130

STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

James M. Knight

v.

School Administrative Unit #16, et al.

Docket No. 00-E-307

ORDER ON MOTION FOR SANCTIONS AND
MOTION FOR RECONSIDERATION OF ATTORNEY'S FEES

The petitioner brought a Petition for Injunctive Relief and Request for Attorney's Fees pursuant to RSA 91-A. On Nov. 2, 2000, the Court ordered the respondents to provide the petitioner with access to the respondents' Internet History Log Files ("IHLFs") dating from January 1, 1998. The Court also ordered the respondents to pay the petitioner's costs and attorney's fees. In a Motion to Reconsider attorney's fees, the respondents notified the Court that they could not comply with the Court's order because most of the IHLFs had been deleted. The petitioner now objects and moves for sanctions. The Court held a hearing on December 13, 2000; and for the reasons set forth below, the Court **DENIES** the respondents' Motion to Reconsider attorney's fees and **GRANTS** the petitioner's Motion for Sanctions.

FINDINGS:

The Court finds the following:

I. After the petitioner filed his Petition for Injunctive Relief on June 15, 2000, but before the trial on the merits on September

19, 2000, the respondents intentionally, and not by a routine matter, deleted the IHLFs.

II. Without revealing the destruction of public records to the Court, the respondents intentionally misled the Court into believing that the IHLFs still existed at the time of September trial.

SANCTIONS:

A. The Court makes a judicial finding that information in the deleted IHLFs was unfavorable and embarrassing to the respondents.

B. The Court finds the respondents to be in contempt of Court.

C. The respondents must pay the petitioner his costs and attorney's fees incurred both in the underlying litigation and in litigating this motion for sanctions.

D. The respondents must bear the costs and produce the remaining records currently in their possession which were the subject of the petitioner's request.

BRIEF BACKGROUND:

Between May and August 1999, the petitioner, James Knight, made three written and several oral requests to the respondent School Administrative Unit #16's Superintendent, respondent Dr. Arthur Hanson ("Hanson"), citing RSA 91-A, the Right-to-Know Law. The petitioner specifically asked to see the respondent's, Exeter Region Cooperative School District ("ERCSD"), and the respondent's, Exeter School District ("ESD"), IHLFs dating **from January 1, 1998,** to the present. Hanson personally responded to each request but through stalling tactics neither granted nor denied the

petitioner's request until September. In a letter dated September 2, 1999, repeating the petitioner's request to access the IHLFs **from January 1, 1998,** Hanson finally denied the request, forcing the petitioner to pursue costly litigation.

On June 15, 2000, the petitioner petitioned this Court for injunctive relief and requested attorney's fees pursuant to RSA 91-A. In his request for relief, the petitioner specifically asked this Court: "B. Order the Defendants to provide the plaintiff with access to the Exeter Regional Cooperative School District's and the Exeter School District's Internet History Log Files in electronic or disk form **from January 1, 1998, to the present**". (Petr.'s Ver. Pet. (emphasis added.)) The respondents, although they knew or should have known that the IHLFs were public records pursuant to RSA 91-A, continued to deny the petitioner access and filed an Answer which referenced the above correspondence. At no time prior to the September 19, 2000, trial, nor at any point during trial, did the respondents notify the Court, or the petitioner, that the IHLFs that the petitioner were requesting did not exist.

On November 2, 2000, the Court issued its order granting the petitioner's request to view the IHLFs from January 1, 1998 to the present and for attorney's fees. On November 13, 2000, the respondents moved for reconsideration of attorney's fees. In this motion, the respondents notified the Court, and the petitioner, **for the first time**, that "the requests currently stored in ERCSD's and ESD's computers no longer date back to 1998." In their November 22, 2000, Memorandum, the respondents first notified the Court that

ERCSD's IHLF dates back only to August 27, 2000 and ESD's IHLF dates back only to January 28, 2000.

The petitioner now moves for "Sanctions Based on the Defendant's Destruction of Public Records and Other Misleading Conduct." The respondents deny that they misled the Court. The Court held a hearing on December 13, 2000. This order is consistent with the rulings made at the December hearing.

