NH Supreme Court affirmed this decision on 06-22-2016. (NH Supreme Court Case No. 2015-0434 & 2015-0516

State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

American Association of University Professors – UNH Chapter
and
University System of New Hampshire

Case No. E-0082-5 (Modification)

UNH Law Faculty Union
And
University System of New Hampshire

Case No. E-0166-1 (Certification)

(Consolidated Cases)

Decision No. 2014-256

Appearances:

Glenn R. Milner, Esq., Milner & Krupski, PLLC, Concord, NH for AAUP-UNH; Joseph P. McConnell, Esq., Morgan, Brown & Joy, LLP, Boston, MA for the USNH; and James F. Allmendinger, Esq., Staff Attorney, NEA-NH, Concord, NH for the UNH Law Faculty Union and Marcus Hurn, Intervenor.

Background:

On April 18, 2014 the American Association of University Professors-University of New Hampshire (AAUP-UNH) filed an agreed upon modification petition (Case No. E-0082-5) seeking to add University of New Hampshire Law School (UNH Law) tenure[1] faculty to the

[1] Tenured and tenure track faculty. The modification petition requests that all other UNH Law faculty positions be excluded.

AAUP-UNH bargaining unit. The existing AAUP-UNH unit consists of University of New Hampshire (UNH) tenure track and tenured faculty at the Durham and Manchester campuses.[2]

On May 6, 2014 four UNH Law professors filed a petition to intervene, stating that: 1) the modification petition inappropriately disregards an existing, albeit unofficial, law school bargaining unit known as the "Voting Faculty of the UNH School of Law;" 2) the existing UNH Law faculty has not been involved in any meaningful discussion of unionization or unit composition issues; 3) the proposed modification excludes some UNH Law positions/employees to their detriment, and that a more broadly based unit or a unit of UNH Law Voting Faculty is appropriate; and 4) the USNH is bound by existing UNH Law tenure contracts which cannot be altered as contemplated and proposed by the modification petition. The petitioners request that the PELRB grant the petition to intervene, provide additional time in which others can join the petition to intervene or file independently, and delay the proceedings for 60 days to provide affected law school employees with time to act.

The AAUP objected to the petition to intervene and asked the PELRB to deny the petition to intervene and approve the modification petition. The USNH filed a limited objection stating that the petition to intervene should be allowed only for the limited purpose of allowing UNH Law faculty to address community of interest issues at hearing.

A pre-hearing conference was held on June 12, 2014. At the pre-hearing the parties discussed the anticipated filing of a UNH Law faculty certification petition proposing a new UNH Law faculty bargaining unit.[3] The parties agreed that the pending modification petition and the anticipated certification petition should be consolidated for a hearing to be held at the end of July, 2014. On June 18, 2014 the UNH Law School Faculty Union (Faculty Union) filed

[2] See PELRB Decision No. 91-55 (August 8, 1991) and PELRB August 8, 1991 AAUP-UNH Faculty Unit Certification, Case No. U-0613.
[3] See PELRB Decision No. 2014-148 (June 12, 2014).

a certification petition[4], requesting that the PELRB conduct a secret ballot representation election for the following proposed bargaining unit:

Unit: All full time tenure/tenure track, alternative security, and contract faculty, including Staff Adjunct, VII.

Exclusions: Dean (and Interim Dean), Executive Director - Rudman Center, Associate Dean, Law Library Director, Assistant Dean of Career Services, Visiting Faculty, Emeritus Faculty.

The USNH filed an answer to the certification petition, raising community of interest and fragmentation concerns. The USNH believes placement of UNH Law tenure faculty in the existing AAUP unit is appropriate and avoids unnecessary fragmentation of USNH faculty into multiple units. The USNH also questions whether there is a sufficient community of interest between UNH Law tenure faculty and the other positions in the proposed Faculty Union unit.

