



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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Certain Classified Employees of the		*
Public Utilities Commission		*
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	Petitioner	*
	v.	*
		*
SEA of NH, Inc., Local 1984, SEIU		*
		*
	Respondent	*
<hr/>		*

Case No. S-0419-1
Decision No. 2008-096

APPEARANCES

For the Party Challenging Eligibility of Voter, SEA of NH, Inc., Local 1984, SEIU:

Glen R. Milner, Esq., Cook & Molan P.A.

For the Responding Party (for purposes of this specific hearing), Certain Classified Employees of the Public Utilities Commission:

Lynn Fabrizio, Staff Attorney, PUC

BACKGROUND

An election, by secret written ballot, cast by eligible voters, was conducted by the PELRB on March 4, 2008 to determine whether the SEA of NH, Inc., Local 1984 SEIU would be decertified as the exclusive representative of a bargaining unit comprised of individuals employed within the State of New Hampshire's Public Utility Commission. An election for this purpose among these employees had been attempted on two prior occasions. The first election, conducted on October 11, 2006, resulted in an order of decertification, but was deemed void on appeal by the court because the employer did not distribute a list of employee home addresses as required by Admin R. Pub 303.01 (b) and the PELRB did not compel the production of those

home addresses instead ruling that employee privacy rights outweighed the rule requiring production of employees' home addresses. After due notice, a second election ordered by the court was conducted on January 9, 2008 and after its conduct the PELRB was informed by the public employer that the list of employees provided to the PELRB and to the parties was inaccurate. The result of this second election also was in favor of decertification. Both parties filed post election pleadings regarding conduct affecting the outcome of an election. On February 5, 2008 the PELRB issued its order for a third election deeming the failure of a complete voter list to sufficiently call into question the validity of the election. After due notice, a third election was conducted on March 4, 2008 at which employee Michael Harrington's eligibility was challenged by the SEA/SEIU. Following a tally of all votes, it was determined that the challenged ballot could determine the outcome of the election. The ballot tally was suspended by the representative of the PELRB and the respective observers informed of the reasons for said suspension.

Following the report of this occurrence to the Board, a preliminary hearing was conducted on March 14, 2008 at the PELRB offices in Concord and the parties undertook efforts to come to agreement on any facts that could be stipulated and to come to agreement on exhibits to be jointly submitted into evidence. The union also withdrew its challenge on the ground of the existence of a supervisory relationship affecting Mr. Harrington's eligibility and the parties agreed that they would proceed to evidence on the sole issue of whether Mr. Harrington was to be excluded from having his vote cast because he was a "confidential employee" as that term is defined in RSA 273-A:1, IX (c). An evidentiary hearing was convened at the PELRB offices in Concord on March 26, 2008 at which both parties were represented by counsel, presented witnesses and exhibits and had the opportunity to cross-examine witnesses. The parties submitted certain stipulated facts that appear below as numbers 1 through 9 in the Findings of Fact. The parties agreed that certain joint exhibits numbered 1-21(c) could be marked for identification and later admitted as joint exhibits providing further, however, that at the conclusion of the hearing, the parties agreed to withdraw Exhibits 11(a) and (b); 14(a) and (b); 15(a) and (b); 17 through 21(c), inclusive. The Board reviewed all filings submitted by the parties and considered all relevant evidence. After closing arguments were advanced by both parties the record was closed upon the representation by counsel that they had concluded their cases. The Board determined the following:

FINDINGS OF FACT

1. This matter comes before the PELRB on the single issue of whether a PUC employee (Senior Policy Advisor, Michael Harrington) is or is not an eligible voter in a decertification election on the grounds that he is or is not a "confidential" employee pursuant to RSA 273-A:1, IX (c).
2. On March 4, 2008, a decertification election was conducted by the PELRB concerning PUC classified employees. The vote was 25 for the SEA, 25 for No Representation, and one vote was challenged.

3. Michael Harrington, the challenged voter, holds the classified position of Senior Policy Advisor at the PUC.
4. That position is a Labor Grade 32 and is classified by the State as "Administrator of Industry Regulation and Licensing".
5. The Senior Policy Advisor position is not now listed as a confidential employee by the State.
6. Of the 62 classified positions at the PUC, two are listed as confidential or exempt by the State. There are a business Administrator II position and an Administrator III position.
7. Michael Harrington was a Commissioner of the PUC from November 12, 2004 through December 26, 2005.
8. Michael Harrington stayed on with the PUC following his tenure as Commissioner initially in a full-time, temporary position as a consultant, then in a full-time, permanent position as a Utility Analyst III.
9. On September 29, 2006, Michael Harrington's current position as a Senior Policy Advisor was established.
10. Although a new position, neither the state employer nor the union has ever previously initiated a modification petition seeking to exclude Mr. Harrington's position as confidential and it has remained within a bargaining unit since its inception.
11. During his service as a PUC Commissioner, Mr. Harrington was involved to a limited extent with unspecified personnel matters.
12. Mr. Harrington is frequently out of the PUC office as he acts as the PUC liaison to primarily regional and national utility panels such as the Federal Energy Regulatory Administration, New England Power Pool; ISO New England, and other states' utility commissions.
13. Mr. Harrington frequently consults with the Chairman of the Commission on regional energy and electrical market matters related to his participation with these utility panels and is viewed by the Chairman as a senior advisor in areas requiring this expertise.

