

STATE OF NEW HAMPSHIRE

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

IN RE: DECERTIFICATION ELECTION
KEENE STATE COLLEGE OPERATING STAFF

CASE NO. U-0608

DECISION NO. 80007

APPEARANCES

Representing the State Employees' Association of New Hampshire, Inc.:

Linda Murtha, Esquire, Counsel
Kathy Duval, SEA
Thomas Hardiman, SEA
Kathy Denys, SEA

Representing Keene State College of the University System of New Hampshire:

Nicholas DiGiovanni, Jr., Esquire, Counsel
Gary Wulf, Executive Director
Robert Mallatt
Dennis C. Hazzlett

Witnesses:

Lois Jefferson, Unit Member
Doris Wagner, " "
Gail Driscoll, " "
Joni Tilton, " "
Pauline Dionne, " "
Doris Damiano, " "
Donna Drouin, " "
Peter Hildreth, Representative, N. H. House

BACKGROUND

In Decision 79034, this Board ordered a pre-election conference and election among the operating staff employees at Keene State College (hereinafter "KSC"), having received a petition for decertification which was both timely and sufficient in number. A pre-election conference was held and on December 20, 1979 the PELRB conducted a decertification election at Keene State College. The resulting vote was 62 votes for the State Employees' Association (SEA) to remain as certified representative, 55 votes for "no representative" and 24 challenged ballots, being those of voters ruled by the Board representatives at the pre-election conference and election to be ineligible because they were "probationary".

Keene State College filed objections to the conduct of the election and conduct affecting the outcome of an election on December 27, 1979, said filing dated December 26, 1979. In that filing, the College alleged that conduct on

the part of SEA staff members at the polling place was prejudicial, the College was not allowed to participate as a full party to the decertification election process, certain SEA election literature distributed prior to the election was erroneous and prejudicial, certain meetings held by the SEA on the KSC campus violated PELRB rules and rulings, and that taken as a whole, these actions by the Board and the SEA contaminated the fairness of the election process to such a degree that the election results must be overturned and the election rescheduled. In addition, by letter to the Board, KSC requested that the challenged ballots be counted since the employees who cast the ballots were alleged to be regular, full-time employees who had a right to participate. Lois Jefferson, a member of the operating staff unit and a petitioner for the decertification election filed similar requests with the Board, both as to conduct and as to the counting of the challenged ballots.

The SEA moved to dismiss both filings on several bases. First, on the basis that the College had no standing to participate in the decertification process. Second, alleging that the objection to conduct at the polling area was untimely filed under Board rules. Third, stating that allegations of "unfairness" as raised in the filing by KSC are not a violation of RSA 273-A. Finally, on the basis that objections to elections must be filed within 5 days of the election and the filing by KSC came in after the 5 days had expired. In addition, the SEA moved to dismiss Lois Jefferson's complaint as being untimely.

The Board held a hearing on all objections to the conduct of the election and on the question of the challenged ballots at its offices in Concord on January 17, 1980.

FINDINGS OF FACT
AND RULINGS OF LAW

I. Standing of the College to Object.

The SEA in its motion to dismiss alleges that the College has no standing as the employer to participate in the decertification election process including no right to object to the conduct of the election. The SEA relies on the decision of this Board concerning a decertification election at Plymouth State College. The difference between that case and the present case is clear. In the Plymouth situation, there were allegations that the College itself had instigated the decertification petition and was behind the election. No such allegation was made in the Keene State College case. This Board believes that the degree of participation allowed the College in this case is the proper participation by an employer when one group of employees seeks to decertify the representative previously selected or, as in this case, grandfathered as the representative. In this case, the College was allowed to participate in the pre-election conference, was allowed to be present at the counting of ballots, communicated with the Board, objected to voting lists, had representatives meet with groups of employees to present facts and state positions, communicated with employees in writing, and was allowed to object to the conduct of the election and request action be taken concerning challenged ballots. The employer has an interest in the results of an election, and the Board believes that although the decertification process is between employees, that one group of employees seeks to decertify a union previously selected by members of the unit, it did not mean to indicate that the employer could not participate in certain ways as were allowed in this case. The Board believes that the employer should not under such circumstances have an

observer at the election since there are already two parties to the decertification process with observers present, the pre-existing union and the petitioning employees and the presence of a third observer on behalf of the employer ~~would~~ obviously indicate to employees that the employer sided with one ~~group~~ of employees or another. In this regard a decertification election differs from a certification election. However, the Board will not dismiss the complaint on the basis of standing since the employer in fact does have an interest and standing if it believes that the process was improper. The degree of participation allowed in this case at Keene State College, where there was no allegation that the College was behind the petition for decertification should be a guide to the degree of participation by an employer in future decertification elections. The employer is not a "party" to the decertification process (see Rule 3.7 (b)) but has certain interests and concerns and a role consistent with them.

