Vacated and remanded with instructions PELRB Decision No. 2005-062

THE SUPREME COURT OF NEW HAMPSHIRE

Public Employee Labor Relations Board
No. 2005-627

APPEAL OF PINKERTON ACADEMY
(New Hampshire Public Employee Labor Relations Board)

Argued: June 8, 2006
Opinion Issued: February 21, 2007

McLane, Graf, Raulerson & Middleton, P.A., of Manchester (Linda S. Johnson and Cathryn E. Vaughn on the brief, and Ms. Johnson orally), for the petitioner.

James F. Allmendinger, of Concord, staff attorney, NEA-New Hampshire, by brief and orally, for respondents Pinkerton Academy Teachers Association and NEA-New Hampshire.

BRODERICK, C.J. The petitioner, Pinkerton Academy (Pinkerton or the Academy), appeals an order of the New Hampshire Public Employee Labor Relations Board (PELRB) asserting jurisdiction over an unfair labor practice complaint against the Academy filed by the respondents, who are two Pinkerton teachers, the Pinkerton Academy Teachers Association and NEA-New Hampshire. Because exclusive jurisdiction over the complaint at issue lies with the National Labor Relations Board (NLRB or Board), we vacate the order of the PELRB and remand with instructions to dismiss the complaint.

I

Pinkerton Academy was organized in 1814 as a nonprofit organization. The Academy operated as an independent day and boarding school until 1948. Beginning in 1949, Pinkerton entered into a contractual agreement with the Derry School District to provide high school education to students from Derry. Pinkerton currently has long-term contracts to provide high school education to students from the school districts of Derry, Chester and Hampstead.

In November 2004, the respondents filed an unfair labor practice charge against the Academy with the PELRB. NEA-New Hampshire also filed a petition for declaratory judgment, asking the PELRB to decide whether Pinkerton is a public employer subject to the PELRB's jurisdiction. In May 2005, the PELRB determined that the Academy is a "quasi-public corporation" subject to its jurisdiction. Pinkerton appealed. Following oral argument, we ordered supplemental briefing on an issue not addressed below: whether the National Labor Relations Act confers exclusive jurisdiction over this dispute to the NLRB.

II

The National Labor Relations Act (Act) provides that

> [t]he Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry . . . even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

29 U.S.C. § 160(a). "By this language . . . Congress meant to reach to the full extent of its power under the Commerce Clause." Guss v. Utah Labor Board, 353 U.S. 1, 3 (1957) (quotation omitted). "The Board, however, has never exercised the full measure of its jurisdiction." Id. "For a number of years, the Board decided case-by-case whether to take jurisdiction." Id. "In 1950, concluding that experience warrants the establishment and announcement of certain standards to govern the exercise of its jurisdiction, the Board published standards, largely in terms of yearly dollar amounts of interstate inflow and outflow." Id. at 3-4 (quotation omitted).

In 1957, noting that the Board's standards left an unknown number of labor disputes "in the 'twilight zone' between exercised federal jurisdiction and unquestioned state jurisdiction," id. at 4, the United States Supreme Court addressed the question "whether Congress, by vesting in the [NLRB] jurisdiction over labor relations matters affecting interstate commerce, has completely displaced state power to deal with such matters where the Board has declined or obviously would decline to exercise its jurisdiction but has not ceded jurisdiction [under the Act]." Id. at 2-3. The Court held that even if the NLRB declined to exercise jurisdiction in its discretion, State courts and agencies could not exercise jurisdiction over matters placed within the competence of the NLRB. Id. at 9-10. The Court stated that "Congress knew full well that its labor legislation preempts the field that the act covers insofar as commerce within the meaning of the act is concerned." Id. at 9-10 (quotation omitted). Recognizing that its decision created "a vast no-man's-land, subject to regulation by no agency or court," in those cases in which the NLRB declined to exercise jurisdiction in its discretion, the Court invited Congress to "change the situation." Id. at 10, 11.

In 1959, Congress responded by passing section 14(c) of the Act. See 29 U.S.C. § 164(c). The statute provides in paragraph (1) that the NLRB may "in its discretion . . . decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction." 29 U.S.C. § 164(c)(1). Paragraph (2) provides that federal law shall not be deemed to preclude "any agency or the courts of any State . . . from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction." 29 U.S.C. § 164(c)(2).

The United States Supreme Court subsequently clarified the extent of federal preemption over labor disputes. "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by [the Act], . . . due regard for the federal enactment requires that state jurisdiction must yield." San Diego Unions v. Garmon, 359 U.S. 236, 244 (1959). Even when it is not clear whether a particular activity regulated by a state is governed by the Act, "courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board." Id. at 244-45.

"Although a state court may assume jurisdiction over labor disputes over which the National Labor Relations Board has, but declines to assert, jurisdiction, . . . there must be a proper determination of whether the case is actually one of those which the Board will decline to hear." Radio Union v.

Broadcast Serv., 380 U.S. 255, 256 (1965) (citation omitted). "While the language of Section 14(c) does not compel the Board to assert jurisdiction, it does manifest a congressional policy favoring such assertion where the Board finds that the operations of a class of employers exercise a substantial effect on commerce." Cornell University, 183 N.L.R.B. 329, 332 (1970). The task before us, therefore, is to determine whether the case at issue is one the Board would decline to hear.

III

"[T]he Board may exercise its broad statutory jurisdiction whenever an employer has more than a de minimus impact on the flow of interstate commerce." YMCA of the Pikes Peak Region, Inc. v. N.L.R.B., 914 F.2d 1442, 1447-48 (10th Cir. 1990) (quotation omitted). Section 2(2) of the Act defines an "employer" as

> any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, . . . or any labor organization.

29 U.S.C. § 152(2). The Board has noted that Congress' rejection in 1947 of proposals to specifically exempt from the Act "broad classes of charitable or nonprofit organizations seems to indicate that Congress was content to leave to the Board's informed discretion in the future as it had in the past, whether and when to assert jurisdiction over nonprofit organizations whose operations had a substantial impact upon interstate commerce." Cornell University, 183 N.L.R.B. at 331.

A

In 1970, pointing to what it saw as an increased involvement in commerce by educational institutions, the NLRB held that "the Board has statutory jurisdiction over nonprofit educational institutions whose operations affect commerce." Id. at 331 (overruling Columbia University, 97 N.L.R.B. 424 (1951)). The Board was "convinced that assertion of jurisdiction is required over those private colleges and universities whose operations have a substantial effect on commerce to insure the orderly, effective, and uniform application of the national labor policy." Id. at 334. Thus the Board determined that it would "no longer decline to assert jurisdiction over such institutions as a class." Id. at 331. Pursuant to the Code of Federal Regulations, the NLRB "will assert its jurisdiction in any proceeding arising under sections 8, 9, and 10 of the Act involving any private nonprofit college or

university which has a gross annual revenue from all sources . . . of not less than $1 million." 29 C.F.R. § 103.1 (2006).

