THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

Consolidated cases

Docket Nos. 04-E- 299 and 04-E-0230

Patricia Bedford v. New Hampshire Community Technical College System and State of New Hampshire Division of Personnel .

Anne Breen

v.

New Hampshire Community Technical College System and State of New Hampshire Division of Personnel .

MEMORANDUM OF LAW IN SUPPORT OF UPHOLDING THE COMMISSION'S FINDING OF NO PROBABLE CAUSE

NOW COMES the Respondents, New Hampshire Community Technical College System and the State of New Hampshire Division of Personnel, by and through their attorneys, the Office of the Attorney General, and states as follows:

PARTIES

1. The Petitioners, Patricia Bedford and Anne Breen, ("Petitioners," or "Bedford," or "Breen") are state employees who works at the New Hampshire Technical Institute in Concord ("NHTI"), an educational institution which is part of the New Hampshire Technical College System. The NHTI is one of four regional community technical colleges within the New Hampshire Technical Col1ege System.

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2. Co-respondent, New Hampshire Technical College System ("NHCTCS"), is a State agency, created by the State of New Hampshire to provide, within its financial ability, for the preparation of youth and adults to engage in employment as technicians and skilled workers and for continued higher education to the mutual benefit of those persons, business and industry, and the general economy of the state. RSA 188-F: 1.

3. The Department of Regional Community Technical Colleges is governed by a Board of Trustees, formerly established as the Board of Governors, and comprised four regional community technical colleges.

4. Co-respondent Division of Personnel ("Division"), is a division of the Department of Administrative Services, is also a state agency. The Division is responsible for managing a centralized personnel system and overseeing the administration of all employee benefit programs except for the state's retirement system. RSA 21-1: 42.

STATEMENT OF THE CASE

5. The Petitioners brought their complaints of discrimination to the New Hampshire Commission for Human Rights which found no probable cause. This appeal followed pursuant to RSA 354-A:22.

STANDARD OF REVIEW

6. RSA 354-A: 22 states, at pertinent parts:

> "I. Any complainant, respondent or other person aggrieved by such order ofthe commission may obtain judicial review of the order... in a proceeding as provided in this section...

> II. Such proceeding shall be initiated by the filing of a petition in such court, together with a written transcript of the record upon the hearing before the commission..... The court shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony and proceedings set forth in such transcript an order or decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the commission, with full power to issue injunctions against any respondent and to punish for contempt of court. No objection that has not been urged before the commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.
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> III. Any party may move the court to remit the case to the commission in the interests of justice for the purpose of adducing additional specified and material evidence and seeking findings thereon, or in the alternative to move the court to accept such additional evidence itself, provided he shows reasonable grounds for the failure to adduce such evidence before the commission. The superior court shall have the authority to make all rulings of law. findings of fact and determinations of damages and fines. if any. notwithstanding any such rulings. findings or determinations made by the commission (emphasis added).. .."

RSA 354-A: 22.

MATERIAL FACTS

7. The Petitioners are full-time state employees who work at the New Hampshire Technical Institute.

8. Their complaints state that each are lesbians who have been in a loving and committed relationships with their same-sex partners for years.

9. In Breen's case, her partner is the birth mother of a child they raise together. Breen states that she shares, in all respects, the duties of parenting including financial responsibility, care taking, and above all else, love and support of the child. *See* Charge of Discrimination, *Breen* v. *NHCTC* & *Div. of Personnel,* Commission for Human Rights, Docket No. 0225-02 (2002).

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10. As state employees each are entitled to certain benefits which include health and dental insurance, sick time, dependant care and bereavement leave.

11. There are no allegations in either Bedford's or Breen's complaint that, as state employees, they are being denied benefits typically provided to unmarried state employees.

12. Their complaints, however, allege that the New Hampshire Community Technical College System ("NHCTCS"), their employer, and the Department of Administrative Services, Division of Personnel ("Division") have discriminated against them by denying them certain employment benefits as those benefits relate to their same-sex domestic partner and, in Breen's case, the child she raises with her partner due to her sexual orientation.

13. Specifically, the complainants allege that due to their sexual orientation a.) they are unable to provide their same-sex domestic partner with health care and dental benefits afforded married state employees; b.) are unable to provide health care and dental benefits for the child of their domestic partner; c.) are unable to use accrued and unused sick leave as sick dependent leave for the purpose of caring for their domestic partner's child; and d.) "should the situation arise," will be denied the use of earned sick leave as bereavement leave due to the administrative rules of the Division and the Collective Bargaining Agreement ("CBA") entered into between the State and the State Employee's Association ("SEA" or "union"). Complaints; Charge of Discrimination, *See* Charges of Discrimination, *Breen v. NHCTC* & *Div. of Personnel,* Commission for Human Rights, Docket No. 0225-02 (2002) and *Beford v.*

NHCTC & *Div. of Personnel,* Commission for Human Rights, Docket No. 0031-03 (2003).

14. The Petitioners brought their complaints against their employer and the Division to the Commission on Human Rights which found no probable cause. *Id.*

15. The Division is the state's central human resources authority for all state agencies with responsibility for position classification, compensation, personnel rules development and overseeing the administration of all employee benefit programs except for the State's retirement system. RSA 21-1: 42.

16. The Division is also responsible for labor contract negotiations, by providing assistance to the Governor and the State Negotiating Team among other things. *Id.*

17. The Division is responsible for developing and implementing an equal employment opportunity program that will ensure the employment of all qualified people regardless of age, sex, race, color, sexual orientation, ethnic background, marital status, or physical or mental disability. *Id.*

18. The NHCTCS's Board of Governors adopted a statement of non discrimination for the NHCTCS on June 18, 1998. This statement is included in college publications (student handbooks, college catalogs, etc.) and in employment notices such as in-house postings.

19. This statement of non-discrimination states, "the NH Community Technical College System does not discriminate in the administration of its admissions and educational programs, activities, or employment practices on the basis

of race, color, religion, national origin, age, sex, handicap, veteran status, sexual orientation, or marital status."