The modification and certification petitions were consolidated for hearing, and the petition to intervene was granted.[5] On July 30, 2014 the undersigned conducted a hearing on the modification and certification petitions at the PELRB offices in Concord. At the time of hearing the Faculty Union and the USNH agreed to reserve inclusion/exclusion of the Staff Adjunct, VII position and address the status of that position as necessary following the issuance of this decision. Accordingly, whether the proposed bargaining unit should include the Staff Adjunct, VII position will not be addressed or decided in this decision. All parties have filed post-hearing briefs, and the decision[6] in these consolidated cases is as follows.

[4] The petition is supported by the requisite number of authorization cards as reflected by the PELRB July 7, 2014 Card Report.
[5] See PELRB Decision No. 2014-169 (July 7, 2014).
[6] The parties' Joint Stipulation of Fact are reflected in the Findings of Fact.

Findings of Fact

Background:

1. The USNH is a public-employer within the meaning of RSA 273-A. The University of New Hampshire is part of the USNH.

2. The University of New Hampshire has three campuses - Durham (UNH), Manchester (UNH-M), and Concord (UNH Law).

3. The AAUP is the duly certified bargaining agent for tenured and tenure-track professors at the UNH and UNH-M.

4. The Faculty Union is a public employee association seeking to represent teaching faculty at UNH Law as their official bargaining agent under RSA 273-A.

5. Franklin Pierce Law Center (FPLC) was established in 1973 as a private, non-profit law school governed by a board of trustees (FPLC trustees). FPLC remained an independent law school until 2010, when it affiliated with UNH (AAUP Exhibit 5) and changed its name to the UNH School of Law (UNH Law). On December 31, 2013 the existing law school dissolved and effective January 1, 2014 the law school formally became a college of the UNH, also known as the UNH School of Law. See AAUP Exhibit 6 (2013 Integration Agreement).

6. Although now formally "integrated" with UNH, the law school has preserved its ability to function in a fairly autonomous manner and has also retained most of its authority over academic operations, although some non-academic administrative functions have been supplanted and absorbed by existing UNH systems. Under the Integration Agreement "the UNH Law faculty and administration will continue to share sole authority over the UNH Law program of legal education" and "UNH Law shall not be subject to the UNH Graduate School's policies, bylaws, or rules."

7. The law school is unique among the UNH graduate schools in that it is subject to, and

dependent upon, the external guidelines, accreditation requirements, and periodic audits imposed by the American Bar Association (ABA) Standards and Rules of Procedure for Approval of Law Schools, UNH Law Exhibit 1. The importance of compliance with these ABA accreditation requirements is vital to the law school, since most states require bar applicants to have a degree from an ABA accredited law school. In order to satisfy the 1973 version of the ABA Standards and Rules of Procedure for Approval of Law Schools and become an ABA accredited law school, FPLC was initially associated with Franklin Pierce University. After a few years FPLC was able to incorporate as an independent entity and maintain its ABA accreditation. The school has since successfully completed approximately six ABA accreditation inspections.

8. ABA Accreditation Standard 405 imposes an academic freedom and tenure policy requirement and also calls for comparable security for faculty teaching in clinic programs:

> A law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members. A law school may require these faculty members to meet standards and obligations reasonably similar to those required of other full-time faculty members. However, this Standard does not preclude a limited number of fixed, short-term appointments in a clinical program predominantly staffed by full-time faculty members, or in an experimental program of limited duration.

9. The ABA "Interpretations" of Standard 405 include the following:

> Interpretation 405-1
>
> A fixed limit on the percent of a law faculty that may hold tenure under any circumstances violates the Standards.
>
> Interpretation 405-2
>
> A law faculty as professionals should not be required to be a part of the general university bargaining unit.
>
> Interpretation 405-3
>
> A law school shall have a comprehensive system for evaluating candidates for promotion and tenure or other forms of security of position, including written criteria and procedures

that are made available to the faculty.

Interpretation 405-4

A law school not a part of a university in considering and deciding on appointment, termination, promotion, and tenure of faculty members should have procedures that contain the same principles of fairness and due process that should be employed by a law school that is part of a university. If the dean and faculty have made a recommendation that is unfavorable to a candidate, the candidate should be given an opportunity to appeal to the president, chairman, or governing board

Interpretation 405-5

If the dean and faculty have determined the question of responsibility for examination schedules and the schedule has been announced by the authority responsible for it, it is not a violation of academic freedom for a member of the law faculty to be required to adhere to the schedule.