One year after Cornell was decided, the NLRB extended its holding in that case to private nonprofit secondary schools. See Shattuck School, 189 N.L.R.B. 886 (1971). The NLRB asserted jurisdiction over a nonprofit Minnesota corporation operating a secondary boarding school that had gross revenues of approximately $1,174,000 per year and annual purchases of more than $71,000 in goods from outside Minnesota. Id. at 886. The Board noted that the employer's operations were not expressly covered by the standards set out in 29 C.F.R. § 103.1, under which the Board asserted jurisdiction over private nonprofit colleges and universities. Id. Nonetheless, the Board stated that "the Employer is a private nonprofit educational institution which, we find, is sufficiently similar to warrant assertion of jurisdiction under the same jurisdictional standard." Id. "The Board now asserts jurisdiction over all private, nonprofit, educational institutions with gross annual revenues that meet its jurisdictional requirements." N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490, 497 (1979). Thus the Academy's status as a private nonprofit secondary school does not in itself preclude NLRB jurisdiction.

B

The main legal issue before us is whether Pinkerton Academy is a "political subdivision" exempt from the Act's coverage, as that term has been defined by the NLRB. In 1971, the United States Supreme Court approved the Board's interpretation of the jurisdictional exemption for "political subdivisions" as contained in section 2(2) of the Act. N.L.R.B. v. Natural Gas Utility District, 402 U.S. 600 (1971). Under this standard, "political subdivisions" are those "entities that are either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." Id. at 604-05. In Gas Utility District, because the Tennessee statute under which the employer utility district was organized made "crystal clear" that the employer was "administered by a Board of Commissioners appointed by an elected county judge, and subject to removal proceedings at the instance of the Governor, the county prosecutor, or private citizens," the Court held that the NLRB erred in holding that the employer "exists as an essentially private venture, with insufficient identity with or relationship to the State of Tennessee." Id. at 605 (citation omitted). As the Court stated: "Plainly, commissioners who are beholden to an elected public official for their appointment, and are subject to removal procedures applicable to all public officials, qualify as 'individuals who are responsible to public officials or to the general electorate' within the Board's test." Id. at 608.

Over the past two decades, the NLRB has changed the standard it uses to determine whether it will assert jurisdiction over a private company that contracts with a governmental entity exempt from the Act. Prior to 1995, the Board extended the "political subdivision" exemption to private employers providing services for exempt governmental entities where the exempt entity exercised effective control of the primary terms of employment. See Res-Care, Inc., 280 N.L.R.B. 670 (1986). In Management Training Corp., 317 N.L.R.B. 1355, 1357 (1995), the Board declared it would no longer apply the Res-Care governmental control test. Rather, it would thereafter "only consider whether the employer meets the definition of 'employer' under Section 2(2) of the Act, and whether such employer meets the applicable monetary jurisdictional standards." Id. at 1358. Under the "bright-line" rule of Management Training, therefore, the jurisdiction of the NLRB is established simply by the minimal showing that the entity both meets the definition of "employer" under section 2(2) of the Act and meets the applicable monetary jurisdictional standards.

"Federal, rather than state, law governs the determination, under § 2(2), whether an entity created under state law is a 'political subdivision' of the State and therefore not an 'employer' subject to the Act." Gas Utility District, 402 U.S. at 602-03. "[I]t is to the actual operations and characteristics" of the employer that the Board must look in deciding whether an entity is exempt from the Act's coverage as a political subdivision. Id. at 604 (citation omitted). "[R]eview of the NLRB's assertion of jurisdiction [is] fact-intensive and [must] be done on a case-by-case basis." N.L.R.B. v. Young Women's Christian Ass'n, 192 F.3d 1111, 1119 (8th Cir. 1999) (citation omitted).

The Pinkerton Academy Teacher's Association argues that two recent cases, Los Angeles Leadership Academy, No. 31-RM-1281 (N.L.R.B. Region 31 March 2, 2006), cert. denied, (N.L.R.B. May 17, 2006), and Education for Change, No. 32-RM-801 (N.L.R.B. Region 32 May 9, 2006), which held that charter schools established under California law qualified as exempt political subdivisions under the Act, "make it fair to say that the NLRB would not assert jurisdiction over Pinkerton." We do not agree. A close reading of these regional directors' decisions reveals material differences between the California charter schools and Pinkerton Academy. We conclude that, as a matter of law, Pinkerton Academy is a nonprofit educational institution over which the NLRB has jurisdiction, rather than an exempt political subdivision.

There are three factors the NLRB has consistently relied upon in determining whether an employer is a political subdivision and thereby exempt from coverage under the Act. The first factor is whether special legislation was required to create the employer. See Research Foundation of the City Univ. of NY, 337 N.L.R.B. 965, 968 (2002); Hinds County Human Resource Agency, 331 N.L.R.B. 1404, 1404 (2000); University of Vermont, 297 N.L.R.B. 291, 295 (1989); Truman Medical Ctr., Inc. v. N.L.R.B., 641 F.2d 570, 572 (8th Cir.

1981). The second factor is whether individuals on the employer's board of trustees are appointed by, or are subject to removal by, government officials, and whether the board includes government officials as members. See Shelby County Health Care Corp., 343 N.L.R.B. No. 48 (2004), 2004 WL 2461368, at *24-*25; Enrichment Services Program, Inc., 325 N.L.R.B. 818, 819 (1998); University of Vermont, 297 N.L.R.B. at 294; Rosenberg Library Assn., 269 N.L.R.B. 1173, 1175 (1984); Truman Medical Ctr., 641 F.2d at 573. The third factor is whether the employees may participate in a state-sponsored pension system. See Shelby County, 2004 WL 2461368, at *26; Hinds County, 331 N.L.R.B. at 1405; Jervis Public Library Association, Inc., 262 N.L.R.B. 1386, 1387 (1982). While each case is unique and there are numerous additional factors which may be taken into consideration, these three factors present a common theme throughout many of the Board's decisions.