20. Neither the NHCTCS nor the Division discriminate on the basis of age, sex, race, color, marital status, physical or mental disability, religious creed, national origin or sexual orientation.

21. It is admitted, however, that neither Petitioners receive the benefits they seeks here because there are no entitlements to those benefits under the law, state statute, administrative rule or the CBA.

22. There is no dispute that as a state employees the Petitioners are receiving the same benefits similarly situated unmarried state employees receive. Since they are unmarried, the benefits they wishes to flow to their same-sex domestic partners, namely health care and dental benefits, are not authorized by law, statute, administrative rule or by the CBA.

23. Likewise, in Breen's case, because the child she shares with her domestic partner is not her child, biologically or adopted, she is unable to provide the child with health care or dental benefits provided through her state employee benefit package.

24. These benefit limitations are applied equally to all unmarried state employees regardless of sexual orientation.

25. New Hampshire Administrative Rule Per ("Per") 1204.05 promulgated by the Division sets out the allowable uses of sick leave, including dependant care and bereavement leave. *Id.* Per 1204.05 (c) states that "[a]n employee shall be entitled to utilize up to 5 days of sick leave per fiscal year for the care of dependents

residing in the employee's household." Per 1204.05 (c). Dependant care is defined as "sick leave used to care for a person residing in the employee's household who may be legally claimed as a dependent for tax purposes." Per 1 02.21. There is no evidence in the record that the child of Breen's domestic partner may be legally claimed as a dependent by the Petitioner for tax purposes. Therefore, she is unable to use her sick time for the dependant care of her domestic partner's child. The administrative rule promulgated by the Division pertaining to dependant care is applied equally to all state employees, regardless of sexual orientation.

26. The administrative rule providing for bereavement leave states that "[a]n employee shall be entitled to utilize up to 4 days of accumulated sick leave for a death in the employee's immediate family ..... " Per 1204.05 (d). Immediate family is defined as "wife, husband, children, mother-in-law, father-in-law, parents, step parents, step-children, step-brothers, step-sisters, grandparents, grandchildren, brothers, sisters, legal guardians, daughters-in law, sons-in-law and foster children." Per 102.32. Since the domestic partners of the Petitioners do not fit in to one of the specified categories, should the Petitioners' unmarried partners die, they would be unable to use accrued sick time for bereavement leave. Again, the administrative rules promulgated by the Division regarding bereavement leave treats all unmarried state employees are similarly.

27. The CBA (2001-2003) at §§ 11.2; 11.2.1 and 11.2.2 regarding allowable uses for sick leave, dependant care, and bereavement leave is essentially the same as that articulated in the Division's administrative rules, including the definition

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of what constitutes an "immediate family" member. *See* CBA (2001-2003) at §§ 11.2; 11.2.1 and 11.2.2.

28. The Petitioners are being treated just like all other unmarried state employees living with a domestic partner with or without a child living in the house hold.

ARGUMENT

A. The Petitioners Are Not Statutorily Entitled To The Benefits They Now Seek And The Relevant Statutes Are Applied Equally to All State Employees.

A presumption exists that the Commission's finding are prima facie lawful and reasonable, and an order shall not be set aside except for errors of law unless the court is persuaded, by a clear preponderance of the evidence, that the order is unjust or unreasonable. *E.D. Swett, Inc. v. NH. Commission for Human Rights,* 124 N.H. 404, 408-9 (1984). One way a party may meet its burden of showing that an order is unjust or unreasonable is to demonstrate that the record contains no evidence to sustain the order. *Appeal of Granite State Electric, Co.,* 121 N.H. 787 (1981).

The Petitioners, openly lesbian women, assert that they are being discriminated against due to their sexual orientation and that as a result of that discrimination, their same-sex partners are without health and dental benefits provided the spouses of married state employees. They assert that this is discrimination and a violation ofRSA 354-A:7 which states that *"[i]t shall be an unlawful discriminatory practice:*

> *I For an employer, because of the age, sex, race, color, marital status, physical or mental disability, creed, or national origin of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification. In addition, no person shall be denied the benefit of the rights afforded by this*
> *paragraph on account of that person's sexual orientation. "*

RSA 354-A: 7.

The issue before this Court is initially one of statutory construction and, as such, the Court is the final arbiter of the intent of the legislature as expressed in the words of the statute considered as a whole. *Appeal of Ann Miles Builder,* 150 N.H. 315, 318 (2003). When the issue raised presents a question of statutory construction, the Court should begin its analysis with an examination of the statutory language. *Id.* The Court should not consider words and phrases in isolation but rather within the context of the statute as a whole. *N.H. Dep't of Health & Human Servs. v. Bonser, 150* N.H. 250, 251 (2003). This will enable the Court to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme. *Id.* When a statute's language is plain and unambiguous, the Court need not look beyond it for further indication of legislative intent, and should refuse to consider what the legislature might have said or add language that the legislature did not see fit to incorporate in the statute. *Balke v. City of Manchester,* 150 N.H. 69, 71 (2003). "If any reasonable construction of the two statutes taken together can be found, this court will not find that there has been an implied repea1." *Board of Selectmen v. Planning Bd.,* 118 N.H. 150, 153 (1978). When interpreting two statutes which deal with similar subject matter, the Supreme

Court will construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statute. *Petition of Public Servo Co. of N.H.,* 130 N.H. 265,282 (1988) (citation omitted). It is to be presumed that the legislature would not enact legislation which nullifies to an appreciable extent the purpose of a statute, *Kalloch v. Board of Trustees,* 116 N.H. 443,445 (1976); and statutes in *pari materia* should be read as a part of a unified cohesive whole. *State Employees Ass'n V. N.H. PELRB,* 118 N.H. 885,890 (1978), 2A Sutherland on Statutory Construction § 51.03 (1972). And fmally, "[w]hen a conflict exists between two statutes, the later statute will control, especially when the later statute deals with a subject in a specific way and the earlier enactment treats that subject in a general fashion." *Board of Selectmen v. Planning Board,* 118 N.H. 150, 152 (1978).

