



NH Supreme Court declined appeal of this decision on January 14, 1999, NH Supreme Court Case No. 98-463.

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

FALL MOUNTAIN REGIONAL	:	
TEACHERS ASSOCIATION,	:	
NEA-NEW HAMPSHIRE	:	
	:	
Complainant	:	CASE NO. T-0227:17
	:	
v.	:	DECISION NO. 97-078
	:	
FALL MOUNTAIN REGIONAL	:	
SCHOOL DISTRICT	:	
	:	
Respondent	:	

APPEARANCES

Representing Fall Mountain Regional Teachers Association:

Mary Gaul, UniServ Director

Representing Fall Mountain Regional School District:

Edward Kaplan, Esq.

Also appearing:

- Sam Jacobs, Fall Mountain Regional School District
- Carol Bennett, Fall Mountain Regional School District
- Dianne O. Hicks, Fall Maintain Regional School District
- Heidi A. Gore, Fall Mountain Teachers Association
- Melanie A. Zwolinski, Fall Mountain Teachers Association
- Ryan Spaulding, Eagle Times
- Patricia Adams, Fall Mountain Regional School District
- Jim Elsesser, Fall Mountain School Board
- Leo Corriveau, Fall Mountain Regional School District
- Stephen Varone, Fall Mountain Regional School District
- Daniel J. Ferreira, Fall Mountain Regional School Assoc.
- Lisa Ranauro, Fall Mountain Regional School District
- Gary Dennis, Keene Sentinel
- Eddie Singer, Fall Mountain
- Edward Singer, Fall Mountain

Alan Chimel, Prinicipal
 Cassandra Deedy, Fall Mountain Regional High School
 William T. Hollis, Fall Mountain Regional Teachers Assoc.

BACKGROUND

The Fall Mountain Regional Teachers Association, NEA-New Hampshire (Association) filed unfair labor practice (ULP) charges against the Fall Mountain Regional School District (District) on August 1, 1996 alleging violations of RSA 273-A:5 I (a), (c), (d), (h) and (i) resulting from the punitive transfer of a guidance counselor because of her involvement in Association grievance activity. The Fall Mountain Regional School District filed its answer on August 23, 1996, inclusive of a request that the PELRB stay action on the ULP until an advisory arbitration proceeding under the CBA and involving the same fact situation shall have been completed. Those proceedings were completed with the issuance of an advisory arbitration award on May 5, 1997, the contents of which are not part of the record in this case. See respondent's Motion to Exclude Arbitration Decision and Motion to Dismiss, both of which were filed with the PELRB on June 12, 1997. The Association filed an answer to the District's Motion to Dismiss on June 27, 1997. The District's Motion to Dismiss was taken under advisement by the PELRB on July 7, 1997. The Association filed an answer to the Motion to Exclude on July 1, 1997. After continuances granted to the parties for prior hearing dates on October 10, 1996, November 19, 1996 and February 27, 1997, this matter was heard by the PELRB on June 12, July 7 and July 8, 1997. The record was held open until the close of business on August 6, 1997 for the filing of post hearing briefs.

FINDINGS OF FACT

1. The Fall Mountain Regional School District is a "public employer" of teachers, guidance counselors and other personnel within the meaning of RSA 273-A: 1 X.
2. The Fall Mountain Regional Teachers Association, NEA-New Hampshire, is the duly certified bargaining agent for teachers, guidance counselors and other personnel employed by the District.
3. The District and the Association are parties to a collective bargaining agreement (CBA) for the period June 16, 1995 through June 30, 1996. Article XV is entitled "Teacher Rights" and says:
 - 15.1 The employer agrees that it will in no way discriminate against or between teachers because of their race, creed, religion, color, national origin, or ancestry, age, sex, marital status,

physical characteristics, or place of residence. The employer further agrees that it will not discriminate against any teacher with respect to hours, wages, or any terms or conditions of employment by reason of his membership in the Association or activities.

- 15.2 The private and personal life of any teacher is not within the appropriate concern or attention of the employer, provided said activities do not directly involve the school community and do not prevent him from carrying out his teaching duties.

Article X is entitled "Grievance Procedure" and defines "grievance" as an "alleged violation, misinterpretation or misapplication with respect to one or more public employees, the Association or any provision of this Agreement." "An 'aggrieved teacher' is the person or persons making the claim." It sets forth both an informal and formal grievance procedure consisting of four steps. The third step, called "Level C," is advisory arbitration and the fourth step, "Level D," is review by the School Board whose decision is "final."

