



State of New Hampshire
Public Employee Labor Relations Board

**KSC Admin. Staff Assoc., NEA-NH, Case No. E-0189-4;
KSC Staff Assoc., NEA-NH, Case No. E-0190-5; and
KSC Directors & Supervisors Assoc., NEA-NH, Case No. E-0191-6**

v.

Keene State College
Decision No. 2023-078

Appearances: Rachel Hawkinson, NEA-NH UniServ Director
Concord, New Hampshire for KSCSA NEA-NH et. al.

Karyl R. Martin, Esq., Associate General Counsel, USNH
Concord, New Hampshire for Keene State College

Background:

On November 23, 2022, KSCASA, KSCSA, and KSCDSA/NEA-NH¹ filed an unfair labor practice complaint with the Public Employee Labor Relations Board (PELRB). The complaint is based upon the College's treatment of, and interactions with, "Introductory employees" who are filling a bargaining unit position. The Associations argue that the College has committed unfair labor practices because it has: 1) treated introductory employees as probationary employees under RSA 273-A:1, IX (d); 2) unilaterally removed introductory employees from the bargaining units without following applicable PELRB rules; 3) communicated with them about Association membership; 4) engaged in communications with introductory employees in violation of the Associations' rights as exclusive representatives of the bargaining units; and 5) violated provisions

¹ Keene State College Administrative Staff Association, NEA-NH; Keene State College Staff Association, NEA-NH; and Keene State College Directors and Supervisors Association, NEA-NH (collectively "Associations").

of the collective bargaining agreement applicable to introductory employees, such as the salary increase and ratification bonus included in the 2022-25 collective bargaining agreement, contrary to how the 2017-20 CBA was administered. The Associations therefore charge the College with violations of the following sub-sections of RSA 273-A:5, I:

- (a) To restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter;
- (b) To dominate or to interfere in the formation or administration of any employee organization;
- (c) To discriminate in the hiring or tenure, or the terms and conditions of employment of its employees for the purpose of encouraging or discouraging membership in any employee organization;
- (e) To refuse to negotiate in good faith with the exclusive representative of a bargaining unit, including the failure to submit to the legislative body any cost item agreed upon in negotiations;
- (g) To fail to comply with this chapter or any rule adopted under this chapter;
- (h) To breach a collective bargaining agreement; and
- (i) To make any law or regulation, or to adopt any rule relative to the terms and conditions of employment that would invalidate any portion of an agreement entered into by the public employer making or adopting such law, regulation or rule.

As relief, the Associations request that the PELRB: 1) find that the College has committed unfair labor practices; 2) order the College to cease and desist from engaging in such conduct; and 3) order the College to make the Associations and affected employees whole.

The College denies the charges. According to the College, "Introductory Employee" is the College's term for an RSA 273-A:1, IX probationary employee. Since probationary employees are not considered public employees under RSA 273-A:1, the College argues the PELRB lacks jurisdiction in this case, the Associations do not represent introductory employees, and introductory employees are not covered by the 2022-25 CBA. The College also argues that the complaint is time-barred by the RSA 273-A:6, VII six month limitation period, and the Associations have failed to exhaust all administrative remedies. The College does not dispute that 2017-20 CBA salary increases were provided to introductory employees. However, the College

maintains that in June of 2020 it duly notified the Associations that payment of such contract benefits to introductory employees would not continue.

The College also filed a motion to dismiss, raising the six month limitations period on complaints imposed by RSA 273-A:6, VII and jurisdictional arguments based on the probationary status of introductory employees. The Associations have objected, arguing the claims are not time barred and the College is incorrectly classifying introductory employees as probationary employees.

As per the pre-hearing order, the parties agreed to submit this case for decision on stipulations, exhibits, and briefs, and our decision is as follows.

Findings of Fact

1. The College is part of the University System of New Hampshire (USNH) and is a public employer within the meaning of RSA 273-A:1, X.

2. The Associations are the certified bargaining unit representatives for certain College employees per PELRB Decisions 2016-132 (June 14, 2016 – KSCASA), 2016-092 (April 29, 2016 – KSCSA), 2022-199 (November 29, 2022 – KSCSA), and 2016-290 (December 13, 2016 – KSCDSA).