14. Mr. Harrington has communication with another PUC employee, Ms. Kim Smith, who provides administrative support both to him and to the Commissioners. He does not communicate with her regarding labor relations or collective bargaining strategies nor does she share such information or any other confidential information with him.
15. Mr. Harrington, while serving as a commissioner in 2004-2005, read unspecified notes related to personnel issues. He does not do so in the position he has held since 2006 with the sole exception of recently reviewing resumes and applications, and interviewing a single candidate for employment. The position remains open and the future state of that hiring, if it occurs, and his role in it can only be speculated upon.
16. While Mr. Harrington once reviewed three resumes for an administrative support position, he does not have final hiring authority for any employee within the PUC and his position does not require his participation in labor relations or involve significant personnel decisions.
17. The PUC has an Executive Director who is supported by two additional employees involved with human resource work and with whom Mr. Harrington more likely would rely on for personnel decisions or counsel.
18. Given the structure of the PUC and the operational relationships its chairman describes, Mr. Harrington interacts with employees within that commission on matters of substantive knowledge on energy and electrical sharing and rates.
19. Chairman Getz maintains an organizational chart for the PUC in the exercise of his administrative responsibilities. On that schematic drawing (see Joint Exhibit #2) there are three positions depicted as directly reporting to him, namely the Executive Director, General Counsel, and "Regulatory Policy Advisor" which we understand to be the position Mr. Harrington holds and which is officially referred to as "Administrator of Industry and Regulation and Licensing". Further, Chairman Getz believes this is an appropriate placement for this position.
20. The reason for the direct reporting is due to the expert advice Mr. Harrington provides to the commissioners in his recognized specialty and not related to labor relations, negotiations or significant personnel decisions.

21. Any confidential information to which Mr. Harrington regularly has access is in his area of expertise in regional energy and electrical markets and not in the area of labor relations matters.
22. At the time of the decertification election, two positions within PUC were recognized by both parties as exempt for reason of confidentiality, namely Kelly Logan an Administrator II and Christiana Mason an Administrator III who are designated as human resource positions.
23. The practice of identifying certain positions with major responsibilities in labor relations is well known to the parties as they had both recognized that among the several types of employment positions within state service those categorized as "confidential" were labeled such for purposes of collective bargaining as testified credibly by Sarah Willingham who held the position within state government of employee relations manager for eight years and recently accepted the appointment to Deputy Director of Personnel for the state.
24. The job descriptions entered into the record are not as current or as accurate as the testimony of the responsibilities of Mr. Harrington's position as offered by the witnesses.

DECISION AND ORDER

JURISDICTION

The Public Employee Labor Relations Board has jurisdiction over elections conducted for purposes of determining whether an exclusive bargaining representative is decertified by the majority vote of the membership of the bargaining unit. See generally RSA 273-A:10; Admin R. Pub 303.

DISCUSSION

This case involves what has become a rather protracted process to determine through the conduct of an election by majority vote whether the State Employees' Association of NH, Inc., SEIU Local 1984 is to continue as the exclusive bargaining representative of certain classified workers employed by the State of New Hampshire within its Public Utilities Commission. (See PELRB Decisions 2006-159; 2006-175; 2007-006; 2007-168; 2007-174; See also *Appeal of State Employees' Association of New Hampshire, Inc.* Decided November 9, 2007. The instant matter comes before us on the union's challenge of the eligibility of an employee voter to have his vote cast and included in the final tally of votes.

On March 4, 2008 an election among classified employees of the PUC was conducted. During the conduct of the election, Mr. Harrington appeared and presented suitable identification requesting a ballot so that he could cast that ballot and have it included in the final tally. The observer for the union challenged his eligibility. The PELRB representative conducting the election memorialized the challenge, reporting that Mr. Harrington's eligibility was being challenged by the union on the basis that he was either a confidential employee or a supervisor as defined under RSA 273-A. Mr. Harrington was given a ballot, allowed to mark his ballot and the PELRB representative then segregated the ballot in a separate envelope and set it aside. At the conclusion of the balloting the tally was initiated and suspended when all ballots, except that of Mr. Harrington, had been counted and the tally was 25 votes cast for decertifying the union and 25 votes cast against decertifying the union. Because the challenged vote would be determinative of the result, the tally was then suspended pending a determination of the validity of the challenge. A copy of the PELRB statement affixed to the sealed ballot of Mr. Harrington and the tally sheet was given to the parties. A hearing process was initiated by the PELRB with a preliminary hearing on March 14 and concluded with the final hearing on March 26, 2008.