As explained in Los Angeles Leadership Academy, charter schools may be created pursuant to California legislation enacted in 1992 authorizing their establishment. L.A. Leadership Academy, slip op. at 4-5. The state statute "establishes the rights and obligations of [the charter schools'] operators, personnel and pupils." Id. at 5. The statute provides for public funding and governmental oversight and declares that charter schools are part of the public school system as defined in the state constitution. Id. Pre-existing private schools are prohibited from obtaining a charter. Id. at 4. To operate a charter school, its developers must submit a petition for approval to one of three chartering authorities: (1) the State Board of Education; (2) a county office of education; or (3) the school district in which the charter school will be located. Id. at 5-6. To be approved, a charter school petition must address sixteen elements required by the authorizing legislation. Id. at 6. These sixteen elements encompass such factors as: a description of the proposed educational program; the educational outcomes that the charter operators commit to achieving and how that academic success will be measured; the governance structure of the charter school itself; the student suspension and discipline policies; whether the charter school will handle its own labor relations or delegate those to the chartering authority; and the manner in which staff will be covered by the public employee retirement system. Id.

> [C]harter schools are strictly creatures of statute. From how charter schools come into being, to who attends and who can teach, to how they are governed and structured, to funding, accountability and evaluation – the Legislature has plotted all aspects of their existence. Having created the charter school approach, the Legislature can refine it and expand, reduce or abolish charter schools altogether.

Wilson v. State Bd. of Educ., 89 Cal. Rptr. 3d 745, 751 (Ct. App. 1999). Accordingly, in Los Angeles Leadership Academy, because the charter school

could not exist but for the State's enabling legislation, it was found to be created directly by the State so as to constitute an administrative arm of the government, thereby satisfying the first common factor in determining if an employer is a "political subdivision." L.A. Leadership Academy, slip op. at 15.

In contrast, Pinkerton Academy was organized in 1814 as a nonprofit corporation. Although the Academy was established by a special act of the legislature, that act was simply the mechanism of incorporating a private academy in New Hampshire in the 1800s. Cf. University of Vermont, 297 N.L.R.B. at 295 (holding that because University was created by special act of Vermont General Assembly it constitutes a political subdivision). Nothing in the special act indicates that Pinkerton Academy was intended to operate under the control of the State of New Hampshire. Compare Research Foundation, 337 N.L.R.B. at 968 (nothing in corporation's charter indicated that employer was intended to operate under control of or as administrative arm of City University of New York), with University of Vermont, 297 N.L.R.B. at 291-92 (University "shall be recognized and utilized as an instrumentality of the state for providing higher education" and the legislature shall "appropriate such sums as it deems necessary for the support and maintenance of said corporation").

Pinkerton Academy was created by private individuals who gave money and land to establish the school "for the purpose of promoting piety and virtue and for the Education of Youth in such of the liberal Arts and Sciences or Languages as the Trustees hereinafter provided shall direct." Laws 1814, ch. 18, reprinted in Laws of New Hampshire, Vol. 8, Second Constitutional Period, 1811-1820 298 (Evans Printing Co. 1920). Pinkerton Academy operated as an independent day and boarding school until 1948. In 1949, Pinkerton entered into a contractual agreement with the Derry School District to provide high school education to students in Derry. Pinkerton is currently engaged in long-term contracts with the Towns of Derry, Chester and Hampstead. "The creation of the Employer by private individuals as a private corporation, without any state enabling action or intent, clearly leaves the Employer outside the ambit of the Section 2(2) exemption." Research Foundation, 337 N.L.R.B. at 968. "The plain language of Section 2(2) exempts only government entities or wholly owned government corporations from its coverage – not private entities acting as contractors for the government." Id. (quotation omitted).

Pinkerton Academy is not governed by a local school board nor is it part of a local school district. Pursuant to RSA 194:22 (1999): "Any school district may make a contract with an academy . . . located in this or . . . in another state, and raise and appropriate money to carry the contract into effect. If the contract is approved by the state board the school with which it is made shall be deemed a high school maintained by the district." This language does not mean that the district takes over the operation of the private academy, but

rather has "the limited purpose . . . of relieving the towns from paying the tuition of students who chose to attend schools lacking town contracts." Johnson v. Pinkerton Academy, 861 F.2d 335, 338 (1st Cir. 1988). Although Pinkerton Academy has assumed the statutory responsibility of providing high school education for the Towns of Derry, Chester and Hampstead, it has done so pursuant to a series of contracts between the Academy and the sending districts, not pursuant to any statutory duty imposed upon Pinkerton Academy. Its contractual relations with political subdivisions of the State do not transform it into a political subdivision. See Truman Medical Ctr., 641 F.2d at 572.

Unlike charter schools in California, where legislation expressly states that the government intends to retain control over them, we conclude that Pinkerton Academy was not created by the State of New Hampshire so as to constitute an administrative arm of the government as that standard has been interpreted by the NLRB and the courts.

Concerning the second major factor, in determining whether an employer is administered by individuals who are responsible to public officials, the NLRB looks to whether individuals on the board of trustees are "appointed by, and subject to, removal by public officials." Id.; see also Gas Utility District, 402 U.S. at 605; Research Foundation, 337 N.L.R.B. at 969. "For an entity to be deemed 'administered by' individuals responsible to public officials or to the general electorate, those individuals must constitute a majority of the board." Enrichment Services, 325 N.L.R.B. at 819. In Temple University, 194 N.L.R.B. 1160, 1160 (1972), the Board declined to assert jurisdiction over the University because, among other things, "the board of trustees, [which] was established to manage, control, and conduct the instructional, administrative, and financial affairs of the University," included the Governor of Pennsylvania, the mayor of Philadelphia, the superintendent of public education, the president of the senate and the speaker of the house of representatives. Likewise, in University of Vermont, 297 N.L.R.B. at 291, the NLRB found the employer exempt from the Board's jurisdiction as a political subdivision in part because twelve of the twenty-one trustees were selected by the State, whether by legislation or by gubernatorial appointment, thereby establishing that the State clearly exercised control over the University's board of trustees. See also St. Paul Ramsey Medical Center, 291 N.L.R.B. 755, 758 (1988) (absent requirement that employer's board of directors be government officials or appointed by government officials or provision for removal of board members by any government official, employer was not political subdivision).

The California enabling legislation provides that the state's charter schools are "under the jurisdiction of" the public school system and "under the exclusive control of officers of the public school system." Wilson, 89 Cal. Rptr. 3d at 754. While the California charter schools have a board of directors, the

board must comply with all laws relating to public agencies. L.A. Leadership Academy, slip op. at 13. The board meetings are noticed and open; the board members are selected by a nominating committee and elected by the sitting board of directors. Id. Parents must be represented on the board and a non-voting space is reserved for a representative of the school district. Id. at 14. The statute has audit, budget and financial oversight provisions, and controls the curriculum and student progress. Id. at 13-15. Furthermore, the state and the school district retain the ultimate power to revoke the school's charter. Id. at 13. Based upon these facts, the regional director concluded that the California charter schools are "administered by individuals who are responsible to public officials or to the general electorate." Id. at 15.