3. The parties' stipulations and exhibits are fully incorporated by reference in these findings of fact.

4. Under University System policy, all newly hired status² employees are subject to a six-month introductory period. During this time, employees cannot use the grievance procedure to "appeal termination for inability to meet the requirements of the position." Joint Ex. 13.

5. In PELRB Case E-0190-1, KSCSA-NEA/NH petitioned for approval of a proposed

² "Status" means benefitted per the College.

bargaining unit and a representation election on December 10, 2015.³ Per PELRB rules, the College filed a list of employees holding positions in the proposed bargaining unit and identified their probationary status.⁴ See Joint Ex. 3. The College identified 21 employees as probationary employees with the following notation: “Probationary status – currently in intro period.” The “intro period” language comes from the introductory period for new hires required by University System policy. See Joint Ex. 13. Seventeen of these employees were subsequently included on the List of Eligible Voters, which under applicable PELRB election procedures means that they were no longer in a probationary status and were eligible to vote in the election.

6. The PELRB held an election in Case E-0190-1 on April 6, 2016. See Joint Exhibit 4. Voters selected the KSCSA/NEA-NH as their exclusive representative and the PELRB issued a Certification of Representative and Order to Negotiate. See PELRB Decision 2016-092 (April 29, 2016).

7. Since 2016, the parties have negotiated three contracts with pay increases as follows:

- July 1, 2017 to June 30, 2020 (2017-20 CBA)(1.5% pay increase eff. 7-1-2018)
- July 1, 2020 to June 30, 2021 (2020-21 CBA)(no pay increase)
- July 1, 2022 to June 30, 2023 (2022-23 CBA)(1.5% pay increase plus one time \$500 payment eff. 7-1-2022)

8. The CBAs reference introductory employees or the introductory period as follows:

- Article I-C (definitions)
- Article II-G (eligibility for tuition benefits)
- Article V-D (introductory period explained)
- Article V-E (use of evaluations to monitor performance of introductory employees)
- Article V-F (just cause does not apply to introductory employees)

³ Joint Exhibit 4 consists of the List of Eligible Voters, the March 16, 2016 Notice of Election, and Ground Rules for Conduct of Election. The List of Eligible Voters is issued by the PELRB following the Order for Election and is posted in the workplace at least seven days prior to election day. See N.H. Admin. Rules Pub 303.

⁴ See N.H. Admin. Rules Pub 301.01 (o) and Form P-1 Petition for Certification – New Bargaining Unit. The PELRB uses employee lists to determine the sufficiency of authorization cards filed to confirm a petition is supported by at least 30% of employees per N.H. Admin. Rules Pub 301.01 (f). Reporting an employee’s probationary status is required because probationary employees cannot sign authorization cards (and cannot vote in a representation election). See RSA 273-A:8, I and PELRB Decision 2006-186 (October 19, 2006).

Article V-H (introductory period does not apply to involuntary transfers).

See Joint Ex. 1 and 2.

9. Article I-C states that the “introductory period” “refers to the initial six (6) months on an employee’s first position with the College or the first six (6) months in a new position if the employee has been promoted, demoted, transferred or reclassified into a position with different duties.”

10. Article V-D states:

1) New employees serve an initial introductory period of six (6) months. The intent is to provide the time needed to do a concentrated evaluation of the new employee’s performance and to determine if the individual is able to meet the job requirements.

2) The supervisor will conduct a performance review after the first three (3) months and again after the first five and one-half (5 ½) months to determine suitability for continued employment. If more time is needed to assess the suitability of the employee to the job, the supervisor may request that the Office of Human Resources extend the initial introductory period. Such extensions may be granted for a period no longer than an additional three (3) months. By the end of the extension, another performance evaluation must be conducted.

....

4) At any time during the initial introductory period, an employee may be terminated, and the employee will not have use of the grievance process to appeal termination.

11. Article V-F sub-section 3 states “[e]xcept for those who may be terminated during their introductory period, no bargaining unit member shall be disciplined or terminated except for just cause.”

12. Introductory employees received the July 1, 2018 pay increase.

13. On June 10, 2020, during negotiations over the 2020-21 CBA, the College’s lead negotiator provided the following “end-of-practice notification” to the Associations’ bargaining team:

In accordance with New Hampshire RSA 273-A:1, probationary employees or those that are

in a temporary status are not part of (exempt from) the bargaining unit. As such, the practice of employees in their 'initial introductory period' having access to the negotiated items in the Collective Bargaining Agreement shall end at the expiration of the current contract period or evergreen (status quo) whichever is later.

