collective bargaining agreements into which the parties entered, and inexorably led the PELRB to conclude that "both parties had knowledge that the practice existed and by their respective actions over the protracted period of time demonstrated acceptance of it." Id. By contrast, the evidence here concerned a single employee's experience in July 2005. The PELRB reasonably determined that this offer of proof was insufficient to establish a binding past practice.

TESPA also argues that statements made by the district during the negotiations for the CBA that immediately followed the one governing the instant matter constitute "compelling evidence" that the CBA at issue here contains an implied just cause provision. TESPA's reliance upon these statements is misplaced. See Elkouri & Elkouri, How Arbitration Works, supra at 505-06. The record supports the PELRB's finding that the evidence of the negotiations "demonstrates a lack of agreement or understanding concerning just cause." Indeed, the PELRB could reasonably have concluded that the negotiations show that TESPA insisted that the new CBA contain a just cause provision because it did not believe that the CBA at issue contained one.

Moreover, the statements by the district at these negotiations did not compel a finding that the CBA at issue contained an implied just cause provision. For instance, in one negotiation, a member of the district's negotiating team stated that the district "feels [that just cause is] covered under labor laws & they just can't dismiss or discipline someone 'willie-nillie.'" In its counter proposals, the district stated that TESPA's just cause proposal was "[c]overed under the grievance procedure delineated in the CBA," and "[c]overed under labor law." "It is the very essence of conciliation that compromise proposals will go further than a party may consider itself bound to go on a strict interpretation of its rights." Elkouri & Elkouri, How Arbitration Works, supra at 506. Such compromise proposals, therefore, are generally entitled to little consideration. See id. at 505. Accordingly, we uphold the PELRB's dismissal of TESPA's just cause claim.

Although at oral argument the district observed that TESPA did not raise a just cause claim before the school board, its brief did not argue that TESPA's just cause claim was procedurally barred. Therefore, we do not consider whether TESPA's failure to raise just cause to the school board was fatal to its ability to argue just cause to the PELRB.

TESPA next asserts that the PELRB erred by failing to find that DeLong's employment was terminated in retaliation for her union activities. To establish

an unfair labor practice based upon retaliatory discharge, the union must prove by a preponderance of the evidence that the discharge was motivated by a desire to frustrate union activity. Appeal of Prof. Firefighters of E. Derry, 138 N.H. 142, 144 (1993). The employer may meet the union's evidence of retaliatory motivation with its own evidence. Id. 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 found to have violated the 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 144-45. The employer's motivation is a question of fact to be determined by the PELRB from the consideration of all the evidence. Id. at 144.

Based upon our review of the record submitted on appeal, we conclude that the PELRB could reasonably have found that DeLong's termination was not motivated by anti-union animus. There was ample evidence to support a finding that she was terminated because, as the PELRB found, she "was in effect using public funds as no interest loans to make purchases for her personal use."

Affirmed.

Eileen Fox,
Clerk

DUGGAN, GALWAY and HICKS, JJ., concurred.