THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case Nos.: 2017-0115

APPEAL OF STATE EMPLOYEE'S ASSOCIATION/SERVICE EMPLOYREES INTERNATIONL UNION, LOCAL 1984

BRIEF OF APPELLEE COMMUNITY COLLEGE SYSTEM OF NEW HAMPSHIRE

MORGAN, BROWN & JOY LLP

Jeffrey S. Siegel, Esq., NH Bar No. 19223
jsiegel@morganbrown.com
Joseph P. McConnell, Esq., *pro hac vice*
jmcconnell@morganbrown.com
200 State Street, 11th Floor
Boston, MA 02109
(617) 523-6666

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2. Whether the Board's determination that Rick Watrous, an affected bargaining unit member, was not improperly denied pay when he attended a bargaining session was unjust or unreasonable as a matter of law.

RELEVANT STATUTES AND RULES

1. RSA Chapter 273-A (Appendix ("App."), 0001 – 10)

2. RSA Chapter 541 (App. at 0011 – 15)

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STATEMENT OF CASE AND FACTS

This case stems from an attempt by the State Employee's Association of New Hampshire, SEIU Local 1984 ("SEA") to expand the scope of the adjunct bargaining unit beyond that legitimately recognized by the New Hampshire Public Employee Labor Relations Board ("PERLB"). The facts underlying this appeal began on February 22, 2016, when the parties commenced negotiations for their successor collective bargaining agreement. (Certified Record ("R.") 000019). The parties' most recent agreement expired on June 30, 2016. (*Id.*) Over the course of March and April 2016, the parties exchanged a number of proposals and counterproposals. (R.000153 – 204). Among its proposals, SEA proposed an amendment to Article 9, "Workload," that would provide compensation for "any requirements, trainings, or professional development." (R. 000162). Community College System of New Hampshire ("CCSNH") rejected SEA's proposed amendments to Article 9 regarding compensation for "any requirements, trainings, or professional development." (R. 000184). Though none of SEA's proposals specifically referenced the tutoring services that members of the bargaining unit

performed in addition to their teaching responsibilities, SEA took the position during negotiations that its proposals were meant to encompass all activities that occur outside of course instruction, to include tutoring. (Rick Watrous Testimony, Transcript p. 43 – 44 [R. 000073 – 74]). In response, CCSNH maintained that compensation for tutoring work was not recognized bargaining unit work, and therefore fell outside the scope of bargaining. (R. 000274, 00085 -86). As support for its position, CCSNH noted that tutoring is not recognized work for the bargaining unit and pointed to an October 13, 2015 arbitration award issued by Arbitrator Philip Dunn. In that case, SEA argued that CCSNH had violated the parties' CBA when it changed the rate of pay for tutors at NHTI without bargaining with the union. (R. 000121). Arbitrator Dunn reasoned that "given the bargaining history...along with the fact that there is no language in the CBA regulating the [pay rate for tutoring]," there was no evidence that the parties intended to include the manner of paying adjuncts for tutoring work as an enforceable part of their CBA. (R. 000124). As to the training, it was CCSNH's position that compensation for required training related to being a faculty member was included in the CBA's per credit compensation for teaching a course. (R. 00081).

The parties reached impasse on May 23, 2016, and agreed upon the services of Mediator Gary Altman for a mediation session. (R. 00019). The parties scheduled mediation for Monday, July 18, 2016 by agreement. (*Id.*)

On July 6, 2016, a bargaining unit member, Mr. Rick Watrous, e-mailed Rebecca Dean, the Director of ACE, requesting that he be allowed to participate in the mediation "without losing pay [he] would otherwise earn as a writing tutor working from 10-2 that Monday." (R., 000028). On July 8, 2016, Ms. Dean informed Mr. Watrous that his request was denied, as he was "not eligible to be paid for tutoring hours that he has elected not to perform due to his

participation in adjunct faculty negotiations. (*Id.*). In response, Mr. Watrous objected to CCSNH's decision, and in doing so reiterated his intent to attend the mediation as a member of the bargaining team. (R. 000231). Ultimately, since it was apparent that Mr. Watrous would not be attending his scheduled tutoring hours and there would be no coverage in the writing center on July 18, Ms. Dean decided to close the writing center for that day. (R. 000103].