II. Motions to Dismiss on Procedural Grounds.

The SEA has moved to dismiss the complaints concerning the conduct of the election under rules 3.8 (as to objections to conduct at the polling areas) and 3.11 (as to objections concerning conduct affecting the outcome of an election not occurring at the polling area). Those rules provide that objections to conduct at the polling area must be filed with the representative of the Board before the ballots have been counted (3.8 (b)), and that objections as to conduct not taking place at the polling area must be made within 5 days of the filing of the report of election (3.11). In this case, the election was held on December 20, 1979, a Thursday. At the conclusion of the election, the observers signed the results of the election. The following day was Friday. The next four days were Saturday, Sunday, Christmas Eve (a date both the College offices and the Board office were closed) and Christmas Day. The next business day was the 26th, on which date the objection to conduct filed by the College was dated. The day after that, Thursday the 27th, the College filing was delivered in person to the Board offices in Concord. The day after the election, Friday the 21st of December, counsel to the College called the Board offices to inquire when objections must be filed. Five days from the date of the election would have been Christmas day and no filing was possible on that day. There is a question as to whether 5 days indicates 5 working days or 5 calendar days. Because of the confusion, the Board will not rule on the motion to dismiss but will state that in the future, absent special extensions granted by the Board, the 5 day rule means 5 calendar days. In this case, however, the Board will not deem the filings to have been untimely and will discuss the substance thereof.

As to the objections to conduct at the polling place, the Board has held above that in a decertification election the College does not have a right to an observer. Therefore, its objections to conduct cannot be precluded on the basis of that rule. The objections of Lois Jefferson to conduct at the polling place, however, must be dismissed under rule 3.8 since they were not made at the polling place.

III. Substantive Issues regarding Conduct relating to the Election.

The Board received evidence on the substance of the objections to the conduct of the election and will discuss and rule on them as follows:

A. The first allegation as to conduct was that the SEA had several representatives in addition to the observer present in the polling area and that this violated Board rules and ground rules set at the pre-election conference. See Rule 3.7. Specifically, the allegations are that SEA staff members drank coffee in the area, took over for observers who were late or needed to make trips to the rest room and that, at the end of the day, counsel and two staff members of the SEA were invited by the Chairman of the Board into the polling area because the library of the College had closed and the temperature outside the polling area was below freezing. These actions are alleged to have contaminated the election. At hearing, testimony indicated that one staff member got coffee for all of those present at the election and was allowed to drink hers with the others. In addition, one staff member came in and briefed observers or relieved observers when they had to leave or go to the rest room and that in fact Chairman Haseltine invited counsel and two staff members at the end of the day to relieve them of the necessity of staying out in the sub-freezing weather. Testimony also indicated that he invited College representatives to come in out of the cold as well. They refused. There was no evidence, no testimony and no allegation that the presence of any of these people changed any vote and, in fact, the testimony was that when voters entered the premises, the additional personnel moved away from the voting area and did not conduct any electioneering or talk to any voters.

The Board requires that all elections be conducted with only the representatives of the Board and one observer present from each party. However, in the real world and under real circumstances, slight variations sometimes occur because of practical necessity. With no evidence of suggestion that any vote was changed and with no evidence that electioneering took place, the Board cannot find that the action affected the outcome in any way. Therefore the results will not be disturbed on this basis. See Rule 3.7 (a).

B. The objection by the College that it was not allowed full participation in the process has been discussed in another context above in I and the Board finds that the participation by the College in this case was at the appropriate level for a decertification election and the argument of the College in this regard is rejected.

C. The College has raised objections to the election because of certain literature which was distributed by the SEA to unit members prior to the election. Specifically, objection has been made to certain SEA literature which states that the SEA is required by law to represent State Employees in bargaining and that the employees who are not members of the unit have no say in what is negotiated for them and cannot be represented by union representatives unless they are members of the union. In addition, the College objected to SEA literature which characterized the negotiating positions of the parties for a new contract as being a mis-statement of the final negotiating positions. Finally, the College objected strenuously to a letter mailed to operating staff members on the Monday evening prior to the Thursday election and apparently received by them as late as the night immediately preceding the election. Both the timing of this letter which allowed for no response and the content of statements by three members of the New Hampshire House of Representatives which were alleged to be inaccurate were cited as reasons for overturning the election.

At hearing, no evidence was produced that any piece of material which was distributed changed any vote or affected the election. There is no dispute that certain of the statements made by the SEA in certain of the brochures were inaccurate