Unlike the California charter schools, Pinkerton Academy is governed by a private board of trustees. Pursuant to the sending district contracts, a certain number of the trustees are from each of the sending districts; however, no trustee is elected or appointed by any governmental body. The decision-making authority of the Academy is not under the direct control of any municipality, school district, or group of taxpayers, citizens or voters in New Hampshire. The trustees have the power to elect future trustees, own and operate real and personal property, and transact all business necessary to run the Academy.

Also unlike the California charter schools, Pinkerton Academy is not administered by individuals who are responsible to public officials or the general public as that requirement has been interpreted by the NLRB. See Hinds County, 331 N.L.R.B. at 1404; Truman Medical Ctr., 641 F.2d at 572. Any responsibility of Pinkerton's trustees to the sending districts "derives from the contractual relations between [Pinkerton] and these political subdivisions, and is not the sort of direct personal accountability to public officials or to the general public required to support a claim of exemption under § 2(2)." Truman Medical Ctr., 641 F.2d at 573 (emphasis added).

Employee participation in a state-sponsored or created pension system is the third significant indicator of statutory exemption under section 2(2) of the Act. See Hinds County, 331 N.L.R.B. at 1405. Pinkerton Academy was removed from the New Hampshire Retirement System in 1991 because it was determined that the Academy is not a "governmental entity, political subdivision, agency or instrumentality." The New Hampshire Retirement System based that conclusion upon the fact that: Pinkerton is not administered by individuals who are responsible to public officials or to the general electorate; Pinkerton is not a department or administrative arm of the government; Pinkerton enjoys financial autonomy and is not subject to the control or supervision of any governmental authority; and Pinkerton does not perform services that are traditionally within the exclusive prerogative of the government. Although a state determination that the employer is not

considered to be a political subdivision is not controlling, it is to be given "careful consideration." Gas Utility District, 402 U.S. at 602. "[T]he Board has found the state's characterization of an entity to be an important factor in determining the more specific issue of whether the Employer was created so as to constitute a department or administrative arm of government." Hinds County, 331 N.L.R.B. at 1404.

In summary, Pinkerton Academy was not created directly by the State of New Hampshire so as to constitute an administrative arm of the State, nor is it administered by individuals who are responsible to public officials, nor do its employees participate in the New Hampshire Retirement System. Consequently, we hold that Pinkerton Academy is an employer as defined in section 2(2) of the Act. Pinkerton likewise meets the monetary jurisdictional standard as the record indicates that Pinkerton receives gross annual revenue in excess of $26 million. Because Pinkerton Academy qualifies as a nonprofit educational institution within the jurisdiction of the NLRB, we vacate the decision of the PELRB, and remand with instructions to dismiss.

Vacated and remanded
with instructions.

DALIANIS, DUGGAN, GALWAY and HICKS, JJ., concurred.

NH Supreme Court vacated and remanded with instructions this decision on 2-21-2007. Slip Op. No. 2005-627.
(NH Supreme Court Case No. 2005-627)

State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Pinkerton Academy Teachers Association, Steven Roderick, John Pelkey, and NEA – New Hampshire Petitioners/Complainants v. Pinkerton Academy Respondent	*	Case No(s): E-0008-1 E-0008-2 Decision No. 2005-062

APPEARANCES

Representing the Petitioners/Complainants:

James F. Allmendinger, Esq., NEA-NH

Representing the Respondent:

Linda Johnson, Esq. and Cathryn E. Vaughn, Esq., McLane, Graf, Raulerson & Middleton, PA

INTERIM DECISION AND ORDER

BACKGROUND

The parties are before the PELRB based upon the certain filings by the parties that include a complaint of an improper practice pursuant to RSA 273-A:6 alleging violations of RSA 273-A:5,I (a) and (c) docketed as Case No. E-0008-1, and a Petition for Declaratory Judgment, *i.e.* Petition for Declaratory Ruling pursuant to ADMIN. RULES. Pub. 206.01 docketed as Case

No. E-0008-2. The above named Petitioners/Complainants filed these pleadings with the PELRB on November 3, 2004. The Respondent filed responsive pleadings with the PELRB in a timely manner on November 19, 2004 pursuant to ADMIN RULES Pub. 201.03 consisting of an Answer and Objection to the Petition for Declaratory Ruling and an Answer to the Improper Practice Complaint.

These two matters were consolidated by previous order of the PELRB and scheduled for a hearing on January 20, 2005 on all pending motions, the request for declaratory ruling and the complaint of improper practice at which both parties were represented by counsel, presented agreed facts, made oral argument and rebuttal. The Board considered the parties' factual stipulations and listened to their respective legal arguments on certain preliminary motions after which it ORDERED:

(1) The Respondent's Objection to Consolidate these matters is denied.
(2) The Joint Motion for Separate Hearings is denied.
(3) The Motion to Stay Consideration of the Complaint until a decision is reached on the Petition for Declaratory Ruling is granted.

Following those procedural rulings, the Board held the record open and requested that the parties' submit memoranda of law on the issue of whether the Respondent qualifies as a "quasi-public corporation" as included the definition of "public employer" in RSA 273-A:1,X. The Board thereafter recessed to consider the Petition for Declaratory Judgment. Subsequent to the Board's recess, and submission of the parties' supplemental brief's on the issue of what constitutes a "quasi-public corporation" consideration of the matter was suspended upon receipt of a Motion to Reopen the Record To Receive Newly Discovered, Relevant, Material and Non-Duplicative Evidence filed by the Respondent on March 11, 2005. The Petitioner timely filed its objection to that motion on March 16, 2005. The Board considered both the motion and the objection and finds that;

(4) The Respondent's Motion to Reopen the Record To Receive Newly Discovered, Relevant, Material and Non-Duplicative Evidence is denied on the basis that, with the exercise of reasonable actions in preparation for the proceedings before the Board, the proffered evidence could have been found and presented at the time exhibits were presented and that the Board does not consider the proffered evidence to possess sufficient materiality to the issue as presently defined and under consideration by the Board.

The Board members then resumed their consideration of the parties' pleadings related to the declaratory ruling, the parties stipulated facts, appearing below as #1- #62 and documents incorporated therein and all evidence and exhibits offered by the parties as well as their respective legal memoranda.