FINDINGS:

I. The Respondents Destroyed Public Records

Throughout litigation, the respondents failed to notify the Court that the files the petitioner was requesting did not exist. Only after the Court ordered the respondents to disclose the IHLFs to the public, the respondent first gave notice to the Court that most of the IHLFs had been deleted.

The respondents claim that they have not "deleted or purged any outgoing URL requests because of plaintiff's right to know requests or this case." (Def. Memo. Mot. to. Recons., 11/22/00.) The respondents argue that before the petitioner filed this action, they did not have a duty to retain any part of the IHLFs. The respondents continue and claim that "because of this case, ERCSD and ESD have saved data which would otherwise have been deleted..." (Id.). The Court finds this statement to be contradictory and unsupported by the record.

First, the respondents informed the Court that the IHLFs "no longer date[s] back to 1998." (Mot. to Recons. 11/13/00.) Then, the respondents claimed that ESD and ERCSD maintained a backlog of 30

days, but also asserted that ERCSD's IHLF dates back to August 27, 2000 and ESD's IHLF dates back to January 28, 2000. (Mem. in Supp. of Mot. to Recons. 11/22/00.) Hanson reiterated this information in a sworn affidavit. (Affidavit of Arthur L. Hanson, 11/22/00.)

Notwithstanding these claims, in a later sworn affidavit, Hanson informed the Court that ERCSD was on a 5-week rotational period and that its IHLF dated back to August 27, 2000. (Affidavit of Arthur L. Hanson, 12/05/00.) He also stated that ESD's IHLF dated back to January 28 or 29, 2000, excluding a period from August 5, 2000, to September 18, 2000. (Id.)

Joseph Faletra, the only technical staff employee, who testified at the September trial **and** at the December hearing, was not hired until July 2000, after this action had commenced and after the files were allegedly deleted. After the December hearing, the Court reviewed the tapes of the September trial. At the September trial, the petitioner's attorney specifically asked Faletra whether he agreed with the statement that "[t]he main Squid Proxy Server log file that dates back to November 1998, is currently over 470MB in size." (quoted from the 6/14/99 response.) Faletra stammered briefly before he replied that he "couldn't say" but never mentioned that the files had been deleted.

Suddenly, at the December hearing, Faletra testified that ERCSD maintained a 5-week rotational period and, after he learned of the lawsuit, he independently decided to begin saving the IHLF on separate disks from August. Faletra also testified that ESD

maintained a 90-day cycle which was changed in favor of saving data because of the pending trial.

It is clear to the Court that Faletra withheld significant information from the Court and the petitioner when he testified in September as he knew, at that time, that the files at issue had already been deleted.

The Court finds the respondents' claims to be untenable and replete with contradictions. None of the respondents' explanations add up mathematically:

ERCSD: If ERCSD was on a 5-week rotational period, and if the IHLF was maintained from the action's institution, the IHLF would date back to early May. If, as Faletra testified, he began saving the IHLF in August, it would date back to June or July. However, the respondents claim that ERCSD's IHLF dates back only to August, 27, 2000.

ESD: If ESD was on a 90-day rotational period, in mid-June or August it would date back only to mid-March or May, respectively. However, the respondents claim that ESD's IHLF dates back to January 29, 2000.

At the September trial, Hanson testified that the only people who have had access to the proxy servers were the System Administrator and three people whom the System Administrator designates ("technical staff"). Hanson testified that the IHLFs became too large to store in the proxy servers and so the technical staff made a decision on its own, without consulting him, to delete large portions of the IHLFs. Hanson claimed that he was unaware

when the technical staff had made this decision and when they began deleting the IHLFs. Hanson testified that at some time prior to the September trial, he learned that the technical staff had been deleting the IHLFs on a rotational basis, but Hanson mysteriously failed to so notify the petitioner.[1] The respondents never informed the Court of this rotational deletion and never mentioned in any of their briefs, nor indicated at the September trial, that such a practice was occurring. The respondents did not produce, either at the September trial or at the December hearing, any of the four members of the technical staff who could support this testimony. Based on the selectively uninformed and unhelpful substance of Hanson's testimony, as well as his evasive and tentative demeanor while testifying, the Court finds his testimony to be incredible and self-serving.