Interpretation 405-6

A form of security of position reasonably similar to tenure includes a separate tenure track or a program of renewable long-term contracts. Under a separate tenure track, a full-time clinical faculty member, after a probationary period reasonably similar to that for other full-time faculty, may be granted tenure. After tenure is granted, the faculty member may be terminated only for good cause, including termination or material modification of the entire clinical program.

A program of renewable long-term contracts shall provide that, after a probationary period reasonably similar to that for other full-time faculty, during which the clinical faculty member may be employed on short-term contracts, the services of a faculty member in a clinical program may be either terminated or continued by the granting of a long-term renewable contract. For the purposes of this Interpretation, "long term contract" means at least a five-year contract that is presumptively renewable or other arrangement sufficient to ensure academic freedom. During the initial long-term contract or any renewal period, the contract may be terminated for good cause, including termination or material modification of the entire clinical program.

Interpretation 405-7

In determining if the members of the full-time clinical faculty meet standards and obligations reasonably similar to those provided for other full-time faculty, competence in the areas of teaching and scholarly research and writing should be judged in terms of the responsibilities of clinical faculty. A law school should develop criteria for retention, promotion, and security of employment of full-time clinical faculty.

Interpretation 405-8

A law school shall afford to full-time clinical faculty members participation in faculty meetings, committees, and other aspects of law school governance in a manner reasonably similar to other full-time faculty members. This Interpretation does not apply to those persons referred to in the last sentence of Standard 405(c).

Interpretation 405-9

Subsection (d) of this Standard does not preclude the use of short-term contracts for legal writing teachers, nor does it preclude law schools from offering fellowship programs designed to produce candidates for full-time teaching by offering individuals supervised teaching experience.

10. UNH Law Faculty has a long history of working together to develop and provide a quality legal education to law school students. Although the law school is now formally a college of UNH, it continues to operate at the same Concord location, and there has not been any notable change in faculty responsibilities and working conditions since its establishment as a college of UNH. With perhaps some limited exceptions, law school faculty work independently of other UNH and UNH-M faculty, and there is not any significant or regular daily interaction between the majority of the law school faculty and other UNH or UNH-M faculty.

11. In general, the law school faculty is comprised of professionals with similar academic credentials and backgrounds. The faculty are all law school graduates, and most are members of the bar or eligible for membership. As lawyers all are subject to the same or similar rules of professional conduct and ethics, and all are engaged in the instruction of law at the graduate school level at the law school campus in Concord.

12. School founder and President Robert Rines, Dean Robert Viles, and the original law school faculty did not value many of the more traditional models of law school faculty organization and structure. For example, at FPLC all teaching faculty were "Professors of Law," and no distinctions like "Associate Professor" or "Assistant Professor" were made. The emphasis was

on faculty unity, inclusion, and the minimization of the negative attitudes and behaviors the school associated with traditional faculty rank and title assignments. Today, based upon the testimony provided by current law school professors at hearing, there is a self-felt community of interest and a reasonable belief and apprehension that denial of the proposed UNH Law Faculty unit and placement of tenure faculty in the AAUP unit will likely fracture the historically cohesive faculty group and result in unnecessary division, strife, and discord.

13. The school did adopt a tenure policy to satisfy ABA accreditation requirements under which full time faculty are eligible for tenure after two years of service. However, the school's tenure policy was somewhat relaxed and novel, both in substance and in process. The precise criteria and standards governing tenure eligibility were somewhat amorphous, and scholarship, a traditional hallmark of the traditional tenure process, was not required. Additionally, contrary to prevailing convention, the decision to award tenure rested with tenured faculty and the Dean (who was allocated one vote). The approval of the FPLC trustees was not required.

