



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Pinkerton Academy Teachers Association,
Steven Rodrick, John Pelkey, and
NEA-New Hampshire

Complainant/Petitioner

v.

Pinkerton Academy

Respondent

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Case No: E-0008-1
E-0008-2

Decision No. 2004-201

PRE-HEARING MEMORANDUM AND ORDER

BACKGROUND

The Pinkerton Academy Teachers Association (hereinafter "the Association"), Steven Rodrick ("Rodrick") and John Pelkey ("Pelkey") filed an unfair labor practice complaint on November 3, 2004 with the Public Employee Labor Relations Board ("PELRB" or "Board") alleging that Pinkerton Academy (hereinafter "the Academy") committed unfair labor practices in violation of RSA 273-A:5 I (a) and (c). (PELRB Case No. E-0008-1). The Association claims that the Academy has interfered with the rights of its employees to engage in protected, concerted activities by, *inter alia*, (1) adversely evaluating Rodrick and Pelkey on or about May 4, 2004, (2) blocking access to the Association's website, (3) denying Rodrick a representative at a disciplinary interview that occurred on September 21, 2004, and (4) issuing Rodrick a letter of reprimand on October 5, 2004. Also on November 3, 2004, NEA New Hampshire filed a Petition for Declaratory Judgment with the Board (PELRB Case No. E-0008-2), requesting that the Board, consistent with its Decision No. 85-48 (July 10, 1985), find that the Academy constitutes a quasi-public corporation within the definition of "public employer" under RSA 273-A:1, X.

The Academy filed its answer denying the Union's unfair labor practice charge on November 19, 2004. At the outset, it specifically denies that it is a public employer subject to the Board's jurisdiction. The Academy also objects on the grounds that the complainants in this matter lack standing to bring the charges. It states that pursuant to *Collins v. City of Manchester*, 143 N.H. 708 (1999), the claimant of an improper practice

complaint, pursuant to RSA 273-A:5, must be a collective bargaining unit, and that neither the Association nor NEA-New Hampshire is a certified bargaining unit with a collective bargaining agreement. The Academy denies that it adversely evaluated Rodrick or Pelkey on or about May 4, 2004. It maintains that since Rodrick and Pelkey were hand delivered letters regarding their evaluations on April 23, 2004, this aspect of the charge is untimely. Moreover, it states that the evaluations were not adverse but in fact the highest results either teacher had ever received on their 2004 evaluations.

The Academy also denies that it illegally or improperly interfered with its teachers' rights by blocking access to the Association's website. It points out that since the Association's website is not an educational website it is thus inconsistent with the Academy's stated internet acceptable use policy. The Academy further denies that it illegally or improperly interfered with its teachers' rights by denying Rodrick a representative at a meeting held on September 21, 2004. The Academy asserts that Rodrick was not entitled to a representative at that meeting since he is not a union employee and the Academy is not a union employer, citing *IBM Corp.*, 341 NLRB No. 148 (June 9, 2004, announced June 15, 2004)(reversing *Epilepsy Foundation of Northeast Ohio*, 331 NLRB No. 92 (2000)). The Academy denies that the October 5, 2004 letter of reprimand issued to Rodrick was in response to his having engaged in protected, concerted activities, but was directed at his recent conduct and attacks upon the Academy's administration and staff's ethics and integrity. The Academy otherwise denies that it has interfered with rights protected under RSA 273-A. Accordingly, the Academy requests that the Board (1) enter a judgment for Pinkerton on all counts; (2) award Pinkerton attorney's fees and costs; and (3) grant further relief as justice deems equitable, fair and required.

On November 19, 2004, the Academy also filed an Answer and Objection to Petition for Declaratory Judgment, a Memorandum of Law in Support of Objection to Petition for Declaratory Judgment, a Motion to Dismiss Improper Practice Charges and a Motion to Stay Improper Practice Charges Pending Resolution of Petition for Declaratory Judgment. In its Answer and Objection to Petition for Declaratory Judgment, the Academy admits that the Board held that it was a public employer for purposes of RSA 273-A in 1985, but objects to the allegation that this decision is applicable today. In this regard, the Academy maintains that it is a private institution and therefore a private employer not subject to the Board's jurisdiction, and asserts that the Board's decision in 1985 that the Academy is a public employer is inapposite in 2004. The Academy points out that in the case of *Johnson v. Pinkerton Academy*, 861 F.2d 335 (1st Cir. 1988), the court held that the Academy was not a state actor. Moreover, it references a letter issued in 1991 by the New Hampshire Retirement System wherein it was determined that the Academy's employees were not eligible to participate in the retirement system. Finally, the Academy states that neither the Association nor NEA New Hampshire have standing to bring forward this declaratory judgment action since, on the face of the pleading, there is no showing the either has been injured in some way. It quotes *Asmussen v. Commissioner of N.H. Dept. of Safety*, 145 N.H. 578, 587 (2000), that "a party will not be heard to question the validity of a law, or any part of it unless he shows that some right of his is impaired or prejudiced thereby."

The Academy's Motion to Dismiss raises the jurisdictional and standing issues referenced above, as well as a claim that the charges are procedurally flawed. The Academy avers that the Associations' complaint does not comply with the provisions of Pub 201.02(d) and Pub 201.02(b)(5).

On December 2, 2004, the Association filed its objections to the Academy's Motion to Dismiss and Motion to Stay.

A pre-hearing conference was held before the undersigned hearing officer on December 6, 2004 at PELRB offices, Concord, New Hampshire.

PARTICIPATING REPRESENTATIVES

For the Association: James F. Allmendinger, Esq.