4. The parties have completed the advisory arbitration phase of this case (Level C) and the School Board (Level D) has made its decision not to comply with the advisory arbitration award. Under Appeal of State Employees Association, 139 NH 441 at 444, (1995), "Where the final determination under the grievance procedure does rest with the public employer, absent explicit language in the CBA specifically negotiated and agreed upon by the parties waiving their right to appeal to the PELRB, the PELRB is not robbed of its jurisdiction to hear unfair labor practice disputes,"
5. Melanie Zwolinski has been employed at Fall Mountain since 1989 when she was hired as a secondary guidance counselor at the high school. She has had consistently positive evaluation reports and has no history of discipline. She has been involved in policy formulation, having written a K-12 curriculum for student involvement in the guidance process and has been involved in projects which have brought recognition to herself and the District. (Associa-

tion Exhibit Nos. 1 and 2). Likewise, historically she has been outspoken in making inquiries about and pursuing issues which she perceives need clarification or correction. They have included a sexual harassment issue for which she later received a written apology (Association Exhibit No. 4), questioning the role of a school board member who wanted information about scholarship awards prior to graduation (Association Exhibit Nos. 5 and 6), reporting an incident where a senior member of the guidance department was observed sitting on the lap of a male faculty member in a situation that was observable by students (Association Exhibit No. 14) and prompting an inquiry, through a NEA UniServ Director, about the qualifications of an individual who may be evaluating her (Association Exhibit Nos. 10 and 17).

6. On February 19, 1996, the high school principal, Alan Chmiel, sent a memo to Cassandra Deedy, Guidance Chair, and both counselors, Zwolinski and Arthur Moyer, explaining the importance of their attendance at the March 13, 1996 eighth grade orientation night. (Association Exhibit No. 18). This prompted a memo from Zwolinski and Moyer raising five concerns about their attendance at that function: (a) they have been paid for attending that function in the past, (b) it is not one of their 185 contracted days (CBA Article 8.3), (c) they no longer receive differential pay for evening functions, (d) attendance was originally described as voluntary, and (e) representation was already available from the department chair. (Association Exhibit No. 19.) This was followed by a formal grievance to the Superintendent on March 15, 1996 citing Moyer, Zwolinski and L. Ranauro as complainants and violations of CBA Articles 8.3, 8.4, 9.1 as well as Appendix A, Section A (1). (Association Exhibit No. 20.) Lisa Ranauro is a special education teacher at the high school and is a twelve-year employee of the District. After the grievance was filed, she testified that the Superintendent called her to ask if she had intended her name to be associated with the grievance and that he "hated to see me get in the middle of a difficult situation," especially because both she and her husband were employed by the District. Uniserv Director Gaul filed a letter of protest with the Superintendent about this incident on April 8,

1997. (Association Exhibit No. 30.)

7. The District uses a group called the "Q Team," consisting of supervisors, administrators and principals, to review the functioning of the various programs in the District, to build consensus and to engage in joint decision making. It usually meets monthly. Assistant Superintendent Dan Ferreira testified that there was little discussion about guidance functions at the February Q Team meeting, other than that Walpole guidance counselor Edward Singer had been looking at other job opportunities and there was a desire to retain him in the District.

8. At 7:30 in the morning on March 21, 1996, prior to the monthly Q Team meeting on that date, Chmiel, Ferreira and Deedy met to discuss the demands on Deedy's position, how responsibilities might be realigned and salary. Deedy testified that during this meeting and the Q team meeting which followed, Singer's qualifications were discussed with her and others. She said it was obvious that if Singer were transferred to the high school, then one of the current counselors, Moyers or Zwolinski, would have to be transferred elsewhere. She claims not to have learned of the Zwolinski transfer until March 27, 1996. After the Ferreira-Chmiel-Deedy meeting, Ferreira memorialized the terms of the reorganization of Deedy's job and salary in a memo to the Superintendent dated March 21, 1996 (Board Exhibit No. 2.) Before this meeting concluded, Chmiel, per his testimony, said that he asked Deedy if she could agree to the reorganization plans for the guidance department, and, if she could, to put those recommendations in writing. Deedy agreed and generated a memo dated March 25, 1996. (Association Exhibit No. 29.) This was the first time the concept of "gender equity" appeared. Deedy said, in pertinent part, "Melanie Zwolinski [will] be transferred to one of the district junior high schools. I would suggest a move to the Walpole School and have Ed Singer transferred to FMRHS. This move would ensure 'gender equity' at both schools." She said it was Chmiel's idea that Zwolinski, not Moyers, be transferred from FMRHS. Chmiel identified, and Ferreira confirmed, that it was Ferreira who mentioned the need for a female counselor at Walpole to address the concerns of teacher Jean Simons; however, neither Chmiel

nor Ferreira could recall using the term "gender equity" with respect to the March 21, 1996 meeting.