14. As a practical matter, the school's approach to its faculty during the 1970's and into the early 1980's, including hiring and compensation, involved placing most, if not all, of the responsibility for such matters with Dean Viles. His management style involved a fair amount of ad hoc decision making and a lack of clear guidelines and formal process. This resulted in a variety of faculty employment and compensation arrangements.

15. At some point in the early to mid-1980's the faculty collectively agreed it was time to initiate reforms to the prevailing customs and working conditions. A Faculty retreat ensued, and a Faculty Status and Equalization Committee was created to address issues like rank, title and compensation. This Committee's work resulted in a plan which, over the next 10 years, reduced pay disparity among the Faculty and implemented a more structured tenure policy. The

compensation equalization effort was modified by a faculty resolution in the 1990's which authorized the Dean to set compensation based on market conditions in order to attract and retain qualified Faculty to provide instruction in areas like tax, securities, and patent law.

16. The pinnacle of faculty efforts to address, structure, and improve their employment status and working conditions is the Faculty Appointments, Rights, and Responsibilities (FARR) agreement (University Exhibit 3). FARR was the result of extensive negotiations between the Faculty and President Rines and Dean Viles in the 1980's. Under FARR §IV faculty positions are classified as follows:

- Tenured or eligible for tenure;
-Alternatively secured or eligible for alternative security;
-Contract faculty with a discrete term;
-Visiting Faculty;
-Adjunct Faculty; or
-Emeritus Faculty.

17. FARR lists a number of rules and policies applicable to all faculty, and covers subjects like academic freedom, tenure, and scholarship as well as faculty hiring, retention, separation procedures, and other matters incidental to teaching at the school, like course load, office space, participation in faculty retreats, committee assignments, orientation participation, and vacation for faculty with substantial duties during the summer. The topics of sabbaticals and personal relationships in the workplace are also covered.

18. FARR also addresses faculty voting rights, and defines voting faculty as tenured or tenure eligible faculty, alternative security or alternative security eligible faculty, and contract faculty with a discrete term. FARR provides that in general faculty have the right to vote on faculty status matters and hiring recommendations, but on certain matters like, for example, tenure, voting is limited to eligible faculty. In other areas, FARR provides that the faculty "should strive to proceed by consensus." FARR, §IV.

19. Under FARR §XIV the five tenure criteria are: 1) Teaching Effectiveness; 2)

Participation in Governance of the Academic Programs; 3) Contribution to the Community; 4) Scholarship and Publication; and 5) Potential for Personal and Professional Growth. Alternative security candidates must meet all of the tenure requirements except Scholarship and Publication. FARR prescribes in detail the process to be followed in hiring, mentoring, and reviewing tenure and alternative security candidates, including a timetable for final decisions on tenure and alternative security status. The hiring of tenure or alternative security eligible faculty is done by the Dean "in consultation with the faculty" under FARR §IX.

20. Per FARR §VII the Dean has the authority to independently hire contract faculty for initial terms of two years, "renewable for terms of no more than five years each by the Dean with the acquiescence of the faculty." Under FARR §VI "the number of full time Contract Faculty for a discrete term...may not exceed one-fifth the number of faculty having or eligible for tenure or alternative security."

21. Tenure faculty have the greatest job security, and are only subject to dismissal due to financial exigency or, as stated in FARR §XVIII because of:

a. Continuing failure or inability substantially to carry out the duties of a faculty member, or

b. Such gross misconduct (such as unjustified violence, dishonesty, or abuse of power) as to make continued collegial association with the actor intolerable.

22. Alternative security faculty have five year terms which are automatically renewed. They are subject to termination for the same reasons as tenure faculty and additionally may be terminated "with one year's notice in case of termination or material modification of the entire program in which the faculty member teaches." FARR §VI.

23. As of 2005 FARR had not been officially approved (or rejected) by the law school's Board of Trustees, although the history of FARR indicates that at the very least the Trustees did not object to FARR and in fact informally accepted FARR as an agreement which governed most, if not all, of the important terms and conditions of employment for the law school faculty. FARR has long

had the approval of the law school's dean and president, and in 2006 the Trustees ratified FARR, which effectively eliminated any lingering question about FARR's legal viability.