As noted above, the Division is the State's centralized human resources authority for all state agencies, including the NHCTCS, and is responsible for negotiating the compensation and benefit package provided all state employees, including the Petitioners. The Division, through the Department of Administrative Services, is also responsible for implementing the resulting collective bargaining agreement ("CBA") and related statutes. RSA 21-1: 27-28; RSA 21-1: 30; and RSA 21-1: 42. RSA 21-1: 30 regarding state employee medical and surgical benefits states, at pertinent parts, states that:

> *"l. The state shall pay a premium for each state employee... including spouse and minor, fully dependent children, if any, ... toward group hospitalization, hospital medical care, surgical care and other medical benefits plan or self funded alternative within the limits of the funds appropriated at each legislative session and providing any change in*

> *plan or vendor is approved by the fiscal committee of the general court prior to its adoption. Funds appropriated for this purpose shall not transferred or used for any other purpose. "*

RSA 21-1: 30.

In this case, the Petitioners can not claim the State did not pay their premiums for their health and dental insurance policies. Just as all other unmarried state employees, they are provided with a health and dental insurance policy at no cost. As the only state employee in their households, they are provided the same level of benefits all other similarly situated state employees are provided regardless of sexual orientation.

As with all benefits provided state employees, health and dental benefits are negotiated and are addressed in the CBA. These benefits are provided so long as the health plans are "within the limits of the funds appropriated" at "each legislative session" and approved by the "fiscal committee of the general court." RSA RSA 21 I: 30. The Petitioners, in charging the Respondents with discrimination, have given an overly literal and broad meaning to this State's anti-discrimination statue by taking it out of context and applying it in ways not contemplated by the legislature. By focusing only on the section of the statute that prohibits discrimination on the basis of sexual orientation they fail to take into consideration other relevant, more recent and more specific statutes regarding state employee benefits. *Board of Selectmen v. Planning Board,* 118 N.H. 150, 152 (1978).

The health and benefits statute, cited above, obligates regular legislative review, both as to the substance of what is being negotiated, and its cost. In this instance, the various benefits at issue were negotiated by the State and the union and

subsequently submitted to the legislature for ratification. The legislature considered the CBA, including all cost items and authorized the CBA to be signed by the Governor to become binding on both the State and its employees including the Petitioners'. RSA 273-A:3; RSA 273-A:9; RSA 21-1:30.

Given the totality of the statutes addressing this issue, including RSA 354-A:7, along with the periodic review done by the legislature, it is proper to conclude that the legislature did not intend RSA354-A to require the provision of benefits the Petitioners seek here. The Petitioners, therefore, are not being discriminated against because they receive the same benefits all unmarried state employees receive and because the legislature has regularly approved them.

B. The Division's Administrative Rules Are Applied Equally To All State Employees And Do Not Authorize The Benefits The Petitioners Now Seek.

The Division's administrative rules apply to all state agencies, including NHCTCS. RSA 21-1:52 prohibits the Division from discriminating on the basis of sexual orientation. It is the Division's administrative rules that govern the benefits provided to all state employees. RSA 21-1: 43. "[T]he long-standing practical and plausible interpretation applied by the agency responsible for its implementation, without any interference by the legislature, is evidence that the administrative construction conforms to the legislative intent. *Hamby v. Adams,* 117 N.H. 606, 609, 376 A.2d 519,521 (1977); see 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 49.09, at 400-01 (4th ed. rev. 1984) (administrative interpretation of statute is presumed correct following legislative reenactment); *United States v. Rutherford,* 442 U.S. 544, 554 (1979) ("we are reluctant to disturb a

longstanding administrative policy that comports with" the language, history and purpose of a statute).

New Hampshire Administrative Rule Per 1204.05 promulgated by the Division sets out the allowable uses of sick leave, including dependant care and bereavement leave. *Id.* Per 1204.05 (c) states that "[a]n employee shall be entitled to utilize up to 5 days of sick leave per fiscal year for the care of dependents residing in the employee's household." Per 1204.05 (c). Dependant care is defined as "sick leave used to care for a person residing in the employee's household who may be legally claimed as a dependent for tax purposes." Per 1 02.21. There is no evidence in the record that the child of Breen's domestic partner may be legally claimed for tax purposes as a dependent. Therefore, Breen is unable to use her sick time for the dependant care of her domestic partner's child. The administrative rule promulgated by the Division pertaining to dependant care is applied equally to all state employees regardless of sexual orientation.

Similarly, the administrative rule providing for bereavement leave states that "[a]n employee shall be entitled to utilize up to 4 days of accumulated sick leave for a death in the employee's immediate family....." Per 1204.05 (d). Immediate family is defined as "wife, husband, children, mother-in-law, father-in-law, parents, step parents, step-children, step-brothers, step-sisters, grandparents, grandchildren, brothers, sisters, legal guardians, daughters-in law, sons-in-law and foster children. Per 102.32. Since the Petitioners' domestic partners do not fit into one of the specified categories of persons, should their partners die, the Petitioners would be unable to use accrued sick time for bereavement leave. Again, the administrative

rules promulgated by the Division regarding bereavement leave treat all unmarried state employees are similarly and are applied equally to all state employees regardless of sexual orientation.

Accordingly, the Petitioners are being treated just like all other unmarried state employees living with a domestic partner.

C. The CBA is Applied Equally To All State Employees And Does Not Authorize The Benefits The Petitioners Now Seek.

The collective bargaining process for all classified state employees, including the Petitioners, is outlined in RSA 273-A. RSA 273-A:9, at pertinent parts, states that:

> *"1. All cost items and terms and conditions of employment affecting state employees in the classified system generally shall be negotiated by the state, represented by the governor as chief executive, with a single employee bargaining committee comprised of exclusive representatives of all interested bargaining units..."*

RSA 273-A:9. In this case the classified state employees are represented by the SEA, and together with the State, negotiated a contract that is binding on the parties which delineates the rights and benefits for all classified employees. 1 The CBA for fiscal years 2001-2003 states, at pertinent parts, that a "Labor Management Committee is established" and that "[t]he purpose of the committee shall be to ensure the application, clarification and administration of [the CBA]." CBA § 4.2. "This committee is also charged with determining eligibility of health and dental benefits."