in that the organization is not required by law to bargain for all State Employees but only those who select it as certified bargaining agent. There was dispute as to whether the characterization of the final negotiating positions of the parties was accurate or not. As to the letter from the three representatives of the General Court, one of them, Representative Peter Hildreth, testified at the hearing that the letter fairly represented his opinion and view of collective bargaining under RSA 273-A as practiced at Keene State College and in the University System of New Hampshire. The Board finds that this last letter was not represented as anything but the opinion of three representatives and that there was no evidence to indicate that it did not fairly represent their opinions. The University alleged that there was some rule concerning distribution of materials prior to an election and alluded to a National Labor Relations Board rule prohibiting such distributions within 24 hours of an election. This Board, the statute under which it operates and the rules have no such prohibition. As this Board held in Decision 79025 between the SEA and Plymouth State College in an objection to materials distributed by Plymouth State College in an election the SEA lost, election campaigns contain a great deal of electioneering, posturing and the like. It is certainly true that employees at Keene State College are familiar with the collective bargaining process and can fairly weigh the materials presented to them. While this Board certainly does not approve blatant mis-statements of fact or law and warns the parties against making them, absent some clear demonstration that any materials had any real effect on the outcome of an election, the Board will assume that all sides had an opportunity to campaign. The fact that one side or another got in the last punch or that the statements in some materials may have contained errors will not be enough to overturn the results of an election following the entire process of election without clear evidence of the effect. Indeed, the Board would note that the trustees and administration of the College had the opportunity and took the opportunity to communicate with the members of the unit and the employees petitioning for decertification had every opportunity to campaign as well. Therefore, the allegations concerning materials distributed cannot be held to have so affected the outcome of the election as to require the overturning of the election.

D. The College has alleged that a meeting was scheduled by the union in violation of Board rules. Specifically, a meeting from 11:00 a.m. to 2:00 p.m. on December 12, 1979 was alleged to have violated Board rulings and orders since it was allegedly held on employee paid time. Again, the College looks to the Plymouth State College case as having general applicability in that certain meetings which were scheduled on paid time were held inappropriate by this Board under the specific circumstances of those meetings and that case. In the Keene situation, however, the evidence indicated that the 3 hour meeting was scheduled by the SEA so that all employees could come during lunch (nonpaid time) and that various employees had lunch hours from approximately 11:00 a.m. to 2:00 p.m. Not only does this not violate any Board rule or ruling, but the explanation that the union scheduled a meeting so that all employees would have an opportunity to come but did not encourage any employees to come on paid time seems to the Board to dispose of the matter.

In summary, the Board cannot find that any of the alleged conduct affected the outcome of the election and will not order a new election based on any of the allegations of improper conduct.

IV. Challenged Ballots.

Both the College and Lois Jefferson for the employees seeking decertification have asked that the challenged ballots be counted. All parties agree that all challenged ballots were cast by employees who were ruled ineligible for the same reason. The Board at the pre-election conference and at the election held that these employees were "probationary". RSA 273-A:1 IX defines public employee as any person employed by a public employer except:

"(d) persons in a probationary or temporary status . . . for the purposes of this chapter, however, no employee shall be determined to be in a probationary status who shall have been employed for more than 12 months or who has an individual contract with his employer; nor shall any employee be determined to be in a temporary status solely by reason of the source of funding of the position in which he is employed."

All employees who cast ballots which were challenged were ruled to be "probationary" because they had been employed by the College for less than 6 months. They were subject to all employment benefits and rights under the previous contract with the SEA and are similar to all employees at the College currently in the unit except for the fact that they can be discharged by the College during the first six months without the right to take the question of discharge to arbitration. The College argues that they are not different from other employees in that they were covered by the previous contract. The previous contract was entered into prior to the effective date of RSA 273-A and its definitions of public employee. The College alleges that the employees should have a right to vote since they are permanent employees. There is no dispute that the employees are permanent as opposed to "temporary" which is a separate category in the law. However, these permanent employees are, until they have served for 6 months, probationary and, therefore, not public employees under the act. Regardless of the agreement of the parties under the contract entered into under the preceding law, and regardless of the feelings of the parties as to whether the legislature should have enacted the definition of public employee to exclude probationary employees, given the fact that during their first 6 months there employees can be terminated under conditions which vary from those under which employees who have served longer than 6 months can be discharged makes them "probationary" employees. This Board must follow the law which excludes them from the definition of public employee and, therefore, excludes them from the election process. The fact that the parties have voluntarily included these employees in some programs and afforded them some rights does not change the definition of the law. The suggestion that some of these employees may be union members is likewise irrelevant to determination of their status. Having found these employees probationary, the Board cannot find that the challenged ballots should be counted and, therefore, the Board rules that they will not be counted and that the election results shall stand.

V. Summary.

In conclusion, the Board finds after considering the substance of the arguments asserted for setting aside the election that nothing presented changed the results or should be the basis for setting aside the election. While the Board could have dismissed these complaints on procedural grounds, the Board will not do so in this case for the reasons set forth above. On the question of challenged ballots, the Board affirms the ruling made by its representatives at the pre-election conference and at the election that the employees not included on the voting list who attempted to vote and whose ballots were challenged are in fact probationary and excluded under the law.

ORDER

The Board issues the following order:

The results of the election held December 20, 1979 are affirmed and the requests for setting aside of the election and for the counting of challenged ballots are denied for the reasons stated in this opinion.

A handwritten signature in cursive script, reading "Edward J. Haseltine", is written over a horizontal line.

EDWARD J. HASELTINE, CHAIRMAN
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Signed this 28th day of January, 1980

Chairman Edward Haseltine presided. Members Anderson and Cummings also present. All concurred. Executive Director Evelyn LeBrun and Counsel Bradford Cook also present.