After the Court ordered the respondents to produce the public records, and the motion for sanctions was filed, the burden shifted to the respondents to show cause why they could not comply with the Court's ruling, especially when the respondents never informed the Court that these public records had been destroyed. The respondents failed to meet this burden. The only witnesses produced at the

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[1] At trial, Hanson testified that his reference to the date of November 1998 and not January 1998 in his 6/14/99 and 8/12/99 responses should have, at the time he received them, caused the petitioner to question the lack of files from January 1998 to November 1998.

Three points are worthy of mention here. First, as the petitioner testified, this is a new technology and he believed the proxy servers might not have been in place or have been recording prior to November 1998. Second, the rotational deletion had not yet started either by November 1998, June 1999, or August 1999. Third, Hanson himself did not question the lack of these files.

December hearing were unfamiliar with all the facts and dates pertaining to the IHLFs' destruction. The respondents produced Hanson and Faletra, neither of whom had any knowledge as to when the respondents began deleting the IHLFs. Based on the pleadings, the direct and circumstantial evidence at the September trial and at the December hearing, and all the logical inferences that can be drawn therefrom, the Court finds that the IHLFs were deleted after June 15, 2000, the date the petitioner filed suit, but before September 19, 2000, the date of the trial. The Court further finds that this deletion was intentional and not a matter of routine.

II. The Respondents Intentionally Misled the Court

The respondents intentionally misled the Court by allowing the Court and the petitioner to believe that the IHLFs still existed at the September trial.

Hanson testified at the December hearing that the reason he failed to notify the Court that the files the petitioner had requested were deleted was because he was under the impression that the petitioner only wanted files saved under the present and future rotations. Despite the petitioner's 5/24/99, 6/22/99 and 8/10/99 requests - which specifically state the January 1, 1998 date; and despite his own 6/14/99, 8/12/99 and 9/2/99 responses - which reference the requests and the latter of which also states the January 1, 1998 date; and despite the 6/15/00 Verified Petition to the Court - specifically asking the Court for access to the IHLFs from January 1, 1998, to the present; and despite the respondents' 7/17/00 Answer to the Court - referencing most of the

aforementioned documents; and despite the petitioner's 9/19/00 Request for Findings - which lists the January 1, 1998 date; Hanson unpersuasively testified that he assumed the petitioner wanted "present" IHLFs and it never occurred to him that the petitioner wanted the "past" IHLFs. Combined with Faletra's testimony, the Court lightly regards this posture.

The respondents' defense is nothing more than a specious and transparent attempt to camouflage their actions. The September trial on the merits was a lengthy evidentiary hearing and never once did the respondents share with the Court that they had already deleted the very subject matter of the litigation, something Faletra clearly and Hanson presumably knew. The Court finds that the respondents, by pretending the records still existed, deliberately deceived the Court.

SANCTIONS:

A. The Deleted IHLFs Contained Unfavorable and Embarrassing Information

At the close of the December hearing, the respondents' attorney repeatedly invited the Court to speculate as to what the respondents would have to gain by deleting the files and perpetrating a fraud on the Court. The clear answer is that the deleted information was unfavorable and embarrassing to the respondents. Accordingly, the respondents were faced with an unpleasant choice: weigh the displeasure of the Court against the outrage of the public. They made a calculated decision to delete the files in an attempt to dupe the Court rather than face the

public reaction of angry and outraged citizens when they learned what was contained in the IHLFs.

As a sanction, through reasonable inferences from the record and by way of analogy to the concept of spoliation, the Court makes a judicial finding that information in the IHLFs was unfavorable and embarrassing to the respondents. *See* Rodriguez v. Webb, 141 N.H. 177 (1996). The following discussion is not relevant under the Right-to-Know statute and was not considered in the Court's November 2, 2000 order, but is now pertinent as to why the Court believes the respondents intentionally, and not as a matter of routine, deleted the IHLFs. Id., at 180 ("Although there was no direct evidence that the defendant acted with fraudulent intent, the circumstances of the destruction alone were sufficient to permit the jury to infer that the destroyed evidence would have favored the plaintiff.")