On August 18, 2016, SEA filed an unfair labor charge alleging that CCSNH had violated RSA 273-A:3; RSA 273A:5, I(a), (e), (f), and (g); and RSA 273-A:11. (R. 000001 – 7). Specifically, SEA alleged that CCSNH failed to negotiate in good faith when it refused to bargain over terms and conditions for summer semester and compensation for tutoring work. (R. 000004). Further, SEA alleged that CCSNH committed an unfair labor practice when it refused to compensate Mr. Watrous for his scheduled tutoring work while he attended mediation. (R. 000006).

A hearing was held on October 3, 2016, before the PERLB. (R. 000034). At the hearing, the parties presented evidence and examined witnesses. Specifically, CCSNH presented substantial evidence and the PELRB found that tutoring is not "bargaining unit work," and accordingly, CCSNH was under no obligation to bargain with SEA with regard to the matter. First, there is no dispute that tutoring work is separate and distinct from the adjunct faculty's course teaching responsibilities. (Transcript, Rick Watrous Testimony, p. 40 at lines 5 – 9 [R. 000071]; see also Rebecca Dean Testimony, p. 60, 63 [R. 000091, 000094]). Specifically, students do not receive any academic credit for any of the tutoring services they receive. (Transcript, Rebecca Dean Testimony, p. 64, lines 10 – 14 [R. 0000095]). Additionally, in contrast to adjuncts or other full-time faculty members, tutors are not required to evaluate or otherwise provide feedback to the students they work with. (*Id.*, lines 15 – 18). While an

adjunct may be familiar with the assignment and/or the student, neither is necessarily from a course the adjunct is teaching. (See Transcript, Rick Watrous Testimony, p. 25 – 26 [R. 0000056 – 57]). The hiring, scheduling, and coordination of tutors is under the exclusive oversight of the Director of ACE, as opposed to the respective academic departments where adjunct faculty are hired and teach their courses. (Transcript, Rebecca Dean Testimony, p. 59 – 63 [R. 000091 – 94]). Moreover, although there are a number of adjunct faculty who elect to seek out and perform services as tutors, not every tutor is an adjunct faculty member. (*Id.*, p. 59 – 61 [R. 000091 – 92]). Rather, as Dr. Dean explained, tutors are sourced from numerous places, including students and individuals otherwise unaffiliated with the CCSNH, *i.e.* professional tutors and retirees. (*Id.*).

Additionally, CCSNH presented evidence that it was not obligated to compensate Mr. Watrous who elected not to perform tutoring hours in order to voluntarily attend mediation. (R. 000244, 000278).

The parties filed post hearing briefs on November 4, 2016. (R. 000243 – 000270). In a decision dated December 15, 2016, the Board appropriately dismissed SEA's unfair labor charge. (R. 000275). In doing so, the Board found that the tutoring work the adjuncts performed at ACE is not bargaining unit work. (R. 000277 – 278). Specifically, the Board concluded that "adjuncts, who are part-time faculty, are responsible for teaching a particular course, inclusive of the limited consultation referenced in our findings of fact." (R. 000278). The Board found that unlike the full-time teachers in *Appeal of Berlin Education Association, NHEAINEA,* 125 N.H. 779 (1984), SEA's bargaining unit members who happened to be engaged by ACE as tutors were not performing a natural and integral extension of their bargaining unit work. (R. 000277). The Board found that tutoring is wholly separate and apart from the course work for which the faculty member was retained and for which the bargaining unit formed. (R. 000278). In finding that the separate

tutoring work performed at ACE was not bargaining unit work, the Board concluded that CCSNH had no obligation to bargain with SEA as to wages for this type of work. (*Id.*). Finally, the Board determined that Mr. Watrous was not improperly denied pay when he attended the mediation. (R. 000279). The Board correctly reasoned that the reference in RSA 273-A:11.II to "without loss of pay or benefit'...mean[s] without loss of any pay or benefit derived from *bargaining unit work*." (*Id.*). As the tutoring work Mr. Watrous missed was not bargaining unit work, the Board found that CCSNH was not required to pay Mr. Watrous for the tutoring hours he did not perform in order to attend the July 18 mediation session. (*Id.*)

SEA filed a Motion for Rehearing, which was denied without an opinion, by a two to one vote of the PELRB on January 31, 2017. (R. 000281 – 00286, 000293). On April 20, 2017, this Honorable Court issued an order denying CCSNH's request for summary disposition, and this appeal followed accordingly.