[1] The Petitioners are members of the SEA and, as a result, have acquiesced to their representation and are bound by the contract they ratified. Even if they were not members, they would still be bound to the CBA and its terms.

CBA § 4.2.3 (2001-2003). Under the facts of this case, the State and union negotiators entered into an agreement defining the eligibility criteria for the health and dental plans they chose. Under the preceding contract, the health care plan was provided by another vendor, Cigna.2 Under the newly negotiated CBA, health care benefits are provided by Anthem Blue Cross and Blue Shield. When the State and the union negotiated the new CBA, the negotiators maintained essentially the same plan and eligibility criteria as had existed in prior contracts. As in prior agreements, the CBA does not provide health care or dental benefits that flow to unmarried domestic partners, regardless of sexual orientation, or to unrelated children.

As a cost item affecting the terms and conditions of employment for all classified state employees, the CBA must be approved by the legislature. RSA 21 1:30; RSA 273-A:9. In this case, the legislature appropriated funds sufficient only to pay the premium for each state employee, RSA 21-1:30, but did not appropriate funds sufficient to pay for health care and dental benefits for unmarried domestic partners or unrelated children. The Joint Employee Relations Committee, established pursuant to RSA 273-A: 9, specifically addressed this issue at their June 21 st and 22nd, 2001 hearings. Exhibit A, Joint Employee Relations Committee minutes, June 21-22, 2001. At that hearing, the state negotiator, Thomas F. Manning, represented to the committee that, after discussing this matter with the Governor, "the state ha[d] no intention to and will not add domestic partners to the health insurance benefit plan under any circumstances. The['re] will not be any additions unless they come before

2 At the time this matter was before the Commission for Human Rights, Cigna had lost the State's health care contract. It has since been re-awarded the contract; a fact not relevant here.

this committee." *Id.* At June 22, 2001. Dennis Martino, manager of the collective bargaining unit for the SEA, stated "that the Association's understanding is the employees, spouses and dependents [,] are covered in the health plan. The inclusion of domestic partners cannot take place because it would change expenditures. They would have to come to a new agreement and come before this conunittee. Mr. Martino read a statement that... said: 'we will not add domestic partners under any circumstances unless we come back to you. '" *Id.* The measure passed the Committee 13-1.

Again, neither the legislature nor the negotiators drew a distinction between homosexual or heterosexual domestic partners. They simply denied appropriating funds to cover health benefits to domestic partners of state employees regardless of sexual orientation.

The Petitioners asserted below that RSA 354-A, in prohibiting discrimination on the basis of sexual orientation, entitles their unmarried domestic partners to health care and dental benefits as if they were married. However, there is nothing in either RSA 273-A, the CBA or the legislative history that would support that position. Even assuming there is a right under RSA 354-A:7, later and more specific legislative action such as RSA 21-1:30, RSA 273-A:9, RSA 273-A:3, II (b) and the regular reviews by the legislature over budgets and the CBA controls. *Board of Selectmen* v. *Planning Board,* 118 N.H. 150, 152 (1978).

Clearly RSA 273-A authorizes the State and the union to enter into a contract which is binding on both the State and its employees; which of course includes the Petitioners. The CBA, just like the administrative rule governing use of sick leave,

does not authorize the use of dependant care or bereavement leave for unmarried domestic partners. The CBA states, at pertinent parts:

> *"Allowable Uses: An employee may utilize his/her sick leave allowance for ... death in the employee's immediate family... An employee may utilize up to five* (5) *days of sick leave per fiscal year for the purpose of providing care to an ill or injured parent residing in the employee's household, dependent, child, or foster child, or to accompany such person(s) to healthcare provider visits... Dependent shall be defined as a person residing in the employee's household who may legally be claimed as a dependent for tax purposes."* CBA at § 11.2.

> *"Bereavement Leave: An employee may utilize up to four* (4) *days sick leave for a death in the employee's immediate family "* CBA at § 11.2.1.
> *"Immediate Family: For the purpose of administering this provision, immediate family shall be defined as: wife, husband, children, mother-inlaw, father-in-law, parents, step-parent, step-children, step-brother, stepsister, foster child, grandparents, grandchildren, brothers, sisters, legal guardian, daughter-in-law, and son-in-law."* CBA § 11.2.2.

The CBA language is identical to the language used in the Division's administrative rules governing the same subject and neither authorizes the use of sick time for the dependant care of an unmarried domestic partner or an unrelated child who has not been adopted by the state employee. Similarly for the use of bereavement leave. The CBA, just like the Division's administrative rules, is neutral on its face and as applied.

D. The Legislative History ofRSA 354-A:7 and RSA 21-1:52 Does Not Support The Petitioners' Theory of the Case.

The Petitioners rest their case on the provision ofRSA 354-A:7 prohibiting discrimination on the basis of sexual orientation. However, there is nothing in the legislative history that would support the notion that RSA 354-A:7 was intended to provide the benefits they seek.

The anti-discrimination statute and the statute governing the Division of Personnel were amended in 1997 when the legislature added "sexual orientation" to the list of protected classes contemplated by the law. RSA 354-A:7 (eff. January 1, 1998). Likewise, the statute that, in part, governs the Division of Personnel, RSA 21 1:52, was amended to state at its pertinent parts, to say:

> *"I No person shall be listed discriminated against with respect to employment in the classified service because of the person's political opinion, religious beliefs or affiliation, age, sex, or race. In addition, no person shall have any such employment action taken on account of such person's sexual orientation...* ".

RSA 21-1:52 (eff. January 1, 1998).