The Board then considered the parties' respective positions as expressed on the issues presented by the Petitioner's request for declaratory ruling and determines the following:

FINDINGS OF FACTS

1. Pinkerton Academy, was organized as a non-profit corporation by an act of the legislature on June 15, 1814. That law acknowledged that John Pinkerton, Esquire of Londonderry was desirous of giving certain lands and personal estate to the trustees of the Academy for the support of a "public School or Academy." The legislature, thereby, established Pinkerton "for the purpose of promoting the piety and virtue and for the Education of Youth in such of the liberal Arts and Sciences or Languages as the Trustees hereinafter provided shall direct." See 1811-1820 N.H. Laws Chapter 18 at Respondent Exhibit, Tab A.

2. Pursuant to its enabling statute, all business of Pinkerton is conducted by a board of trustees. Included in the rights of the trustees are the rights to elect future trustees, to own and to operate real property and personal property, and to transact all business necessary to run the academy. See 1814 law at Respondent Exhibit, Tab A.

3. Pinkerton Academy is, and always has been, governed by a board of trustees which consists of up to 15 individuals and which is self-perpetuating. None of the trustees at Pinkerton Academy are elected by the general public of any community or group of communities in New Hampshire. Decision making ability of Pinkerton Academy is not under the direct control of any municipality, school district, group of tax payers, or citizens or voters in New Hampshire.

4. Pinkerton has been in operation since Monday, December 4, 1815. Its campus is located in Derry, New Hampshire. At present, the Pinkerton campus contains approximately 20 separate buildings.

5. Pinkerton Academy does not have the statutory power to raise and appropriate money from taxpayers as do school districts nor does it hold an annual school district meeting as do public schools under the requirements of RSA 197:1.

6. All equipment and buildings located on the grounds of Pinkerton Academy are owned by Pinkerton Academy and not by any public school district or town. The business of Pinkerton is conducted on privately-owned property acquired between 1885 and 1989 through gift, endowment and acquisitions from budgeted and bond issues.

7. There is no superintendent of schools having jurisdiction over the Pinkerton Academy, and Pinkerton Academy is not subject to the jurisdiction or authority or control of a school administrative unit under RSA 186:11.

8. Pinkerton functions solely as a secondary school, providing education for all high school students from the towns of Derry, Hampstead and Chester (collectively known as the "sending towns.")

9. Currently, Pinkerton has over three thousand (3,000) students, ninety-nine percent of which are from the sending towns.

10. Initially Pinkerton operated as an independent day and boarding school until 1948. In 1949, the Academy entered into an agreement with the school district of the town of Derry to provide for the education of the students in that district. As a result of this service agreement, Pinkerton educated all high school aged students who lived in Derry. The school district paid for the school's services on a per pupil tuition basis.

11. In 1962, the school district in Derry negotiated a long-term contractual agreement with Pinkerton Academy. The contract specified the terms and conditions under which Pinkerton's services were purchased.

12. Over the next 30 years, additional communities (Chester, Hampstead, Londonderry and Windham), which have not established public high schools pursuant to RSA 194:22, have signed service contracts with Pinkerton. See also "A Brief Overview of our History" and "Management" sections from the 2004 Professional Staff Handbook at Joint Exhibit, Tab B. See also e.g. sending district contract with the Derry School District at Joint Exhibit, Tab C.

13. Currently, Pinkerton has long-term contracts (known as "sending district contracts") with the Derry School District, the Hampstead School District, and the Chester School District, and those districts has raised and appropriated money to carry those contracts into effect pursuant to RSA 194:22.

14. Pursuant to the sending district contracts, Pinkerton has agreed that during the term of the contract, it will provide a course of studies for grades 9-12 and such facilities and equipment so that at all times during the term of the agreement, Pinkerton qualifies as an approved high school according to RSA 194:23 and 194:23-b.

15. The sending district contracts provide that the school districts will send their respective students to Pinkerton subject to the approval of the respective school boards, the State of New Hampshire, as well as the voters in each town. Each sending district then pays the tuition of each of the pupils sent to Pinkerton from its district.

16. (a) Pursuant to the Derry School District contract, the initial term is for a period of 20 years commencing July 1, 2002. In July of 2007 and every 5 years thereafter, the agreement may be extended by 5 years unless either party notifies the other in writing prior to March 30 of that year of the intent not to extend the term by the additional 5 years.

(b) Pursuant to the Chester and the Hampstead School District contracts, the term of the agreement began on July 1, 2000 and ends on June 30, 2012. The term shall continue after that date unless terminated by either party providing the other party with written notice of termination seven years before the termination date.

17. Pinkerton Academy's contracts with the School Districts of the Towns of Derry, Chester and Hampstead have been approved by the State Board of Education.

18. Pinkerton Academy is a public academy which, pursuant to RSA 194:23 III, is required to comply with the standards prescribed by the state board of education which shall be uniform in their application to all schools including public schools and public academies.

19. The State Board of Education annually publishes a list of all public schools and public academies which it has approved as meeting the requirement of RSA 194:23, and Pinkerton Academy is included in that list.

20. The State Department of Education website states under a "School Highlights" section that Pinkerton Academy is a "private secondary school," and an "independent academy." The State Department of Education website has also listed Pinkerton Academy as a "public academy" and not as a "nonpublic school."
See http://www.ed.state.nh.us/NHPublicSchools/HS.html.

21. Pursuant to RSA 194:23-e, in order to be entitled to accept tuition students, Pinkerton Academy must be approved by the state board of education as complying with the provisions of RSA 194:23.

22. The board of trustees of Pinkerton Academy submits school attendance information to the department of education each year as required by RSA 198:45.

23. The large majority of Pinkerton's operating budget is derived from governmental funding pursuant to the contracts with the sending districts.

24. The sending district contracts allow for a certain number (currently 25) of non-district "other tuition-paying students" to be admitted to the Academy.

25. Pursuant to the sending district contracts, a certain number of the trustees for Pinkerton must be from each of the sending districts. The Derry School District contract provides that not less than 4 members of the Board of Trustees must be residents of that district at all times during the term of the contract, and the Chester and Hampstead School District contracts provide that not less than 2 members of the Board of Trustees must be residents of that district at all times during the term of the contract.

26. None of the members of the Board of Trustees at Pinkerton are elected or appointed by any governmental body.

27. In the event revenues exceed expenses during any fiscal year, the excess is allocated among the respective school districts. Likewise, in the event that the amount paid by the District during the preceding school year is less than the actual tuition due to Pinkerton pursuant to the contract, the school district must pay such amount to Pinkerton on the following October 15, in addition to the payment of the estimated tuition due on that date.

See e.g. Paragraph 11(E) of the Derry sending district contract at Respondent's Exhibit, Tab C.