SUMMARY OF ARGUMENT

This appeal is without merit – the Board's decision in this matter rests on a sound interpretation of both the record and legal precedent before it. SEA's arguments amount to nothing more than a mere disagreement with the Board's findings of fact and analysis, which is insufficient to justify overturning the Board's reasoned decision in this matter.

Pursuant to RSA 541:13, when reviewing a decision of the PERLB the Court should "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 State Employee's Assoc. of N.H.*, 158 N.H. 258, 260 (2009), *Gallo v. Traina*, 166 N.H. 737, 740 (2014). The Board's findings of fact are presumed *prima facie* reasonable. RSA 541:13. "In reviewing the Board's findings, [the

Court's] task is not to determine whether [it] would have found differently or to reweigh the evidence, but rather, to determine whether the findings are supported by competent evidence in the record." *Appeal of N.H. Retirement System*, 167 N.H. 685, 690 (2015).

In the case at bar, in determining whether CCSNH was obligated to bargain over the subject of tutoring, the Board properly focused its analysis on whether the separate tutoring work being performed is "bargaining unit work" for adjunct faculty members. Ultimately, after a careful review of the evidence, which included testimony from both the Dean of ACE and Mr. Watrous, the Board found that it is not. The Board also properly determined that Mr. Watrous was not improperly denied pay when he attended mediation because he had not missed any bargaining unit work in doing so.

SEA argues that in reaching its conclusions the Board deviated from the principles of *Appeal of Berlin* and failed to apply the required analysis for determining what constitutes a mandatory subject of bargaining. However, these arguments are at odds with the precedent SEA has placed so much reliance on. Specifically, in *Appeal of Berlin*, the Court first found that extracurricular activities were necessarily a part of the job of full-time teachers, and accordingly, were *bargaining unit work*. In the instant case, the Board correctly found that unlike extracurricular activities, tutoring is not an essential or necessary part of the role of part-time adjuncts and their per-course assignments. Because this tutoring is not bargaining unit work, the Board appropriately determined that there was no violation in the CSSNH's refusal to discuss a mandatory subject of bargaining.

With regard to the CCSNH's failure to pay Mr. Watrous for tutoring work that he missed while serving on the bargaining team, the Board's conclusion was the logical result of the Board's determination that tutoring is not bargaining unit work. SEA's arguments against the

PERLB's analysis are merely re-litigation of the Board's conclusions regarding the status of tutoring services performed by adjunct faculty.

Because SEA has failed to establish that the Board's determination was unjust, unreasonable, and/or unsupported by the law, this appeal should be denied.

ARGUMENT

1. The decision of the New Hampshire Public Employee Labor Relations Board that tutoring performed at New Hampshire Technical Institute's ("NHTI's") Academic Center for Excellence ("ACE") is not bargaining unit work for adjunct faculty was not unjust or unreasonable as a matter of law.

The PELRB properly concluded that the scope of the work of adjunct faculty at the colleges of the CCSNH was limited to the part-time teaching role that they are hired to perform – teaching credit-bearing classes. The PELRB also correctly determined that additional tutoring work was not within the scope of the certified bargaining unit and therefore was not a mandatory subject of bargaining. The Board appropriately exercised its expertise and applied its precedent. Nothing in this Court's review should compel a different result than that made by the Board.

A. The Board's Analysis of Appeal of Berlin Was Appropriate.

In *Appeal of Berlin*, the primary argument advanced to the Court was that the performance of extracurricular activities by bargaining unit members was not covered under the bargaining agreement, and therefore, was not bargaining unit work. 125 N.H. at 781. In response, the Court made the following determination:

> Teaching is not limited to classroom instruction, but also involves the complete training of a child for citizenship and leadership. Extracurricular activities can be a significant part of that training.