24. FARR, which survived the law school's integration with UNH and remains in full force and effect, can only be amended by a majority vote of the FARR faculty with the assent of the Dean. Recent amendments made in anticipation of full integration with UNH include a 2012 amendment to recognize that final tenure decision now rest with the Trustees of the University System, which aligns final tenure approval at the law school with the system governing final tenure approval in the USNH, and a second 2012 amendment which adopted the use of professorial titles (Assistant Professor, Associate Professor, Professor) based upon years of experience. While the use of titles conforms to some extent with the current practice at UNH, assigning titles based upon years of experience is unique to the law school.

25. In terms of its student body and formal curriculum, the law school has always appealed to traditional (recent undergraduates) and non-traditional students (including individuals with advanced degrees and those making career changes). The law school's intellectual property program is among the best in the country, and for years has attracted students with advanced degrees and/or extensive professional experience in science, engineering, and technology.

26. The school has developed strong clinical programs, which involves hiring experienced and duly licensed New Hampshire attorneys to maintain a law practice at the law school in specific practice areas with the assistance of students. The clinics provide valuable legal services to members of the community. Clinical faculty have an attorney-client relationship with clinic clients and are subject to applicable obligations and regulations which govern attorney-client relationships. Students who work in the clinic are provided with practical experience in areas fundamental to the practice of law like client contact, case management, and case responsibility.

27. The school's most recent innovation is the Daniel Webster Scholar program, which, through a mixture of traditional academics and intern/externships, qualifies the successful graduating student for direct admission to the New Hampshire Bar without taking and passing the a multi-day bar examination.

28. The school's more traditional or standardized law school curriculum includes, for first year J.D. students, Legal Writing and Analysis I & II Legal Research and Information Literacy, The Legal Profession (a legal skills course that introduces students to the practicalities and skills necessary to be an effective lawyer), Contracts, Civil Procedure, Torts, Constitutional Law, Fundamentals of Law Practice or Fundamentals of Intellectual Property (Legal Skills course that introduces students to criminal, civil, and IP practice through hands-on assignments and realistic simulations), Article II Sales, and Property.

29. The upper level requirements for J.D. students include Criminal Procedure, Administrative Procedure, Professional Responsibility, an Upper-Level Writing Course, and an Upper-Level Legal Skills Course.

30. The affiliation and integration have resulted in benefits for students at both institutions as well as enrichment and joint research opportunities for faculty. The schools worked together to create two popular dual degrees: a JD/MBA with UNH's Peter T. Paul College of Business and Economics, and a JD/MSW with UNH's College of Health and Human Services. The Exchange Agreement between the two schools allows graduate degree students from UNH and JD and LLM or interdisciplinary masters students from the UNH Law who are in good academic and financial standing at each institution to enroll for graduate/law coursework and to earn academic credits at the other institution.

Decision and Order

Decision Summary:

The petition to modify the existing AAUP UNH Durham and Manchester faculty bargaining unit to add UNH Law tenured and tenured track faculty is dismissed. The petition for certification requesting approval of a proposed bargaining unit of UNH Law faculty is granted. The bargaining unit status of the Staff Adjunct VII position remains to be determined.

Jurisdiction:

The PELRB has jurisdiction over all petitions to determine bargaining units, modify bargaining units, and certify the exclusive representative of an approved bargaining unit through the process of a representation election pursuant to RSA 273-A:8, 273-A:10, and N.H. Admin. Rules, Pub 301-303.