28. Pursuant to the contracts between Pinkerton and the sending districts, joint meetings of the Board of Trustees of Pinkerton and the School Boards of the sending districts must take place at least 3 times per year. The purpose of these meetings is to discuss Pinkerton's curriculum, financial matters and policies. In addition, a joint meeting must be held before there is any capital expenditure in excess of seven hundred and fifty thousand dollars ($750,000). Notwithstanding these contractual (not statutory) conditions, upon consideration of the joint recommendations, the Board of Trustees of Pinkerton is vested with the ultimate authority to make decisions and to approve capital expenditures. See Derry sending district contract at Joint Exhibit C.

29. Pursuant to the obligations that it assumes under the sending district contracts, Pinkerton complies with the federal "No Child Left Behind" law including that its teachers must be "highly qualified" under that law; and if its students do not make "adequate yearly progress" then Pinkerton would be listed as a "school in need of improvement."

30. Pinkerton owns motor vehicles that are registered as local government vehicles.

31. Pinkerton students are transported to and from school in buses provided by the local school districts.

32. Pinkerton complies with minimum state standards for public academies including but not necessarily limited to Part Ed 306 of the Rules of the State Board of Education. Public high schools are also subject to these same minimum state standards.

33. As the ultimate recipient of federal funds received pursuant to its sending district contracts obligations, Pinkerton complies with the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, Title IX of the Education Amendments of 1972, and Title VI of the Civil Rights Act of 1964. As such, Pinkerton is subject to the jurisdiction of the Office of Civil Rights of the U.S. Department of Education.

34. Pinkerton hires all employees under annual written contracts.

35. Pinkerton teachers are not nominated by the superintendent nor elected by the school boards as set forth in RSA 189:39.

36. The work of teachers at Pinkerton is not directed or supervised by superintendents as described in RSA 189:30.

37. The superintendent of the sending districts has no authority to remove any teacher for cause pursuant to RSA 189:30.

38. Teachers at Pinkerton are not subject to dismissal by any sending district school board pursuant to RSA 189:13.

39. Teachers at Pinkerton are not subject to re-nomination or re-election rights set forth in RSA 189:14-a.

40. Any appointment and reappointment rights for professional staff at Pinkerton are covered under the annual contract agreement with Pinkerton. The teachers are entitled to notice of non-renewal on or before April 15 and if they have been employed for three consecutive years they are entitled to other rights, as set forth in Pinkerton's Handbook for Professional Staff.

41. Pinkerton teachers and "professional staff" employees are subject to the guidelines set forth in the Professional Staff Handbook and private employment contracts rather than any statutorily prescribed rules applicable to public school teachers.

42. Employees aggrieved by any action related to appointment, discipline or termination can appeal to the Headmaster or to the Board of Trustees. See Pinkerton Academy Faculty Handbook, September 1984, "Faculty Appeals Process" and Professional Staff Handbook, July 2004, "Appointment, Reappointment, and Termination of Employment" at Joint Exhibit, Tab D.

43. Paragraph twelve of Pinkerton's teachers' contracts for the 1985-1986 academic year stated "[t]he Teacher and the Academy shall be bound by the public school statutes and all administrative rules and regulations of New Hampshire made applicable to comprehensive high schools by state law, and by administrative rules and regulations adopted by the Trustees." This clause no longer appears in Pinkerton's teachers' contracts. Paragraph Ten of the 2004-2005 Professional Staff Contracts provides, "[t]he academy makes every effort to maintain rules, regulations, and policies with respect to Employee's employment security comparable to those protections afforded similarly-situated employees employed in comprehensive public high schools." See e.g. Rodrick contract of 1985-86 and 2004-05 attached at Joint Exhibit, Tab E. (with amount of wages redacted per agreement of the parties.)

44. Pinkerton teachers are required to comply with the teacher certification requirements established by the N.H. Department of Education. Teachers must have a copy of their certificate on file with the Headmaster. It is the responsibility of each teacher to renew certification and at the end of each certification period present to the Headmaster a copy of the renewal from the State Department of Education.

45. Pinkerton teachers participated in the New Hampshire Retirement System (or its predecessor state plans) from 1948 to 1991.

46. In 1991, Pinkerton Academy was involuntarily removed, by the New Hampshire Retirement System (NHRS), as a participating employer in that System on the grounds

that it was a nongovernmental employer. See letter dated August 15, 1991 from the N.H. Retirement System at Joint Exhibit, Tab F.

47. The NHRS prepared a summary outlining the basis for its decision that Pinkerton is a nongovernmental employer. Those grounds are as follows:

a. Pinkerton Academy is not administered by individuals who are responsible to public officials or to the general electorate.

b. Pinkerton is not a department or administrative arm of the government.

c. Pinkerton enjoys financial autonomy and is not subject to the control or supervision of any governmental authority.

d. No governmental entity has any of the powers or interests of owner with respect to Pinkerton.

e. Pinkerton does not perform services that are traditionally within the exclusive prerogative of the government.

These grounds were set forth in more detail by the NHRS in a summary prepared by them in which the NHRS concludes that "Pinkerton exercises its powers and performs services in a manner that is inconsistent with governmental entity status." Id.

48. By letter dated November 14, 2001, Pinkerton asked the New Hampshire Retirement System to reconsider its 1991 determination that Pinkerton is not eligible to participate in the Retirement System. See letter at Joint Exhibit G. That request has been denied by the New Hampshire Retirement System.

49. Pinkerton is a private non-profit corporation exempt from federal taxes pursuant to IRC 501(c)(3), 509 (9)(1), and 170 (b)(1)(A)(ii).

50. Pinkerton is also exempt from state taxes pursuant to N.H. R.S.A. 72:23 (exempt from real estate taxes as a school or academy) and 77-A (exempt from business profits taxes as a 501(c)(3).

51. The Pinkerton Academy Teachers Association (PATA) and NEA-New Hampshire (NEA-NH) are organizations in which some Pinkerton employees are members. These organizations exist, and/or claim to exist, for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work. Neither PATA nor NEA are a certified exclusive representative or certified collective bargaining unit for Pinkerton employees nor has either such organizations filed any petition calling for an election to be recognized as an exclusive representative or bargaining unit for Pinkerton employees.

52. John Pelkey and Steven Rodrick are teachers employed by Pinkerton who have from time to time voiced concerns about their retirement benefits. Both men claim that together both as individuals and as members of PATA and NEA-NH, they seek the right to organize by forming and joining labor organizations for the purpose of engaging in concerted activities for the purpose of collective bargaining or other mutual aid or protection. As stated above, neither PATA nor NEA are a certified exclusive representative or bargaining unit for Pinkerton employees.