Id. at 782. Accordingly, the Court held that extracurricular activities were within the scope of a teacher's duties. *Id.* It was only after making this finding that the Court turned to the question of whether extracurricular activities were a mandatory subject of bargaining. *Id.*

In the instant case, the Board conducted its analysis in a similar vein, dealing first with CCSNH's primary argument that tutoring is not bargaining unit work. In doing so, the Board made the astute observation that, unlike *Appeal of Berlin* and the cases cited therein, this case does not involve *extracurricular activities*. (R. 000277). Rather, as the Board found in its decision, the tutoring provided by ACE "is merely a *service* CCSNH offers to students who would like help completing class assignments." (*Id.*) (emphasis added).

This particular finding is well supported by the record where both Mr. Watrous and Ms. Dean testified that students are not required to go to tutoring, but do so on their own volition, by "walking in" during ACE's hours or, on the rare occasion, by making an appointment. (Transcript, Rick Watrous Testimony, p. 47 – 48 [R. 000078 – 79]; see Rebecca Dean Testimony, p. 58 at lines 12 – 23 [R. 000089]). Moreover, though students are encouraged to bring specific assignments with them to tutoring, and in fact most do, they do not receive any academic credit for any of the tutoring services they receive. (Transcript, Rebecca Dean's Testimony, p. 63 – 64 [R. 000094 – 95]). While an adjunct faculty member may be familiar with the assignment and/or the student, neither is necessarily from a course the adjunct is teaching. (See Transcript, Rick Watrous Testimony, p. 25 – 26 [R. 0000056 – 57]). Indeed, the student has no obligation to continue to work with any one particular tutor or even to participate at all. Finally, in contrast to the courses that adjuncts or other full-time faculty members teach, students do not receive academic credit for work with tutors and tutors are not required to evaluate or otherwise provide feedback to those they work with. (Transcript, Rebecca Dean Testimony, p. 64, lines 15 - 18, [R. 0000095]).

CCSNH does not refute that tutoring is an important resource for a student in his or her educational development, or that there can be some overlap in the skillsets that adjuncts use to

provide course instruction versus tutoring. However, the record clearly establishes that tutoring is not a part of or attendant to the limited part-time teaching that bargaining unit adjunct faculty are hired to perform. Rather, tutoring is an extra resource that CCSNH makes available, and students are not required to make any commitment to either ACE or the tutors.

Consequently, the instant case is reasonably distinguishable from not only *Appeal of Berlin*, but also the cases SEA places its reliance on in arguing to the contrary. (Appellant's Brief, at p. 27). Indeed, the cases which SEA argues support its contention that tutoring work is an extension of an adjunct's normal duties and responsibilities are cases that focus explicitly on the performance of extracurricular activities, *i.e.* coaching, supervising student activities, by full-time employees. *Appeal of Berlin*, 125 N.H. at 781, *Brd. of Ed. of the City of Asbury Park v. Asbury Park Ed. Ass'n.*, 145 N.J.Super 495, 499 (N.J. 1976) (striking bargaining unit members were assigned to coach and/or supervise various sports and performance arts groups). In contrast, the adjuncts here "are part-time faculty, [who] are responsible for teaching a particular course, inclusive of the limited consultation...," and are not, as the Board recognized, engaged in the "training of a child for citizenship or leadership." (R. 000278).

SEA argues that the Board erred in failing to consider the required test for determining mandatory subjects of bargaining. However, the emphasis SEA places on this test is misplaced as the case law clearly demonstrates that first and foremost there must be a determination as to whether the work in question is *bargaining unit work*. Notably, in *City of Asbury Park*, the New Jersey court case cited by SEA, employed this exact approach in its analysis of whether certain bargaining unit members had engaged in an illegal strike when they withheld their performance of assigned extracurricular activities. Specifically, the Court conducted a detailed analysis of case law from various jurisdictions, all supporting the proposition that tutoring is an extension

of a teacher's ultimate responsibility towards his or her students. 145 N.J.Super. at 500 – 506. After holding "that extracurricular activities are an integral part of a child's education and are incorporated into the duty to properly teach," the Court then turned to whether or not the teachers could negotiate over the subject. *Id.* at 507 – 508.