These two statutes were amended by House Bill 421 (Chapter Law 108:4 (1997» in which a reference to "sexual orientation" was placed in the general sections of the bill and listed it among the other protected classes noted in both RSA 354-A and RSA 21-1. House Bill 421, however, was substantially amended before it even left the House when the legislature removed sexual orientation from the list of protected classes and made it a separate, stand-alone sentence. *House Journal*, March 19, 1997 at p. 525. This clearly distinguishes sexual orientation from the rest of the protected classes. Representative Barbara Hull, reporting for the House of Representatives Judiciary Committee, wrote, without mentioning other benefits, that "[t]his bill extends civil rights in employment, public accommodation in housing.. .."

Id. The bill's statement of intent was also amended to state, "[w]hile the State of New Hampshire does not intend to promote or endorse any sexual lifestyle other than the traditional marriage-based family, the legislature recognizes the need to provide protection in certain areas.. .." *Id.* As noted above, these "certain areas" were narrowly restricted to employment, housing and public accommodation but not benefits even though the legislature could have easily done so by amending RSA 21 1:52. In other words, the intent of House Bill 421 as declared by its writers was solely to address employment, housing and public accommodation and was not enacted to guarantee benefits to anyone who lives a "lifestyle other than in the traditional marriage-based family." *House Journal,* March 19, 1997 at p. 525.

In the New Hampshire Senate, Senator Deborah Pignatelli, a member of the Senate Committee on Internal Affairs, stated that "[the bill's] aim is to prevent people from being deprived of housing, a job, or public accommodation solely on account of their sexual preference..." and that "[i]t [was] a narrowly drawn bill." *Senate Journal,* May 6, 1997 at p. 518. Clearly the bill was never intended to be as broadly applied as the Petitioners would like the Commission and this Court to apply it.

Throughout the entire legislative history, there is almost no discussion or testimony of the type of employment benefits that the Petitioners raise in this case.3 The vast majority of the testimony was focused solely on getting and keeping ajob,

3 In testimony before the Senate, Representative William McCann briefly raised the issue of "health insurance benefits." He also testified about a copy of a letter he had received fTom an employee ofNynex who complained that his employer, Nynex, was paying for health insurance benefits for employees with "same-sex partners" but not for employee who had heterosexual partners. The former executive director of the Human Rights Commission, in responding to the Nynex employee's letter, speculated that it "appears fTom you[r] letter that Nynex is discriminating against you based on your sexual orientation. Because the

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housing and public accommodation. In this case, there are no allegations that the Petitioners are being discriminated against with regard to their keeping a job, housing or public accommodation. In fact, it is clear that the Petitioners are receiving the benefits of being state employees regardless of her sexual orientation. Their complaints are that those benefits are not being extended to their domestic partners or, in Breen's case, her domestic partner's child. To do so would extend both the anti discrimination statute and the Division's statute way beyond their legislative intent.

When a statute's language is plain and unambiguous, the Court need not look beyond it for further indication oflegislative intent, and should refuse to consider what the legislature might have said or add language that the legislature did not see fit to incorporate in the statute. *Balke* v. *City of Manchester,* 150 N.H. 69, 71 (2003). In this case, the controlling statutes are clear, but to the extent they are not, the legislative history would not support the Petitioners' position. In other words, to interpret House Bill 421 by broadening its reaches to incorporate the benefits the Petitioners now seek would expand the bill's scope way beyond its legislative intent.

E. Case Law Does Not Support The Petitioners' Case.

Case law does not support the notion that the prohibition against discrimination on the basis of sexual orientation mandates the provision of same-sex domestic partner health care coverage or the use of sick leave benefits. *Lilly* v. *City of Minneapolis,* 973 P. 2d 717 (Colo. 1998); *Ross* v. *Denver Dept. of Health and Hospitals,* 883 P.2d 516 (Colo.Ct. App. 1994); *Hinman* v. *Dept. of Personnel*

Legislature declined to add 'sexual orientation' as a protective category... the Commission has no jurisdiction over your claim." *Senate Committee on Internal Affairs, Minutes, April* 29, *1997* at p. 3.

Administration, 167 Cal. App.3d 516 (1985). For example, in *Ross,* an employee was denied family sick leave benefits to care for her same sex partner because such a relationship did not fall within the state agency's definition of "immediate family" just as it does in this case. The plaintiff alleged that the definition of immediate family allowed an employee to take family sick leave to care for a husband or wife, but not for her same sex partner, violated a state agency rule prohibiting discrimination on the basis of sexual orientation.

The Court disagreed, holding that the plaintiff was not denied family sick leave benefits because she was a homosexual. As in this case, the definition was applied equally to heterosexual and homosexual employees and thus did not discriminate on the basis of sexual orientation. An unmarried heterosexual employee also would not be permitted to use family sick leave benefits to care for his or her unmarried opposite sex partner. Thus, the court said, the employer did not treat homosexual employees and similarly situated heterosexual employees any differently. *Ross,* 883 P. 2d at 518.

The Court also stated that in addressing two statutory rules or regulatory sections, the provisions should be reconciled to uphold the validity of both. "We must harmonize them in order to give effect to their purpose. *Id.* In the *Ross* case, the Court held that simply because the rule prohibiting discrimination on the basis of sexual orientation was promulgated after the definition of "family member" did not mandate that it had a superseding effect with respect to determining who was to be deemed a family member for purposes of sick leave. Just as in this case, the Court noted that the plaintiff could cite no legislative history to demonstrate that this was

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the intent of the parties in adopting the language prohibiting discrimination on the basis of sexual orientation.

As in *Ross,* the denial of benefits in the instant case is not based on the sexual orientation of the Petitioners. Rather, it was based on the health plan negotiated through the CBA, ratified by the legislature and applied equally to all state employees. In this case, the plan treats both heterosexual and homosexual employees the same; an unmarried heterosexual employee could no more qualify for benefits for their opposite sex domestic partner than could a homosexual employee for their same sex partner.