Discussion:

A. <u>Unit Composition and Modification Criteria and Process</u>:

"The principal consideration in determining an appropriate bargaining unit is whether there exists a community of interest in working conditions such that it is reasonable for the employees to negotiate jointly." *Appeal of Town of Newport*, 140 N.H. 343, 352 (1995) (quoting *Appeal of the University System of New Hampshire*, 120 N.H. 853, 855 (1980)). The PELRB determines bargaining units in accordance with the provisions of RSA 273-A:8 and Pub 302.02 (b). RSA 273-A:8 (Determining Bargaining Unit) provides that:

> I. The board or its designee shall determine the appropriate bargaining unit and shall certify the exclusive representative thereof when petitioned to do so under RSA 273-A:10. In making its determination the board should take into consideration the principle of community of interest. The community of interest may be exhibited by one or more of the following criteria, although it is not limited to such:
>
> (a) Employees with the same conditions of employment;
> (b) Employees with a history of workable and acceptable collective negotiations;

(c) Employees in the same historic craft or profession;
(d) Employees functioning within the same organizational unit.

In no case shall the board certify a bargaining unit of fewer than 10 employees with the same community of interest. For purposes of this section, probationary employees shall be counted to satisfy the employee minimum number requirement. In no case shall such probationary employees vote in any election conducted under the provisions of this chapter to certify an employee organization as the exclusive representative of a bargaining unit.

II. The board may certify a bargaining unit composed of professional and non-professional employees only if both the professional and non-professional employees, voting separately, vote to join the proposed bargaining unit. Persons exercising supervisory authority involving the significant exercise of discretion may not belong to the same bargaining unit as the employees they supervise.

Pub 302.02 (b)(Additional Criteria for Determining Appropriate Bargaining Units) states that:

(a) An appropriate bargaining unit shall be characterized by the existence of a community of interest shared by its members.

(b) In determining the appropriate bargaining unit, the board shall consider the following as evidence of a community of interest, in addition to the elements set out in RSA 273-A:8, I (a) through (d):

(1) A common geographic location of the proposed unit;

(2) The presence of:

a. Common work rules and personnel practices; and
b. Common salary and fringe benefit structures; and

(3) The self-felt community of interest among employees.

(c) In addition to considering the principle of community of interest, the board shall also consider:

(1) The effect of forming any particular bargaining unit on the efficiency of government operations as contemplated in RSA 273-A:1, XI; and

(2) The potential for employees within the proposed bargaining unit experiencing a division of loyalties between the public employer and the employees' exclusive representative.

Petitions for modification of existing bargaining units are processed according to the following procedure and criteria set forth in N.H. Admin. Rule, Pub 302.05:

(a) Where the circumstances surrounding the formation of an existing bargaining unit are alleged to have changed, or where a prior unit recognized under the provisions of RSA 273-A:1 is alleged to be incorrect to the degree of warranting modification in the composition of the bargaining unit, the public employer, or the exclusive representative, or other employee organization if the provisions of section (d) are met, may file a petition for modification of bargaining unit.

(b) A petition shall be denied if:

(1) The question is a matter amenable to settlement through the election process; or

(2) The petition attempts to modify the composition of a bargaining unit negotiated by the parties and the circumstances alleged to have changed, actually changed prior to negotiations on the collective bargaining agreement presently in force.

(c) The petition shall set out the same categories of information, including the present bargaining unit positions, which is required of a petition filed under Pub 301.01 except no showing of interest shall be required to accompany a petition filed under this section. The petition shall set out a clear and concise statement of the circumstances prompting the filing of the petition. This information may be provided on a modification petition form, copies of which may be obtained from the board pursuant to Pub 103.01.

(d) An employee organization, other than the exclusive representative, may file a petition for modification only during time periods or under conditions when it would be entitled by statute or these rules to petition for an election to be certified as the exclusive representative. At other times, only the employer or exclusive representative may file a petition for modification of a bargaining unit.

B. <u>Sequence of Filings:</u>

The AAUP and USNH argument that the modification petition must be granted and the certification petition denied because the modification was filed first and is agreed to is denied. The PELRB's authority under RSA 273-A:8, I to determine bargaining units is not limited or restricted by agreements between a public employer and bargaining agent. N.H. Admin. Rule, Pub 302.01 (b) provides that "[a]greement between a public employer and an employee organization (on unit composition) shall not prejudice the rights of any intervenor not participating in such discussions and shall not be binding on the board." There is also no specific authority in the PELRA or the administrative rules which requires the PELRB to give priority or

preference to a modification petition filed ahead of a certification petition where both petitions involve the same public employer and overlap as to the positions involved.