See Joint Exhibit 6. The Associations verbally objected to this notice but did not file a grievance or an unfair labor practice complaint.

14. The College issued appointment letters to new employees in 2021 with the following language:

This position falls within the Keene State College Staff Association (KSCSA), an affiliate of the National Education Association of New Hampshire (NEA-NH). You may access the Collective Bargaining Agreement at (cite omitted). You will be eligible for all fringe benefits available to staff members within the KSCSA... You and your supervisor will work together to define your performance expectations and a schedule for reviewing your performance. As outlined in the KSCSA Collective Bargaining Agreement V.D.2, professional staff members are reviewed after the first 3 months, and again after the first 5 ½ months, and annually thereafter.

See Joint Ex. 7.

15. On January 20, 2022 the College provided a new hire notice to Association presidents, stating “[p]lease be advised that the following positions(s) have been filled and the newly hired staff member will be part of the appropriate union (KSCDSA, KSCSA, KSCASA) upon the successful completion of their introductory period.” See Joint Ex. 9.

16. The College began using an updated version of the appointment letters in January of 2022, which included the following language:

This position falls within the Keene State College Staff Association KSCSA, an affiliate of the National Education Association of New Hampshire (NEA-NH). At the end of your introductory period, you will be part of the KSCSA.

See Joint Ex. 8 - Appointment letters issued January 20 (1), February 10 (2), June 24 (3), and August 30 (1). The College did not provide the Associations with copies of these letters at the time they were issued to new hires.

17. On March 30, 2022, the Associations' representative complained to the College about the new hire notices (Joint Ex. 9), stating:

“...we need to talk about introductory employees. In the last round of negotiations we explained that introductory employees are represented and noted the portions of the CBAs that explicitly govern treatment of introductory employees as evidence of our mutual agreement on this subject when the first staff CBAs were negotiated (before your time with USNH). However, recently the new hire notices that are issued to the Association include a statement that the position will not be in a bargaining unit until the employee has completed their introductory period. This is incorrect and needs to be fixed.

See Joint Ex. 10. The College did not respond to this request to change the content of the hiring notices.

18. Introductory employees did not receive the July 1, 2022 pay increase and one-time \$500 payment provided by the 2022-23 CBA. The Associations notified the College that introductory employees should have received these benefits as well. The College responded by providing the Associations with two of the June 2022 appointment letters (contained in Joint Ex. 8) which include the language recited in Finding of Fact 15. After reviewing these letters, the Associations complained to the College as follows:

The letters that you attached are, in our view, confusing with respect to union membership. The bullet point that states employees will be part of the union at the end of their introductory periods could potentially confuse these employees since they have to fill out a membership form to join the union – it is not automatic.

See Joint Ex. 11 (July 29, 2022 email).

19. No information was provided about explanations, if any, the College provides to new employees at the all-day New Employee Orientation referenced in the 2022 appointment letters about collective bargaining concepts, existing bargaining units, membership in existing bargaining units, or membership in unions representing existing bargaining units. No evidence was submitted to show that any newly hired employee was confused by any information provided in the 2022 appointment letters.

Decision and Order

Decision Summary:

Introductory employees are probationary employees under RSA 273-A:1, IX (d). This means the PELRB lacks jurisdiction over many of the claims the Association has filed. Other claims are barred by the six-month limitation period set forth in RSA 273-A:6, VII. There is otherwise insufficient evidence to prove that the College has committed unfair labor practices as charged. The complaint is dismissed.

Jurisdiction:

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, *see* RSA 273-A:6. The College's motion to dismiss is addressed in the discussion portion of our decision that follows.

Discussion:

The core dispute in this case is the probationary status of introductory employees following the certification of the Associations as bargaining unit representatives in 2016. Under the PELRA, public employee means any person employed by a public employer except those who fall into one of the following categories:

- (a) Persons elected by popular vote;
- (b) Persons appointed to office by the chief executive or legislative body of the public employer;
- (c) Persons whose duties imply a confidential relationship to the public employer; or
- (d) Persons in a probationary or temporary status, or employed seasonally, irregularly or on call. 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.