The California court of appeals also squarely addressed this issue in *Hinman* v. *Dept. of Personnel Administration,* 167 Cal. App 3d 516 (1985). There the Court considered whether the denial of dental benefits coverage to unmarried partners of homosexual state employees unlawfully discriminated against them in violation of a state executive order prohibiting employment discrimination on the basis of sexual orientation. The Court wrote:

> *"The terms have the same effect on the entire class of unmarried persons. Rather than discriminating on the basis of sexual orientation, therefore, the dental plans distinguish eligibility on the basis of marriage. There is no difference in the effect of the eligibility requirement on unmarried heterosexual employees and unmarried homosexual employees. Thus, the plaintiffs are not similarly situated to heterosexual employees with spouses. They are similarly situated to other unmarried state employees. Unmarried employees are all given the same benefits; plaintiffs have not shown that unmarried homosexual employees are treated differently than unmarried heterosexual employees. "*

Hinman at 526. As in *Hinman,* the Petitioners cannot show that homosexual employees are treated any differently from unmarried heterosexual employees with

respect to eligibility for domestic partner coverage. *Also see Phillips v. Wisconsin Personnel Board*, 167 Wis. 2d 205 (1992).

In *Phillips v. Wisconsin Personnel Board, id.*, the Wisconsin appeals court upheld the denial of health insurance to the same sex domestic partner of a state employee. The Court said n[w]e do so because the rule is applied to hetero and homosexual employees and this does not discriminate against the latter group. Nor does the rule treat gender differently than the other; it is applied equally to males and females. It is keyed to marriage and, as we said, it does not illegally discriminate by doing so. n *Id.* at 212. In discussing these claims, the Court noted:

> *"In this case the personnel commission ruled that Phillip's complaintfailed to state a claims for discrimination based on sexual orientation because the challenged* [ ] *rule distinguishes between married and unmarried employees, not between homosexual and heterosexual employees. . . And while [the plaintiff} complains that she is not married to her partner only because she may not legally marry another woman, that is not a claim of sexual orientation discrimination in employment; it is claim that the marriage laws are unfair because of their failure to recognize same sex marriages. It is the result of that restriction, not the insurance eligibility limitations in the statute and the department rule that Phillips is unable to extend her state employee health insurance benefits to Tommerup. And any change in that policy is for the legislature, not the courts. " Id. at 221-222.*

The Court also dismissed her equal protection claims and marital status discrimination claims as well. And as previously discussed, in *Hinman v Dept. of Personnel Administration, supra*, the California appellate court considered the question of whether the denial of dental benefits coverage to unmarried partners of homosexual state employees unlawfully discriminated against them in violation of a state executive order prohibiting employment discrimination on the basis of sexual orientation.

In *Rutgers Council of AAUP Chapters v. Rutgers, the State University, 1997* WL 106864 (N.J. Super., A.D, March 12, 1997), the New Jersey Superior Court found that the denial of health benefits to domestic par1ners of university employees did not violate their right to equal protection under the state constitution, as no discriminatory intent based on sexual orientation could be found. The court cited *Hinman* with approval. The Court also said that in the past and in the instant matter, "we have not been disposed to expanding plain language to fit more contemporary views of family and intimate relationships" in dealing with statutory and contract interpretation issues, thus refusing to expand the concept of spouse beyond its legal *limits.Id.* at p.3. Accordingly, the existence of a clause banning discrimination on the basis of sexual orientation has not been read to mean the automatic establishment of domestic partner coverage in a number of cases and should not be read that way here. The State did not treat the Petitioners any different from any other unmarried state employee. Her sexual orientation, whether homosexual or heterosexual, was not and is not a factor in deciding what benefits, health or leave-time off, she is entitled to.

In *Beaty v. Truck Insurance Exchange*, 6 Cal. App. 4th 1455 (1992), the issue was whether an insurer violated the Civil Rights Act when it refused to offer a couple living together in a homosexual relationship the same insurance policy and at the same premium it offers to married couples. Claims of both sexual orientation and marital status discrimination were rejected by the court:

> *"With regard to the claim that the denial of coverage was based on marital status in violation of the equal protection clause, we noted the statutory distinctions based upon marital status need only be rationally related to a legitimate state purpose. Given the state's legitimate interest in promoting marriage, and noting that interest is furthered by conferring statutory rights*

> *upon married persons which are not afforded to unmarried partners, we had no difficulty in upholding the decision of the Department of Personnel Administration denying benefits to Beaty." Id.*
>
> Further in the decision, the Court wrote:
>
> *"Equally important, the shared responsibilities and the legal unity of interest in a marital relationship- a status not conferred on unmarried couples of whatever their sexual orientation - provide a fair and reasonable means of determining eligibility for services and benefits." (Citing Norman v. Unemployment Ins. Appeals Board* 34 *Cal. 3d at p. 8).*

Id. See also Miller v. CA. Muer Corp, 43 FEP 1195 (Mich, 1984).

Similar to the way the courts viewed this matter in *Rutgers* and *Beaty,* the New Hampshire Supreme Court has stated that for purposes of federal equal protection analysis, homosexuals do not constitute a suspect class, nor are they within the ambit ofthe so-called "middle tier" level of heightened scrutiny. *Opinion of the Justices,* 129 N.H. 290, 296 (1987). Therefore, since no suspect or quasi-suspect class or fundamental right is involved, the proper test to apply in determining federal equal protection rights is whether RSA 21-1:30 as applied is "rationally related to a legitimate governmental purpose." *Id. at* 296, *citing Clebume v. Clebume Living Center, Inc.,* 473 U.S. 432, 446 (1985). Likewise, under the New Hampshire Constitution there is no suspect class involved, nor is heightened scrutiny requiring the application of the fair and substantial relation test, *Carson v. Maurer,* 120 N.H. 925,932 (1980), appropriate. *Opinion of the Justices,* 129 N.H. at 298. The proper test under the State Constitution is the rational relationship test. *Id. See Estate of Cargill v. City of Rochester,* 119 N.H. 661,667 (1979).