C. Timing of Certification Petition:

USNH's argument that the certification petition is somehow flawed and should be dismissed because it was not filed within the statutory "open window" is without merit. RSA 273-A:10 certification petitions proposing the formation of a new bargaining unit, like the one filed by the UNH Faculty Union, may be filed at any time[7] per Pub 301.01 (a), and they are not subject to the filing and election limitations imposed by Pub 301.01 (a) and (b) and RSA 273-A:11, I (b).[8]

D. Community of Interest:

The USNH argues that there is an insufficient community of interest among the UNH Law Faculty and that placement of UNH Law tenure faculty in the existing AAUP unit is the appropriate disposition of these cases. The AAUP supports the USNH's view, and contends that all UNH tenure faculty, including UNH Law tenure faculty, should be in the same bargaining unit. For its part, the Faculty Union maintains that there is a strong community of interest among UNH Law Faculty and that the establishment of an official bargaining unit comprised of all UNH Law Faculty is consistent with the history of UNH Law labor relations at the school and prevents an unnecessary division among the faculty.

The community of interest inquiry is fact driven and the applicable criteria allow for the combination of a variety of different positions in a single bargaining unit. In this case I find

[7] Although petitions seeking recognition of a unit previously decertified by vote are subject to 12 month representation election hiatus per RSA 273-A:10,III

[8] In contrast, "challenge" petitions filed by a rival union seeking to take over representation of an existing bargaining unit, or modification petitions filed by a union seeking to remove positions from an existing bargaining unit for the purpose of forming a new unit and having a representation election are subject to filing and election restrictions under Pub 301.01 (a) and (b), Pub 302.05 (d), and RSA 273-A:11, I (b).

there is a sufficient community of interest among UNH Law Faculty to justify their placement in the same bargaining unit. With respect to the listed community of interest criteria, UNH Law Faculty are all in the same historic craft or profession (teaching at the graduate level to law degree candidates) and have the same or substantially similar professional training and credentials. They all work in a common location (Concord) as part of the same organizational unit (law school teaching faculty), and they have a history of workable and acceptable collective negotiations (represented, for example, by FARR and other faculty initiatives to address employment issues and law school operations over the past 30 years). Many of the rules governing their service and their essential work as teachers, regardless of their rank or title, are similar or the same. There is also a strong self-felt community of interest as reflected by the testimony of several current law school professors at hearing.

Additional community of interest evidence includes the fact that all faculty has, and will, continue to confront the specter of ABA accreditation requirements and inspections. It is also worth noting that, although not dispositive of the question, the ABA Interpretation 405-2 expresses a clear preference for some degree of independence with respect to law school faculty bargaining units (law faculty as professionals should not be required to be part of the general university bargaining unit). There is also the faculty's joint efforts over the last 30 years to augment the school's more traditional law school curriculum with nationally recognized programs like the school's Intellectual Property and Clinic Programs and, most recently, the Daniel Webster Scholar program. The development, success, and maintenance of these kinds of programs, together with instruction in the traditional curriculum areas, has clearly unified the faculty into a cohesive and productive group of individuals with common professional goals and objectives.

Evidence which highlights the differences among the UNH Law Faculty includes current rank and titles, like tenure, alternative security, and contract faculty or Assistant Professors, Associate Professors, and Professors of Law. However, there is a lack of evidence suggesting that such differences have in the past, or will in the future, result in problematic divisions of the faculty or special alliances which will undermine, threaten or otherwise impair the ability of the faculty to negotiate jointly under the PELRA. In fact, the evidence of the faculty's role in the school's history and development is to the contrary, and it supports the conclusion that the faculty has in the past, and likely will continue in the future, to use their common interests to effectively address workplace issues.