9. Sam Jacobs is a 17 year employee of the District and attended the February Q Team meeting as well as the morning of the March 21st Q Team meeting. He said the Singer-Zwolinski transfers were not an agenda item for the March 21st meeting. He liked Singer, said he was doing a good job, was well liked and that he did not want to lose him to the high school. He did not have an opportunity to speak with either Zwolinski or Singer prior to the time the transfer decision was made. After that decision was made, it caused his staff to be upset at the loss and prompted calls of dissatisfaction from parents. Subsequently, Jacobs testified at the advisory arbitration hearing that one of the reasons for the transfer was to separate Moyers and Zwolinski. Their not being together was intended to improve the high school guidance program because they represented two personalities which were troublesome to Chmiel. After having given this testimony, the Superintendent called Jacobs to attend an executive session of the school board where his testimony was discussed with him and he was thereafter non-renewed, notwithstanding his having told the board he would support the transfers if they were in the best interests of the District. He said that the board knew he did not want the transfer to happen. Approximately a week after this meeting with the school board, it met again and renewed his contract for School Year 1996-97.

10. Carol Bennett, a 20 year employee of the District, is currently principal at Alstead and was formerly the Student Services Director to whom guidance counselors reported. She is an attendee at Q Team meetings and confirmed the February discussions relating to keeping Singer on staff. She knew that transferring Singer to FMRHS would mean someone would leave. She confirmed that Chmiel recommended pursuing Zwolinski's transfer and was aware of her talents because of her work on grades 6 through 8 curricula. She said there was "tension" between Chmiel and Moyers and Zwolinski and that Chmiel had called them a "strong team." Chmiel's own testimony acknowledged philosophical differences between Moyers, Zwolinski and himself. Bennett was unaware of Jean Simons's request for a female guidance counselor at Walpole until after the

transfer decision had been made. Likewise, she knew Jacobs was not wholeheartedly behind the transfer but would support it for the benefit of the District. The Q Team did not ask Singer about what would induce him to stay in the employ of the District nor was Zwolinski consulted about how this would make her credentials more "well rounded." The issue of "gender equity" was not raised during the time she attended the March 21st Q Team meeting.

11. Edward Singer has been a District employee for five years, four at Walpole and one at FMRHS. He learned of this involuntary transfer to FMRHS from Jacobs, one or two days before the school board met. The news upset him and caused him to lose 1 1/2 days of work. He attended the school board's public meeting to tell them that he wanted to stay at Walpole and that he had not asked to go to FMRHS. He also said he had told Deedy he did not want to transfer during her weekly visits to his building. All but one Walpole teacher signed a letter asking that he be kept at Walpole.
12. After the intervening events, Chmiel informed Zwolinski of her transfer at 1:15 p.m. on Monday, May 27, 1996. Bennett testified that this was the only involuntary transfer in the guidance department that she could recall in her twenty years as an employee of the District.

DECISION AND ORDER

After reviewing the extensive presentation of facts developed by the parties in two and a half days of hearing, we have concluded that no unfair labor practice has been committed. We reach this conclusion based on several factors.

Primarily, management has reserved to it the right to direct the structure and operation of the district. This is preserved by Article II of the CBA which says, "Except as otherwise provided in this Agreement...the operation and management of the schools, and the control, supervision and direction of the staff, are vested exclusively in the Board, and this Agreement shall not be so construed as to limit or impair its respective statutory powers, discretions or authorities." Likewise, it is also preserved by statute. RSA 273-A:1 XI notes that "managerial policy...shall be construed to include but shall not be limited to the functions, programs and methods of the public employer including...the public employer's organizational structure, and the selection, direction and number of its personnel, so as to continue public control of governmental functions." (Emphasis added.) The transfer of Zwolinski to

the Walpole School was nothing more than the Board's exercising its prerogatives under the contract and the statute. This is further substantiated by the fact that the action complained of was not solely the transfer of Zwolinski but a reorganization where it was first determined that there was a need to transfer Singer to FMRHS after which Zwolinski was back filled to the Walpole position.


Second, management asserted that the reorganization was in furtherance of improving student services, in this case the breadth and experience to be offered by guidance personnel at both locations. Management wanted to emphasize certain guidance skills and specialties. To accomplish this, they implemented the reorganization, well within their mandate under RSA 273-A:1 XI.