The Petitioners are not similarly situated to married employees since their companions are not their legal spouses. Instead, they are similarly situated to

unmarried employees and is treated no different than other unmarried employees regardless of sexual orientation.

The Petitioners asserted below that other Courts and human rights agencies, after having considered similar cases, have concluded contrary to the Commission's finding of no probable cause in this case. However, the cases the Petitioner cited are not based on New Hampshire law and are not on point. For example, in *Levin v. Yeshiva University,* 754 N.E. 2d 1099 (N.¥. 2001), the issue was whether married students and unmarried gay or lesbian students were allowed equal access to student housing. The court, in that case, concluded they were not. However, in this case,
what the Petitioners are overlooking is the fact that they do receive the same benefits as all other State employees. The benefits they now seek are to the advantage of their same-sex partners or, in Breen's case, her partner's child. In other words, where the plaintiff in the *Levin* case was being denied the benefit at issue (student housing), the Petitioners in this case are not.

The Petitioners have also cited *Tanner v. Ore. Health Scis. Univ.*, 971 P. 2d 435 (Ore. Ct. App 1998) as supporting their position. However, that case turned on a provision in Oregon's State Constitution and pre-existing case law interpreting their constitution after a trial in a court of general jurisdiction. This case was before an administrative body whose jurisdiction and remedies are limited by statute. In any event, an interpretation of another state's constitution has little bearing on this case. More importantly, and more to the point, is the fact that the statutory anti discrimination claim raised in *Tanner,* which is similar to the one being raised here, was struck down by the Oregon Supreme Court. Just as was the case in *Rutgers*

Council of AAUP Chapter v. Rugers, 689 A.2d 828 (NJ Super. Ct. App. Div. 1997), the plaintiffs' statutory claims were rejected because state employment discrimination law did not reach discrimination in benefits. *[d.* at 832. Similarly, other states have limited the applicability of their employment discrimination statutes to ensure that the state does not effectively endorse same-sex relationships or the concept of "gay marriage." For example, the Massachusetts law prohibiting discrimination against gays and lesbians states: "Nothing in this act shall be construed so as to legitimize or validate a 'homosexual marriage,' so-called, or to provide health insurance or related employee benefits to a 'homosexual spouse,' so-called." Mass. Gen. Laws. Ann. ch. l5lB, § 4. *But see Goodridge v. Dept. of Public Health,* 440 Mass. 309(2003).

Similarly, an Alaska employment discrimination law provides:

> "(n]otwithstanding the prohibition against employment discrimination on the basis of marital status or parenthood under (a) of this section, (1) an employer may, without violating this chapter, provide greater health and retirement benefits to employees who have a spouse or dependent children than are provided to other employees."

Alaska Stat. § l8.80.220(c)(1).

Thus, the Alaskan employment discrimination law does not reach discrimination in domestic partner benefits if the recipient does not meet the state's definition of a "spouse" just as in this case. Interestingly, in *Connors v. City of Boston,* 430 Mass. 31 (1999), the Massachusetts Supreme Court struck down an executive order by the mayor of Boston extending health care benefits to same-sex partners, finding that such an expansion was improper because it was done outside of the province of the legislature and that the mayor's order was inconsistent with

legislature's grant of authority. *Id.* at 42-43. Similarly as argued here by the Respondents, the grant of legislative authority in this case has restricted both the Respondents from extending benefits to same-sex partners (and to unrelated children) and has limited the authority of this Commission to render a decision which would "promote or endorse any sexual lifestyle other than traditional marriage." *House Journal,* March 19, 1997 at p. 525.4

And finally, "[t]o date, no state or city has attempted to enforce a general nondiscrimination law against a private sector employer's benefit plan that provides benefits only to spouses or dependents." *See* Catherine L. Fisk, ERISA Preemption of State and Local Laws on Domestic Partnership and Sexual Orientation Discrimination in Employment, 8 UCLA Women's L.J. 267 (1998) at 277-78. Suits against public employers on such a basis have also been unsuccessful. *Id. See, e.g., Tanner v. Oregon Health Scis. Univ.,* 971 P.2d 435,442 (Or. Ct. App. 1998) (holding that statute which prohibited discrimination on the basis of the sex of an individual with whom one associates not violated where state denies benefits to same-sex partner of employee).

To support their request to reopen and reconsider the Commission's initial finding of no probable cause below, the Petitioners cited cases where either private

4 It is very unlikely that the New Hampshire Legislature would pass a statute whose intent would be to provide similar benefits to unmarried same-sex partners as they would married partners. Last year, the Senate has passed SB 427 in reaction to the public debate concerning same-sex maniages. The bill stated "II. This state shall not give effect to any public act, record, or judicial proceeding of any other state, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage or the legal equivalent of marriage under the laws of such other state, territory, possession, or tribe, or a right or claim arising from such relationship.
III. For purposes of this section, "marriage" means only a legal union between one man and one woman as husband and wife."

persons or non-sovereign entities have been found to be discriminatory based on state law OR they cited accommodation cases not applicable to the context of the case here. In this case, the Respondents' actions have been completely in concert with State law. Accordingly, the Petitioners request for relief is without merit and should be denied.

F. The Commission Was Without Authority To Pass Judgment On The Constitutionality Of Any Statute And To Force The Expansion Of Employee Benefits To Same-Sex Couples Under Those Statutes.