In an Internet Statement in ESD's 'Acceptable Use Policy,' ("policy") sent to students' parents in April 1999, the respondent ESD recognized the Internet's negative effects.

> There is, unfortunately, a "dark side" to the Internet which is composed of material that is not of educational value in the context of the school setting. This information may be judged as inaccurate, abusive, profane, sexually oriented, or illegal. (Policy, p.3, Pet'r Ex. 1-1).

Despite this acknowledgement, the respondents decided that Internet "blocking" or "filtering software" was too costly and would not be installed (Policy, p.4, Pet'r Ex. 1-1), thereby leaving open the ability for students to access inappropriate websites and information. The petitioner, a parent, believed that the Internet

was being used inappropriately and voiced his concern over the lack of filtering to the respondents on numerous occasions.[2]

Finally, at the end of September 1999, ERCSD installed a computer filter monitoring system. Hanson testified at the September trial that ERCSD began requiring students and parents to sign its Internet and Electronic Mail Permission Form at the beginning of the 1999-2000 school year. (Resp. Ex. E.) ESD circulated a similar policy to parents in April 1999.

Once the petitioner instituted legal action, the respondents were faced with an unpleasant choice: grant the petitioner's request to view the IHLFs and reveal the actual use of the computers to the public or deny the petitioner's request to view the public record. The Court finds the respondents chose to sabotage the petitioner and the public by deleting the IHLFs so that when the Court ordered the respondents to produce the public records the petitioner had asked for, these could no longer be produced. At present, the IHLFs which the respondents claim that they have saved, and could produce, all conveniently date after September 1999, i.e. after the filter was in place and after the respondents' "acceptable use policies" were in effect.

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[2] *See* ERCSD School Board Minutes, 6/8/99, Pet'r Ex. 1-5; ERCSD School Board Minutes, 6/22/99, Pet'r Ex. 1-8; ERCSD School Board Minutes, 8/10/99, Pet'r Ex. 1-12. *See also* 9/2/99 response; respondents' Memorandum, 9/19/00. Hanson testified at trial to having conversations with the petitioner about his concerns in April and May 1999.

Accordingly, the Court makes a judicial finding that information in the deleted IHLFs was unfavorable and embarrassing to the respondents.

B. The Respondents are in Contempt of Court

The Court finds that the respondents fraudulently destroyed a public record when they deleted the IHLFs. For all the reasons given in this order, the Court believes that the respondents acted in bad, if not rancid faith, and finds them in contempt of Court.

C. Costs and Attorney's Fees

This Court has equitable powers to impose sanctions.

> The inherent power to impose sanctions stems from a court's necessary power to control the proceedings before it. When overriding considerations so indicate, the award of fees lies within the power of the court, and is an appropriate tool in the court's arsenal to do justice and vindicate rights. The power of the judiciary to control its own proceedings, the conduct of the participants, the actions of the officers of the court and the environment of the court is a power absolutely necessary for a court to function effectively and do its job of administering justice. Emerson v. Town of Stratford, 139 N.H. 629, 631 (1995) (quotations, citations and brackets omitted).

This case is replete with bad faith. First, the respondents denied the petitioner his right to view the IHLFs, forcing the petitioner to pursue costly litigation. Next, the respondents destroyed these public records. Then, without revealing this destruction to the Court, or to the petitioner, the respondents continued to feign their existence during lengthy litigation. The Court finds that the respondents have wasted judicial resources, the petitioner's counsel's time, and the petitioner's time and money.

The Court is frankly astonished that the respondents have the temerity to sulk over the initial imposition of attorney's fees, in a motion to reconsider, given the foregoing circumstances.

The Court finds that the respondents have displayed a flagrant disregard for the public's right to know under RSA 91-A, have destroyed public documents in bad faith and have intentionally misled the Court. The Court rules that the respondents shall be responsible for the petitioner's costs and attorney's fees incurred both in the underlying litigation and in litigating this motion for sanctions.

D. The Remaining Records

The Court rules that the respondents must now bear the costs to produce for the petitioner the remaining records currently in their possession, consistent with the Court's November 2, 2000 Order.

So Ordered.

1/3/01
Date

Gillian L. Abramson
PRESIDING JUSTICE