See RSA 273-A:1, IX. With limited exceptions, the PELRA does not apply to employees in a

probationary status because they are not public employees.⁵ This is true even though a probationary employee is filling a bargaining unit position. For the duration of their probationary period, employees cannot sign authorization cards to support an election petition, cannot vote in representation elections, are not members of the bargaining unit, and are not represented by bargaining unit exclusive representatives. Whether to hire employees into a probationary status is inextricably intertwined with the selection of employees, and is part of “managerial policy within the exclusive prerogative of the public employer” that helps “continue public control of governmental functions.” See RSA 273-A:1, XI. The introductory period or introductory employee language at issue in this case comes from USNH personnel policies and was understood by the parties and the PELRB during the 2016 election proceedings to mean probationary employees under RSA 273-A:1, IX (d). The College filed the employee list and the PELRB determined voter eligibility on this basis. See Joint Ex. 3 and 4.⁶

The Associations cite *In re Town of Durham*, 149 N.H. 486 (2002) to support the proposition that probationary employment is negotiated once the PELRB certifies a bargaining unit representative, and this is what the Associations claim happened in this case. *Durham* is not particularly helpful to the Associations’ case, since the issue was whether the PELRB, and not an arbitrator, had jurisdiction to determine the arbitrability of a probationary employee’s grievance. The court reversed the PELRB’s decision sending the arbitrability question to an arbitrator, and on remand, the PELRB vacated its prior order and closed the case. See PELRB Decision 2003-058 (June 19, 2003). In the present case, the CBAs between the Associations and the College

⁵ Two recognized exceptions are: 1) RSA 273-A:5, I (c) prohibits discrimination against probationary as well as public employees. See *Appeal of International Brotherhood of Police Officers*, 148 N.H. 194, 195-196 (2002); and 2) probationary employees are counted when determining whether the ten employee minimum required to form a bargaining unit under RSA 273-A:8, I has been satisfied.

⁶ List of Eligible voters was published with the March 16, 2016 Notice of Election.

include a number of references to introductory employee and introductory period as reviewed in the Findings of Fact. However, these references are, on balance, more consistent with the documentation and continuation of probationary employment for new hires than with its termination. In particular, there is insufficient proof, based on the provisions of the CBA and other evidence, that: 1) the College agreed to negotiate and change the substance of its introductory employment program; 2) the College agreed to give the terms introductory employee and introductory period new meaning; or 3) the College agreed to the elimination of any sub-section (d) probationary period so as to immediately grant new employees "public employee" status under PELRA at the time of hire.

The Associations maintain the non-probationary status of introductory employees is supported by the fact that introductory employees are not excluded in the relevant PELRB's bargaining unit certifications, they receive appointment letters which constitute "individual contracts" under RSA 273-A:1, IX (d), and the College has not taken action to have introductory employees removed from the bargaining unit pursuant to N.H. Admin. Rule Pub 305.02.

The introductory or probationary period refers to a particular employee's status, not a position, and the failure to list "introductory employee" as specifically excluded does not mean the position is included.⁷ Such exclusionary language, if included, would be superfluous, as probationary employees are excluded from bargaining units by law because they are not public employees. Furthermore, it should also be noted that an employer's treatment of employees as members of a bargaining unit is legally insufficient to make them members of the bargaining unit. See *Appeal of Hollis Education Assoc., NEA-NH*, 163 N.H. 338 (2012)(speech-language pathologists and occupational therapists who were treated like bargaining unit positions for a

⁷ Examples of "positions" in the KSCSA bargaining unit include Academic Counselor II, Grant/Contracts Administrator II and the like posted with the March 14, 2016 Notice of Election. See Joint Ex. 4.

number of years are not part of the bargaining unit as these positions are not covered by the bargaining unit certification); *Appeal of Londonderry School District*, 142 N.H. 677, 682 (1998)(employer may provide similar terms to non-union positions without fear of enlarging bargaining unit...CBAs...may reflect the rights of employees not included in bargaining units); *Appeal of Somersworth*, 142 N.H. 837, 841 (1998)(PELRB may only add a position to a bargaining unit when a petition to modify is filed, and not based on employer conduct and principles of equitable estoppel).