53. Either as a private school or pursuant to the obligations it assumes under its sending district contracts, Pinkerton complies with New Hampshire laws governing safe schools and school performance, including RSA 193-B, -C, -D, -E, -F, -G, and –H, some of which apply to both private and public schools and some of which apply only to public schools.

54. Pinkerton's school year matches state minimum requirements for school days at public schools of 180 days.

55. Public school teacher contracts throughout the state have a prescribed number of days usually in the range of 183 to 190 days. The usual Pinkerton's teacher contract has 185 days. The current Professional Staff Handbook at Pinkerton states the following, on page 35:

> The usual teacher contract is 185 working days per year, to include 180 days of school and 5 days which may be any combination of teacher workshops or meetings, start-of-the-year business, end-of-the-year "wrap up", and curriculum work or information exchange with school districts. Certain professional staff, such as counselors, may have contracts that include more than 185 days.

56. Pinkerton teachers are required to undergo criminal and background checks as recommended by the New Hampshire Department of Education guidelines for public school teachers, as set forth in their Handbook:

> Background Investigation
>
> In accordance with New Hampshire Department of Education guidelines, the Human Resources Director/designee shall conduct a thorough investigation into the past employment history, and other applicable background, of any person considered for employment with Pinkerton Academy. This investigation shall be completed prior to making an offer of employment.
>
> Criminal Record Check
>
> Each person considered by the Academy for employment must submit a State and FBI Criminal Records Check.

57. Pinkerton receives $150 from the NH Department of Education for each student enrolled in Drivers Education.

58. Pinkerton's web site contains the attached "Description of Pinkerton Academy" and "A Brief History." See Joint Exhibit H.

59. Pinkerton does not receive, and has never received, any state building aid toward the construction of school buildings under RSA 195:15 which provides such aid to local school districts and to cooperative school districts. See RSA 198:15-a and 15-b.

60. For purposes of special education requirements to the public school students at Pinkerton, (such as under the Individuals with Disabilities in Education Act (IDEA)), Pinkerton is not a local education agency (LEA). Rather, Pinkerton serves as an educational provider to the local school district which remains the LEA.

61. The following pages appear on the New Hampshire Department of Education website and are attached for the convenience of the Board. See Joint Exhibit, Tab I. [Please note that beyond the fact that these pages appear on the Department of Education website, neither party asserts to the truth of the statements contained therein unless those facts are attested to in a separate affidavit.]

Pinkerton Academy School Highlights 2003-2004 and 2000-2001
Districts Listed by Town
School Enrollment – Pinkerton Academy 2003-2004
School Assessment – Pinkerton Academy 2003-2004
School Graduate Report – Pinkerton Academy – Class of 2003
Pinkerton Academy District Calendar 2004-2005
District Finance re Pinkerton Academy 2002-2003
Minimum Starting Teacher Salary 2003-2004
Teacher Average Salary for Public School Districts and Public Academies 2003-2004
NH School Districts and Public Academies Teacher Salary Schedules 2003-2004
NH School Districts and Public Academies Teacher Salary Schedules 2000-2001

62. The Respondent has submitted copies of documents reflecting Pinkerton Academy Facts & Figures 2001 and 2002.

DECISION AND ORDER

DECISION SUMMARY

The Public Employee Labor Relations Act (RSA 273-A) creates the Public Employee Labor Relations Board and assigns it the primary jurisdiction to interpret and apply its provisions. This Board exercises its jurisdiction in pursuit if its statutory purpose "to foster cooperative and harmonious relations between public employers and their employees and to protect the public by encouraging the orderly and uninterrupted operation of government." (Session Laws, 1975, Chapter 490) The statute enables the Board to exercise jurisdiction over parties determined by it to be public employers, public employees, employee organizations and other interested parties. For the purposes of RSA 273-A, the Board finds again, as it did in 1985, that the Respondent Pinkerton Academy is a quasi-public corporation and therefore a public employer subject to relevant provisions of the statute governing labor relations between itself and its employees. Therefore, it and its employees are afforded all of the rights and protections provided in RSA 273-A and are held to the performance of the obligations also contained therein.

The Board concludes in a similar fashion in the instant case as it did twenty years ago that the Respondent is a public employer because it meets the criteria of a quasi-public corporation under RSA 273-A for the limited purposes for which the Board exercises its jurisdiction, that being in the context of RSA 273-A governing public employer and employee relations and assuring the uninterrupted delivery of services to the state's citizens as further discussed below. The Board acknowledges the petitioners' assertion that the doctrine of *res judicata* ought to be applied at least as it relates to one of the four Petitioners/Complainants, NEA-New Hampshire, because it and the Respondent were parties to a 1985 action before the board at which jurisdiction was an issue and in which the Board held that jurisdiction over the Respondent did exist. However, the Board has elected to consider this issue again after the passage of twenty years because we do not believe that the two actions arise out of the same occurrence, all the parties are not identical in the instant action and that during this time period factual changes have occurred that were determined as relevant facts in the prior action. The Board also believes that because of the agency's primary subject matter jurisdictional authority, the advancement of administrative law is enhanced if, provided with an appropriate opportunity to be further instructive to its limited labor relations community by clarifying bases for its decisions, it may do so in order to add consistency and permanence to certain basic tenets of RSA 273-A. For similar reasons it declines to apply the doctrine of *collateral estoppel.*

With respect to the Respondent's assertion that none of the Petitioners have the authority to file either a petition or complaint with the Board because they lack standing, we find otherwise. Administrative Rules PUB 100.01 *et seq.* are intended to fill in the interstices of RSA 273-A and have fulfilled that function for nearly thirty years without applying party jurisdictional qualifications *ultra vires*. These administrative rules are designed to assist and facilitate the Board's performance in upholding the purpose of RSA 273-A and to further express to public employers and employees, alike, how their statutory rights and obligations are exercised through the Board's processes. Admin. Rule Pub 206.01 allows any public employee or employee organization to petition for a declaratory ruling. Following its finding that the

Respondent meets the criteria of a quasi-public corporation, and thereby a public employer, its employees qualify as public employees for purposes of labor relations under RSA 273-A. In light of the rationale for our Administrative Procedures Act, See RSA 541, to provide access to governmental bodies, we find no prohibition for the petitioning organization to seek a declaratory ruling from the Board prior to any formal certification. To deny a petitioner that level of access would ignore the existence of RSA 273-A and eliminate necessary protections during an organizational phase of activity preliminary to an election and before an exclusive representative of a bargaining unit as contemplated by RSA 273-A:3 can be certified. Therefore, both the individual and organizational petitioner's are deemed to have standing in this matter.