No matter how the Petitioners tries to confuse the issue, what they are arguing is that New Hampshire's marriage statute and the statutory scheme which provides benefits to its employees are unconstitutional and therefore any benefits triggered by the marriage statute is likewise unconstitutional. The Commission for Human Rights, as an administrative agency of the State of New Hampshire, has only those powers and authority the legislature has granted to it. Nothing in the Commission's grant of authority permits it to decide the constitutionality of a New Hampshire statute. As the investigator for Commission pointed out below, the enabling statute which authorizes the Commission with regard to sexual orientation clearly states that the "protections authorized under that law extends only to "protections in certain areas to an individual on account of their sexual orientation." Chapter Law 108, §§ 1 (1997). Therefore, the Commission's authority is limited and "[n]othing in this act shall be interpreted... to allow marriage of persons of the same sex, Chapter 108, §§ 17 (1997), or "to promote or endorse any sexual lifestyle other than traditional marriage-based family.. .." Chapter Law 108, §§ 1 (1997). Thus, the Commission was without jurisdiction to render a decision which would fundamentally attack the

constitutionality ofthe marriage statute, or for that matter, any other statute including their own enable law. Likewise, the Commission was without authority to promote or endorse any sexual lifestyle other than a traditional marriage-based family. Without attacking the marriage statute or the collective bargaining statutes the Petitioners' charge of discrimination is totally without merit.

To assert that the Commission is somehow authorized to nullify clear statutory language on the grounds that it discriminates against one or more employees would be way outside its jurisdiction and authority. Likewise, the Respondents, each a state administrative agency, are obligated to follow the law. They would be remiss if they did not follow the mandates of the Legislature. If the Petitioners wishes to challenge what they perceive as discrimination, the proper forum would be a court of law where the challenge would likely be an equal protection claim regarding the constitutionality of one or more state statutes. Their challenge should not, and can not be, with the Commission's decision in this case. Therefore, this Court must uphold the Commission's decision of no probable cause.

G. There Is No Equal Protection Violation Under Either The Federal or State Constitutions In This Matter.

Since the Petitioners are challenging the decision of the Commission, this Court must similarly confine its decision to the limits of the Commission's enabling statute. Further, arguments not raised below must not be considered. RSA 354-A:22, II. However, even if the Petitioners initially brought their claims to State court challenging the constitutionality of the marriage statue, it is still unlikely they would prevail.

The Federal and State Equal Protection Clauses do not "demand that a statute necessarily apply equally to all persons or require things which are different in fact to be treated in law as though they were the same." *Michael M.* v. *Sonoma County Superior Court,* 450 U.S. 464, 469 (1981) (quotation omitted). Where a classification "realistically reflects the fact that the [two groups] are not similarly situated in certain circumstances," *id.,* and the legislation's differing treatment of the groups is sufficiently related to a government interest, it will survive an equal protection challenge. *See id.* at 472-73.

The New Hampshire Supreme Court's "similarly situated" analysis focuses on the dissimilarities of the classes, which were self-evidently a basis for reasonable classification. *Walker* v. *Exeter Region Co-op. School Dist.,* 284 F.3d 42,44, (2002); *see also Emond* v. *NH. Dep't of Labor,* 146 N.H. 230, 231 (2001); *McGraw* v. *Exeter Region Coop. Sch. Dist.,* 145 N.H. 709, 712 (2001). In those decisions, the Court concluded that they were not similarly situated which justified the difference in treatment under the law. *McGraw,* 145 N.H. at 712. The Federal courts would apply the same equal protection standard of review, *i.e.,* rational basis. *See id.; Walker,* 284 F.3d at 46. Thus, although the language in some of the New Hampshire Supreme Court decisions varied from that used by federal courts, the New Hampshire Supreme Court has concluded that our State equal protection analysis is identical. *In re: Sandra H.,* slip op., March 12,2004.

In considering an equal protection analysis, the New Hampshire Supreme Court has said that homosexuals do not constitute a suspect class, nor are they within

the ambit of the so-called "middle tier" level of heightened scrutiny, as sexual preference is not a matter necessarily tied to gender, but rather to inclination, whatever the source thereof. *Opinion of the Justices,* 129 N.H. 290 (1987) *citing Bowers* v. *Hardwick,* 106 S. Ct. 2841 (1986). There is no right to adopt, to be a foster parent, or to be a child care agency operator, as these relationships are legal creations governed by statute. Therefore, since no suspect or quasi-suspect class or fundamental right is involved, the proper test to apply in determining a statute's constitutionality for federal equal protection purposes is whether the legislation is "rationally related to a legitimate governmental purpose." *Opinion of the Justices,* 129 N.H. 290,296 (1987) *citing Cleburne* v. *Cleburne Living Center, Inc.,* 473 U.S. 432,446 (1985).

In this instance, the Respondents are acting in accord with New Hampshire statutory law and are promoting traditional marriage based families while holding down the cost of providing benefits to its employees. Therefore, there is no equal protection violation in denying benefits to same-sex partners and their children.

H. The Petitioners Have Waived Their Right To Seek The Benefits They Now Claim.

And lastly, it is no small issue that the Petitioners are members of the State Employees Association, an organization that they have acquiesced to and who, as a contracting party, has signed the very contract they complain of and are bound to. Accordingly, they have waived their right to contest the decision of the Commission in this instance.

CONCLUSION

For all the reasons stated above this Honorable Court should find for the Respondents and uphold the decision of the New Hampshire Commission for Human Rights.

PRAYER FOR RELIEF

Wherefore, it is requested that this Honorable Court:

A. Dismiss the Complaints;

B. Find the Respondents did not discriminate against the Petitioners;

C. Uphold the Commission's finding of no probable cause;

D. Deny any award of costs and attorneys fees; and

E. Grant such other and further relief as justice may require.

Respectfully submitted,

NEW HAMPSHIRE COMMUNITY
TECHNICAL COLLEGE SYSTEM
AND
DIVISION OF PERSONNEL
By their attorneys

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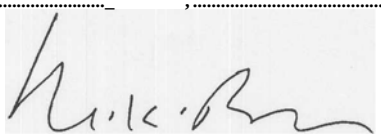
CERTIFICATION

May { .> , 2005

I hereby certify that on this date that the herein Answer was mailed, first class postage prepaid to Jon Meyer, Esquire, Backus, Meyer, Solomon, and Branch, LLP, 116 Lowell Street, Manchester, NH 03105 and Karen L. Loewy, Esquire and Michele Boston, MA 02108.



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