In the case before this Court, contrary to SEA's contentions, the Board adhered to the relevant case law and properly first addressed the question of whether tutoring work can be considered bargaining unit work. Because it properly determined that it was not, the Board correctly came to the attendant conclusion that bargaining regarding non-bargaining unit work was not a mandatory subject of bargaining.

B. The Board Properly Found that Tutoring is Not Bargaining Unit Work.

In its analysis, the Board concluded that the tutoring work being performed by adjuncts was not integral or related to their bargaining unit work. (R. 000277). In doing so, the Board recognized and applied the lessons from *Appeal of Berlin* to the realities of the tutoring work at issue in light of the evidence presented at the hearing.

Specifically, the Board found that adjunct faculty positions are part-time, and that the bargaining unit members' engagement was specific to the classes the faculty member was assigned to teach, recognizing this was a significant distinction from *Appeal of Berlin*. (R. 000278). Moreover, the hiring, scheduling, and coordination of tutors is under the exclusive oversight of Rebecca Dean as the Director of ACE, as opposed to the respective academic departments where adjunct faculty are hired and teach their courses. (Transcript, Rebecca Dean Testimony, p. 59 – 63 [R. 000091 – 94]). Specifically, Ms. Dean is responsible for sourcing tutors from various pools of candidates, which includes a variety of individuals other than those concomitantly serving as adjunct faculty – including current students who serve a "peer tutors,"

and professional tutors (such as recent graduates, high school teachers, and retirees). (*Id.* at p. 59 – 61 [R. 000091 – 92]). Once an individual is hired to be a tutor, Ms. Dean is responsible for issuing him or her an appointment letter, which is wholly separate from the adjunct's engagement to provide instruction in certain courses. (*Id.*, p. 63 at lines 8 -10 [R. 000094]; see also Rick Watrous Testimony, p. 39 at lines 12 – 16 [R. 000070]). Finally, all of the scheduling for all tutors, to include those in the writing center, is coordinated by Ms. Dean and based on the tutor's stated availability. (*Id.*, p. 62 at lines 15 – 17 [R. 000093]).

Moreover, there is nothing in either the parties' CBA or elsewhere that states that tutoring is a regular and natural occurrence of the adjuncts' duties. (R. 000273).[1] Indeed, to the contrary, the only evidence directly on point is the October 13, 2015, arbitrator's award issued by Arbitrator Phillip Dunn, where it was expressly found that there was no evidence that the parties intended to include the manner of paying adjuncts for tutoring work as an enforceable part of their CBA. (R. 000122 – 23).

Because SEA has not advanced any evidence that demonstrates that tutoring work is a necessary and integral part of the part-time adjuncts' duties, it has not met its burden in establishing that the Board's determination was unjust, unreasonable and/or unsupported by the record. Accordingly, this Court should affirm the Board's decision.

2. The Board's determination that Rick Watrous, an affected bargaining unit member, was not improperly denied pay when he attended a bargaining session was not unjust or unreasonable as a matter of law.

As to the Board's findings regarding Mr. Watrous' claim for compensation for tutoring hours he missed as the result of his participation in negotiations, the Board's determination was the logical

[1] In its brief, SEA takes particular issue with the argument CCSNH advanced in its post-hearing brief regarding the description of the bargaining unit as set forth in the Board's MA 2011 certification, specifically the contention that it focuses exclusively on the course teaching work that adjunct faculty perform. (Appellant's Brief, at p. 29 – 30). However, any influence this argument had on the Board's decision appears to be minimal, particularly where the Board did not place any specific reliance on this finding in making its determination. (R. 000122 – 124).

consequence of the Board's analysis of the whether tutoring work is bargaining unit work. Accordingly, the Board's conclusion was not only reasonable, but fully supported by the record.