Third, while the evidence showed that both Signer and Zwolinski would have preferred to remain in their original assignments, neither lost any salary, benefits or entitlements under the CBA as the result of the reorganization. As noted by Carol Bennett (Finding No. 10), the transfer of Zwolinski was intended to make her more "well rounded" and enhance her guidance credentials.

Finally, based on the foregoing and particularly the immediately preceding paragraph, we find no violation of the CBA. Wages, benefits and entitlements remain intact while the employer has exercised its managerial prerogative. The ULP is DISMISSED.

So ordered.

Signed this 29th day of AUGUST, 1997.


EDWARD J. HASELTINE
Chairman

By majority vote. Chairman Edward J. Haseltine and Member Seymour Osman voting in the majority with Member Molan voting in the minority. Member Molan's dissenting opinion follows.

The majority of the Board finds that the School District in this case has an unrestricted right to transfer District employees. This member would agree that the contract under which the Complainant was working reserves such a right to management but I part company with the majority in their belief that this right is unfettered. The agreement, besides a Management's reservation clause, provides a non-discrimination clause which this member feels was violated. In a case such as this one, it is necessary for the Complainant to meet the initial burden of showing anti-union animus and/or discriminatory reasons for the transfer. I believe

that the Association met that burden. The burden thereafter should shift to the employer to demonstrate the bona fide business reasons which dictated the employer's actions. In this case, the employer, through the documentary evidence and testimony, established a business reason, however, I do not find it to be a bona fide business reason.

In the first instance, the superintendent set forth several reasons in his reply to the Complainant's grievance which were then repeated in the District's answer to this complaint. Those reasons included, *inter alia*, that the transfer would provide for gender equity and the opportunity to have a female present at the Walpole school to deal with female student problems.

Although the federal and state statutes regulating discrimination provide for a bona fide occupational qualification exception to the non-discrimination provisions, that exception has been strictly construed by the courts. The employer bears a heavy burden to demonstrate that such a requirement was a bona fide qualification. The employer in this case simply did not meet that burden. The transfer of Ms. Zwolinski and Mr. Singer did not create any gender equity within the school system. In fact, it was demonstrated that throughout the school system there was gender inequity. I would find that the reasons proffered by the School District in its official communications and which were supported by documentary evidence are simply bald faced gender discrimination. Indeed, the parties' collective bargaining agreement does not contain the bona fide occupational qualification exception, so even if the employer were able to meet that burden under statutory law, it cannot prevail under the terms of the collective bargaining agreement.

Of course, during the hearing, the employer sought to abandon the reasons set forth in their official responses and put distance between those reasons and those which they offered at the hearing. The testimony was offered to indicate that the Q-team did not consider the matter of gender equity but rather were considering the possibility that Mr. Singer might leave the school system. It was their desire to retain his services. In order to retain his services they felt that a transfer to the high school would be beneficial for that purpose. I find it most interesting that the Q-team, neither prior to their meeting nor after, inquired of Mr. Singer as to whether he wanted such a transfer. Mr. Singer testified that he did not want the transfer and he made that known to the administration and the school board. This argument on the part of the District simply cannot withstand the test of logical explanation. It also fails to explain why the superintendent, not once but twice, caused the reasons relating to gender equity to be put in writing.

Having failed to demonstrate a bona fide business reason, one is left with the question as to why then was Ms. Zwolinski transferred. The Association offered the most plausible explanation. During the previous year, a number of incidences had occurred when Ms. Zwolinski was involved in the filing of a grievance and asserting other matters which brought into

question the decisions made by or conduct on the part of administrators. It has been acknowledged that there were educational philosophical differences between the principal and members of the Guidance Department. The only plausible reason offered by either party as to the reason for the transfer was that this was an attempt to discriminate against the Complainant based on her having utilized her contractual rights through the Association to question the administration. The fact that the principal refused to answer legitimate inquiries made with respect to certain matters at the high school that were posed through the Association contrasted against the principal's readily given explanation to an individual teacher who did not approach the matter through the Association only breathes life into the allegation of anti-union animus.

Anti-union animus is most difficult to prove in any forum and it is a matter of deductive reasoning rather than objective evidence. However, in this case, the principal's attitude demonstrated by the evidence is as close to objective evidence as one can reasonably expect to secure in any union discrimination case. It also fills the vacuum created by the lack of a business reason for the transfer.

In sum, I would find that the Association met its burden of proof to demonstrate anti-union animus and discriminatory conduct on the part of the employer. I would further find that the employer has failed to demonstrate a bona fide business reason for their conduct. I would also find that they must be held to the reasons set forth in their official responses as the testimony regarding the reasons for the transfer are simply not credible. I respectfully dissent.