The statute's definition of "public employee" excludes employees "whose duties imply a confidential relationship to the public employer." RSA 273-A:1, IX (c). The PELRB has been called upon to interpret this provision since the inception of the law. The legislature intended to vest the PELRB with primary authority to define "confidential" as it is used in the statute." *Department of Revenue Admin. V. Public Employee Labor Relations Bd.* 117 N.H. 976 (1977). Over these past thirty years the PELRB "has approached cases involving 'confidential employees' and made its determination[s] based upon a long standing guideline that generally limits the application of "confidential" employee to,

...persons who formulate, determine and effectuate management policies in the field of labor and/or personnel relations...whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process, would make his membership in the [employee organization] incompatible with his official duties." SEA/SEIU v. State of NH, PELRB Decision #2002-045, citing Keene State College PAT Staff Assoc. v. Univ. of New Hampshire, PELRB Decision No. 780007 (February 28, 1978).

This definition is "consistent with the one commonly used by the National Labor Relations Board and in other public employee statutes." *Univ. System v. State*, 117 N.H. at 101.

In an earlier case the PELRB summarized the court's interpretations in this manner,

A representative collection of court findings has focused on such criteria as the function of a position, the "finality of decision input" in collective bargaining, and the nature of the information to which an individual was privy. See *In Re Nashua Ass'n of School Principals*, 119 N.H. 90 (1979). In addition, the court has found a confidential relationship to exist where an administrative secretary was privy to a personnel director's

personal thoughts about the collective bargaining process and where the administrative secretary would be present at discussions of collective bargaining strategies. See *Appeal of City of Laconia*, 135 N.H. 421, 423-425 (1992). (While *Appeal of City of Laconia*, 135 N.H. 421, 423 (1992), suggests that "merely statistical" data may be public, non-confidential information insufficient to invoke "confidential employee" status under RSA 273-A:1 IX (c), that case also requires us to look to the totality of the employee's job functions to insure that his or her union activities do not hinder management's ability "to prepare for and conduct labor relations and labor negotiations." *Appeal of City of Laconia*, 135 N.H. 424-425 (1992). A third example of the court's finding involved a director of public works, testified that he considered the department secretary to be his "administrative assistant", that the departmental secretary kept the personnel records, was privy to any disciplinary actions taken, and attended staff meetings at which confidential matters were discussed. See *Appeal of Town of Newport*, 140 N.H. 343, 352 (1995). SEA/SEIU v. State of NH, PELRB Decision #2002-045.

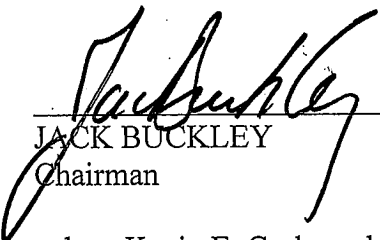
History reveals repeated and consistent reference by the PELRB in its decisions that the significance of the confidential relationship referenced in the statute would have to be of an ilk such that would affect labor relations, contract negotiations, matters and policy considerations embodied in RSA 273-A. (See Manchester Educational Support Personnel Assoc. v Manchester School System, PELRB Decision #89-28; Teamsters local 633 v. Town of Alton, PELRB Decision # 92-85; Freedom School Employees v. Freedom School District, PELRB Decision # 93-57; Oyster River Management Association v. Oyster River School District, PELRB Decision #97-065; NEPBA Local's #40 and #45 (Fish and Game Employees) and SEA/SEIU, PELRB Decision #2006-174; City of Portsmouth v. AFSCME Council 93, Local #1386 Portsmouth City Employees, PELRB Decision No. 2000-058.

We find that the union's evidence is insufficient to establish what must be considered, after thirty years, a necessary link the confidential relationship must bear upon labor relations. When we consider the weight of the evidence indicating that Mr. Harrington's position is based upon his knowledge and experience in energy and electrical markets and his non-involvement in the development of labor or personnel policy making and weigh it against the evidence offered by the union including his written job description and his review of three resumes we cannot find that Mr. Harrington holds a position that implies a confidential relationship to the employer as intended by application of the Public Employee Labor Relations Act.

Therefore, we find that Mr. Harrington is eligible to cast a vote in the decertification election and have it added to the tally. A PELRB representative will resume the tally, unseal Mr. Harrington's ballot before the parties, and complete the final tally which shall be undertaken at the offices of the Public Employee Labor Relation Board on Friday, April 18, 2008 at 1:30 PM.

So ordered.

Signed this 12th day of April, 2008.



JACK BUCKLEY
Chairman

By unanimous decision. Chairman Jack Buckley, members Kevin E. Cash, and James M. O'Mara, present and voting.

Distribution:

John S. Krupski, Esq.
Dennis Kinnan, SEA Representative
Jody O'Marra, Petitioner
Lynn Fabrizio, Petitioner
Thomas Getz, Commissioner, NH PUC
Michael Brown, Esq.
Sara Willingham, Mngr. Employee Relations
~~Debra Howland, Exec. Director NH PUC~~