For the Academy: Linda S. Johnson, Esq.

ISSUES PRESENTED FOR BOARD REVIEW

- (1) Is Pinkerton Academy a "public employer," within the meaning of RSA 273-A:1 X, and therefore subject to the Board's jurisdiction?
- (2) Do the Association, NEA – New Hampshire, and/or Steven Rodrick and John Pelkey have proper standing to bring forward the Petition for Declaratory Judgment and/or Unfair Labor Practice Complaint?
- (3) Must either the Association's Petition for Declaratory Judgment and/or Unfair Labor Practice Complaint be dismissed for lack of compliance with procedural regulations of the Board?
- (4) Is any portion of the Association's complaint violative of the six (6) month statute of limitations set forth in RSA 273-A:6 VII?
- (5) If the complaint is within the Board's jurisdiction and review, has the Academy committed unfair labor practices in violation of RSA 273-A:5 I (a) and/or (c) by:
 - a. Adversely evaluating Rodrick and Pelkey on or about May 4, 2004,
 - b. Blocking access to the Association's website,
 - c. Denying Rodrick a representative at a disciplinary interview that occurred on September 21, 2004,
 - d. Issuing Rodrick a letter of reprimand on October 5, 2004, or

- e. Otherwise interfering with employees in the exercise of their rights under RSA 273-A?

WITNESSES

For the Association:

1. Steven Roderick
2. John Pelkey

For the Academy:

1. Mary Anderson
2. Marie Rodgers

Both parties reserve the right to amend their List of Witnesses in conformity with the schedule contained in the DECISION SECTION appearing at the conclusion of this order or, upon proper showing, later with reasonable notice to the other party. It is understood that each party may rely on the representations of the other party that witnesses appearing on their respective list will be available at the hearing.

EXHIBITS

For the Association:

1. Employee Evaluations – 2004
2. Employee discipline (10/5/04)
3. Prior Evaluations Rodrick and Pelkey (date of hire to present)
4. “Read the Whole Story” package
5. E-mails re: disciplinary meeting 9/17-20/04

For the Academy:

1. Rodrick and Pelkey’s 1985 contracts
2. Rodrick and Pelkey’s 2004-05 contracts
3. 1985 Prof. Staff Handbook
4. 2004 Prof. Staff Handbook
5. NH Retirement system 1991 letter
6. Rodrick & Pelkey’s 2003-04 Performance Evaluations

Both parties reserve the right to amend their List of Exhibits in conformity with the schedule contained in the DECISION SECTION appearing at the conclusion of this order or, upon proper showing, later with reasonable notice to the other party. Copies of all exhibits are to be submitted to the presiding officer in accordance with Pub 203.02. It

is understood that each party may rely on the representations of the other party that the exhibits listed above will be available at the hearing.

LENGTH OF HEARING

The time set aside for this hearing will be one (1) day. If either party believes that additional time is required, written notice of the need for additional time shall be filed with the PELRB at least twenty (20) days prior to the date of the evidentiary hearing.

DECISION

1. The Board, in accordance with Pub 206.01(b), has determined that it shall give a ruling on the Petition for Declaratory Judgment. For administrative purposes and pursuant to Pub 201.07 (i), PELRB Case Nos. E-0008-1 and E-0008-2 shall be consolidated. However, in accordance with Pub 201.07 (i), “[i]n the event a party objects to such a consolidation, the consolidation shall not be finalized until the objecting party has had an opportunity to be heard on the basis of its objection.”
2. The parties’ representatives shall meet, or otherwise confer, on or before **December 17, 2004**, in order to compose a mutual statement of agreed facts and attempt to reach agreement on the presentation of the declaratory judgment petition (Case No. E-0008-2) by written submission, or, in the alternative, without the need for formal testimony.
3. The parties’ representatives shall notify the Board, on or before **December 22, 2004**, as to their need for an evidentiary hearing, or, in the alternative, oral argument, relative to the presentation of the declaratory judgment petition (Case No. E-0008-2).
4. In the event that agreement is reached on submitting the declaratory judgment petition (Case No. E-0008-2) by written submission, the parties’ legal memoranda relative thereto shall be filed with the Board on or before **January 5, 2005**.
5. A supplemental status conference shall be conducted by the PELRB Hearing Officer, via telephone conference call with the parties’ counsel, on **Friday, January 7, 2005 @ 2:00 PM**.
6. The party representatives shall forward any amendments to, or deletions from, their Witness and Exhibit lists, as detailed above, to the opposing representative or counsel, and to the PELRB, at least five (5) days prior to the scheduled hearing date. The party representatives shall meet, or otherwise arrange, to pre-mark any exhibits, for identification, prior to the time of

hearing and have sufficient copies available for distribution at the hearing as required by Pub 203.02.

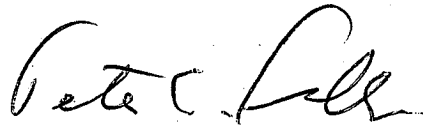
7. The parties shall file any additional preliminary, procedural or dispositive motions no later than twenty (20) calendar days prior to the scheduled hearing date.
8. Unless otherwise ordered as a result of the filing of any subsequent motion or for other good cause shown, a hearing before the Board will be held on:

Thursday, January 20, 2005 @ 9:30 AM

at the offices of the Public Employee Labor Relations Board, Concord, New Hampshire.

So ordered.

Signed this 15th day of December, 2004.



Peter C. Phillips, Esq.
Hearing Officer

Distribution:

James F. Allmendinger, Esq.

Linda S. Johnson, Esq.