In contrast, any community of interest between UNH Law tenure faculty and the AAUP is relatively weak, and is based almost entirely on rank. However, the tenure job classification is not, in this case, enough to require approval of the modification petition and dismissal of the certification petition. It is true that there is some overlap and integration among and between UNH Law tenure faculty and AAUP unit faculty, and that partly as a result of these efforts students will be able to pursue several joint degree programs and other opportunities, as mentioned in Finding of Fact 30. However, there are no significant and regular professional working relationships between the UNH Law tenure faculty and UNH and UNH-M tenure faculty which outweigh the strong community of interest among positions in the proposed UNH Law Faculty bargaining unit. There is also insufficient evidence that, having integrated with and become a college of the University of New Hampshire, the law school and its faculty will now experience transformations in daily operations, professional relationships, duties, and responsibilities, and work location to a degree which will dilute the existing community of

interest among UNH Law Faculty or increase the community of interest between UNH Law tenure faculty and other UNH tenure faculty.

Based on the foregoing I conclude that the proposed UNH Law Faculty unit satisfies and meets the community of interest requirements set forth in RSA 273-A:8, I and Pub 302.02 (b). It appears that UNH Law will continue to function as a "stand alone" law school in Concord with a unique identity and history, notwithstanding its new status as a college of the University of New Hampshire. Virtually all UNH Law Faculty will continue to focus and concentrate the majority of their professional efforts on UNH Law operations at the Concord campus. The predominant UNH Law Faculty objective will continue to be the delivery of a legal education subject to the constraints and requirements of the ABA Standards and Rules of Procedure for Approval of Law Schools.

E. Fragmentation, Government Efficiency/Operations, Loyalty:

The certification petition does not present concerns about fragmentation, possible impact on the efficiency of government operations, or employee loyalty which require either denial of the proposed UNH Law Faculty unit or approval of the modification petition. There is a dearth of evidence indicating that UNH suffers from a plethora of bargaining units in general or faculty bargaining units in particular. There is also a lack of evidence which can establish that approval of the proposed UNH Law Faculty unit will impose any administrative impact on the USNH or interfere with government operations and efficiencies beyond what is typically incidental to a duly approved bargaining unit. Additionally, placement of the UNH Law tenure faculty into the AAUP unit would not necessarily resolve USNH fragmentation concerns since granting the modification petition and dismissing the certification petition would not prevent a subsequent petition to establish a bargaining unit of the remaining UNH Law Faculty. Likewise, there is no

evidence showing that approval of the proposed UNH Law Faculty unit will result in diminished employee loyalty or, conversely, that approval of the modification petition and dismissal of the certification petition will more effectively preserve employee loyalty.

F. Election Proceedings:

The use of election proceedings under the PELRA to resolve questions like those presented in this case is another basis for dismissal of the modification petition and approval of the certification petition. A fundamental difference between modification and certification proceedings is that all petitions for certification are subject to the election process for the purpose of resolving questions of representation. Further, per N.H. RSA 273-A:10, III, the election ballot always includes a "no representative" option, which allows, by majority vote, employees to choose not to participate in collective bargaining under the PELRA. In contrast, representation elections are not conducted in modification proceedings. However, the value and utility of the election process is specifically recognized in the modification rule, N.H. Admin. Rule Pub 302.05 (b)(1)(calling for dismissal of a modification petition in the event the question is "amenable to settlement through the election process"). In this case, approval of the proposed UNH Law Faculty unit in the certification petition is appropriate for the reasons already discussed, irrespective of the Pub 302.05 (b)(1) election language. However, the Pub 302.05 (b)(1) election language is further support for dismissal of the modification petition and approval of the certification petition.[9]

Accordingly, the certification petition is granted and the modification petition is dismissed. The bargaining unit proposed in the certification petition is appropriate under the

[9] Under N.H. Admin. Rule, Pub 301.02 the AAUP could have (but did not) filed a petition to intervene, supported by the requisite number of confidential authorization cards, to appear on the ballot in any election held in the certification case.

relevant standards and is approved. The inclusion/exclusion of the Staff Adjunct, VII position in the bargaining unit remains to be determined.

So ordered.

Date: 11/20/2014

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