As to the appointment letters, these simply reduce to writing basic information that is provided to new employees, including position title, start date, compensation, work schedule, full or part-time status, fringe benefits, orientation session date and time, and performance review procedures. The appointment letters do not provide a specific employment term or duration, and do not contain any provision establishing that the employment is anything other than at-will, all of which are essential characteristics of probationary employment.

The next issue relates to the January 20, 2022 new hire notice in which the College stated the “position will not be in a bargaining unit until the employee has completed their introductory period.” See Joint Ex. 9. The Associations, including NEA-NH representatives, were familiar with the content of this notice by March 30, 2022 at the latest. Therefore, any complaint based on this notice is barred by the RSA 273-A:6, VII six month limitation period. Additionally, consistent with our discussion about the status of introductory employees, it is a correct statement of the law.

The Associations also complain about language in appointment letters the College issued in 2022, which the Associations did not learn about until July, as reviewed in the Findings of Fact. According to the Associations, the language “at the end of your introductory period, you will be part of the KSCASA” incorrectly informs new hires that they will automatically become union

members at the conclusion of their introductory period. The Associations argue this constitutes an interference in the rights of employees and the administration of the Associations' affairs. The disputed language is somewhat imprecise, and it can easily be improved to distinguish more clearly between membership in the bargaining unit and membership in the union representing the bargaining unit. For example, instead of "at the end of your introductory period, you will be part of the KSCASA" the letter could say "...you will be part of the KSCASA *bargaining unit*." It appears the College was using an abbreviation for the bargaining unit (e.g. KSCASA) which technically is the name of the union representing the bargaining unit. In considering this portion of the Associations' complaint, we note that even the court, at times, has used the "union" reference when describing the bargaining unit.⁸ There was also no evidence of any actual confusion among the recipients. This situation appears to be more the result of mistake or careless drafting than active illegal interference in the rights of employees or the administration of the Associations' affairs in violation of any sub-section of RSA 273-A:5, I. Nevertheless, we expect the College will take necessary steps to update and improve the relevant language in appointment letters.

The remaining issue is the College's refusal to provide the July 1, 2022 pay increase and bonus to introductory employees and the related relevance of the July 2018 pay increases provided to introductory employees and the June 2020 End of Practice notification. The Associations make two slightly conflicting arguments in support of this claim: first, that introductory employees are represented members of the bargaining unit and therefore are entitled to the July 1, 2022 pay increase and bonus just like other bargaining unit employees; and second, that there is a binding past practice pursuant to which the College is obligated to provide non-bargaining unit employees

⁸See *Appeal of Londonderry School District*, 142 N.H. 677, 682 (1998)(employer may provide similar terms to *non-union positions* without fear of enlarging bargaining unit...CBAs...may reflect the rights of employees not included in bargaining units). Technically, the italicized text should read "non-bargaining unit positions."

with CBA pay increases. In the first argument, introductory employees are members of the bargaining unit and in the second, they are not. For the reasons already explained, introductory employees are not public employees, which means the PELRB has no jurisdiction over claims that the College has breached an obligation to provide them with the July 1, 2022 pay increase or bonus. Additionally, a union cannot establish and enforce a past practice on behalf of unrepresented non-bargaining unit introductory employees. Even assuming there was an enforceable past practice,⁹ the End of Practice notice satisfies the requirements of *Appeal of State Employees Association of NH*, 171 NH 391 (2018). No language changes in a CBA are necessary to perfect the termination of a past practice - a proper notice is effective, regardless of whether it is accepted by the union at the time it is given.

In summary, portions of the Associations' complaint are time-barred or raise claims over which the PELRB has no jurisdiction, and accordingly we grant the College's motion to dismiss to this extent. There is otherwise insufficient evidence to prove that the College has committed unfair labor practices as charged, and the complaint is therefore dismissed.

So ordered.

May 1, 2023

/s/ Peter G. Callaghan
Peter G. Callaghan, Esq.
Chair/Presiding Officer

By unanimous vote of Alternate Chair Peter G. Callaghan, Esq., Board Member Brian Paquette, and Board Member Carol M. Granfield.

Distribution: Rachel Hawkinson, UniServ Director
Karyl R. Martin, Esq.

⁹ For a review of the level of evidence required to prove a binding past practice see *Appeal of NH Dept. of Corrections*, 164 N.H. 307 (2012).