As noted in the Board's decision, its analysis on this issue was based on SEA's argument that the tutoring work is included in the "terms and condition of employment" CCSNH is required to bargain over. (R. 000262, 000278). Such an argument necessarily presumes that tutoring work is bargaining unit work; however, as set forth above, the Board correctly concluded that tutoring work was not bargaining unit work. The Board recognized, pursuant to RSA 273-A:11, that the question of whether the work in question is bargaining unit work must be answered before determining whether the faculty member is entitled not to lose compensation. (R. 000279). Accordingly, the Board appropriately focused its inquiry on whether Mr. Watrous was missing bargaining unit work when he elected to attend the July 18 mediation. (*Id.*) As the Board concluded that such work was not bargaining unit work, it necessarily followed that Mr. Watrous was not entitled to the compensation he demanded. (*Id.*)

SEA's chief disagreement with Board's findings is that there should be no qualifications whatsoever as to what constitutes "loss of pay or benefits." (Appellant's Brief, at p. 20 – 21). However, such a broad interpretation of RSA 273-A:11 (II) would virtually put employers on the hook to compensate any bargaining unit member who professes to be engaged in the "vital work" of the union.

Contrary to SEA's contentions, CCSNH did not divest Mr. Watrous of the opportunity to attend mediation without loss of pay of benefits. Rather, the record demonstrates that Mr. Watrous knew that mediation was scheduled for July 18, 2016, as early as June, 2016. (Transcript, Rick Watrous Testimony, p. 45 at lines 17 – 22 [R. 000076]). Despite this knowledge, Mr. Watrous waited until July 6, 2016, to inform Ms. Dean of his intention to attend the session and request payment for the tutoring hours he would be missing in doing so. (*Id.* at

p. 46 at lines 1 – 5 [R. 000077]). On July 8, 2016, Mr. Watrous was informed by email that he would not be paid for the tutoring work he intended to miss on July 18, 2016. (R. 000232). In response, Mr. Watrous objected to CCSNH's decision, and in doing so reiterated his intent to attend the mediation as a member of the bargaining team. (R. 000231).

In none of these communications did Mr. Watrous ever indicate that he would forego attending mediation or that he intended swap shifts with someone else, a regular practice among the tutors. (See Transcript, Rebecca Dean Testimony, p. 72 at lines 9 – 12 [R. 000103]). Accordingly, since it was clear that Mr. Watrous did not intend to perform his tutoring responsibilities on July 18 and had not secured anyone to fill in for him, Ms. Dean decided that to close the writing center. (*Id.*).[2]

Accordingly, SEA has failed to establish that Board's determination that Mr. Watrous was not entitled to payment for his July 18 tutoring hours was unjust, unreasonable, and/or unsupported by evidence. Accordingly, the Board's decision should be affirmed.

CONCLUSION

For the foregoing reasons, CCSNH respectively requests that the decision of the Public Employee Relations Board be affirmed.

[2] SEA argues that Mr. Watrous was not given any notice as to CCSNH's decision to completely close the center, which effectively precluded him from finding another tutor to swap with. However, as the record demonstrates, swaps are coordinated among the tutors on a regular basis without the involvement of Ms. Dean. (Transcript, Rick Watrous Testimony, p. 44 – 45 [R. 000075 – 76]; Rebecca Dean Testimony, p. 69 at lines 12 – 16 [R. 000100]). Accordingly, once Mr. Watrous learned that CCSNH did not intend to compensate him for the tutoring hours in question, there was nothing stopping him from making efforts to obtain his replacement and lose no pay.

Respectfully submitted,

COMMUNITY COLLEGE SYSTEMS OF NEW HAMPSHIRE

By its Attorneys:

Jeffrey S. Siegel, Esq., NH Bar No. 19223
jsiegel@morganbrown.com
Joseph P. McConnell, Esq., *pro hac vice*
jmconnell@morganbrown.com
MORGAN, BROWN & JOY, LLP
200 State Street, 11th Floor
Boston, MA 02109
Tel: (617) 523-6666

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ORAL ARGUMENT

Oral argument, not to exceed fifteen minutes, will be presented by Joseph P. McConnell, on behalf of the Community College System of New Hampshire.

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2017, in accordance with Rule 16 of the New Hampshire Supreme Court rules, two (2) true and correct copies of the foregoing document have been served upon counsel for the SEA, John Krupski, Esq., and the PERLB Executive Director Douglas Ingersoll, Esq., as well as one copy upon the Attorney General's Office, through first class mail.

Jeffrey S. Siegel