As a result of these determinations the Board will convene the parties for purposes of a continuation of the original hearing to allow presentation of evidence by each party on the issues raised by the complaint of improper labor practices being committed by the Respondent against the Petitioners and any other attendant motions.

DISCUSSION

The Board has primary jurisdiction to interpret and apply the provisions of RSA 273-A. This statute creates the Board (§ A:2) and defines those parties over which it shall exercise its jurisdiction (§A:1) in pursuit of its statutory purpose "to foster cooperative and harmonious relations between public employers and their employees and to protect the public by encouraging the orderly and uninterrupted operation of government." (Session Laws, 1975, Chapter 490) The statute enables the Board to exercise jurisdiction over "public employers" (§ A:1,IX) which includes, among other entities, "quasi-public corporations".

The Board first considers the Petitioners' argument that the doctrine of *res judicata* and *collateral estoppel* preclude our consideration of the issue of jurisdiction at this time in light of our decision in 1985 in *NEA-New Hampshire v. Pinkerton Academy*, Case No. T-0363, Decision #85-48. Then we determined that Pinkerton was "a 'quasi-public institution' and as such constitutes a public employer." *Ibid,* p.4. We did so on the basis that Pinkerton acted as a public high school for four towns, came under the regulations of the New Hampshire Department of Education and its Commissioner, had teachers who are certified by the state, received tuition money from the four towns and was "behaving in much the same way as a public high school except with its own board of trustees and governing units." *Id.* Since that time, the Town of Windham's involvement has changed through withdrawal, the contract language has changed and length of the term of contracts has changed, participation in other forums by the Respondent have raised the need to compare definitional applications by those forums of other statutes to determine if any involve the term "quasi-public corporation" that is at issue in this proceeding. We apply the standard expressed in the *Restatement (Second) of Judgments* § 24, at 199 (1982) and relied upon by our Supreme Court in Appeal of University System Board of Trustees, 147 N. H. 626, 629 that "In determining whether two actions are the same cause of action for the purpose of applying *res judicata*, we consider whether the alleged causes of action arise out of the same transaction or occurrence". We do not believe that the petition presently before us meets this standard. Having decided in this fashion, we proceed to decide whether or not

Pinkerton presently operates as a "quasi-public corporation" and thereby meets the definition of "public employer" for the limited purposes of RSA 273-A.

Since the several provisions of a statute are not to be considered in isolation from each other, the Board brings to its examination of the term "quasi-public corporation" the backdrop of one of the principle reasons RSA 273-A was enacted in the form in which it presently appears. That express reason is to maintain "the orderly and uninterrupted operation of government" so as to protect the community at large from possible disturbances and loss that is caused when government service, or one of its several functions, is abruptly halted or radically diminished. In the field of public labor relations, where the Board exercises its jurisdiction for the most part[1], this means strikes, work stoppages and other work actions. (See Statement of Senator Brown speaking for the Conference Committee addressing necessity that legislation cover the major point "that it establish an orderly legal process for the establishment of bargaining units for negotiations for resolving unfair labor practice charges and for settling disputes without crippling strikes or lockouts." (Senate Journal 12 June 75, p.1069). The legislature passed this act fully aware of its broad scheme in order to reduce the probability that communities would be deprived of important government functions. A review of the legislative history of the original HB 516 as it wended its way through the legislative process in 1975 reveals that members of the legislature redefined "public employer" during that process and in doing so changed their references regarding entities in contemplation for inclusion as public employers beyond merely the state and its subdivisions. (See House Bill 516, 1975 Session; House Journal 30Apr75, p.668; Senate Journal 29 May 75, p.968; Senate Journal 17 June 75, p.1103.) In each instance, the definition of public employer was changed, as was the severance of "quasi-public corporation" from any effective modifier or qualifier. We believe that such separate treatment of "quasi-public corporation" clearly indicates that the legislature anticipated that public functions may sometimes be performed or provided by an entity other than a government entity. Indeed the term, "quasi-public corporation" as it is applied in the field of education appears to us to embody an appropriate degree of flexibility to address the dynamic configuration of entities involved in the delivery of public education today. We would also note that after our decision in 1985, wherein we determined that the Respondent was a "public employer" over which the Board had jurisdiction, the legislature has twice amended RSA 273-A and specifically amended the definition of "public employer" to include "the judicial branch of the state". While given the opportunity to consider the definitional clause of the statute, it did so without altering the term "quasi-public corporation" as it has appeared within the definition of "public employer". (RSA 273-A:1,XI, 2004 Supp).

The term "quasi-public corporation" is not defined within the Public Employee Labor Relations Act (273-A:1 *et seq.*). Webster's Ninth Collegiate Dictionary defines "quasi-public" as "essentially public (as in services rendered) although under private ownership or control." at p.965. There are corporations which... "by reason of the nature and extent of their operation and effect on the welfare of the public at large, have been styled quasi-public corporations." *Fletcher's Cyclopedia of the Law of Private Corporations Corporations*, §63, p.812. Further, they have been defined as, " private corporations which have accepted from the state the grant of a franchise or contract involving the performance of public duties." *Id.*

[1] The Board also exercises authority over racetrack employees under a separate statute. See 273-C

Pinkerton Academy was organized as a non-profit corporation by an act of the legislature in 1814 apparently to accept a donation of real and personal estate from one, John Pinkerton for the support of a "public School or Academy". Pinkerton is governed by a self-perpetuating board of trustees who are not elected by the general public. Pinkerton functions solely as a secondary school providing education for all high school students from the towns of Derry, Hampstead and Chester. Since its incorporation, Pinkerton has evolved from an independent day and boarding school in 1815 to a secondary school serving only these so-called "sending districts" (See RSA 194). Indeed, the over three thousand students in attendance at Pinkerton sent by these towns constitute ninety-nine percent of its student population. These towns do not maintain high schools of their own but through contracts with Pinkerton meet state requirements that they provide an educational opportunity for their citizen's children in grades 9-12. Pinkerton's contracts with these towns are long-term contracts. For instance, the present contract between the Town of Derry was executed for a term of twenty years expiring in 2018 with a further provision that the contract will extend for an additional five years in July of 2007 and every five years after that the agreement will automatically extend for an additional five years unless either party notifies the other prior to March 30 of any extension year that it desire not to extend.

The contracts with Derry, and with Chester and Hampstead, which contain requirements that these two towns give at least seven years notice to terminate their contract, are subject to approval of the State Board of Education. Pinkerton is required to comply with standards prescribed by the State Board of Education. (See generally, RSA 194 and RSA 193 as to requirements of public high schools). These contracts assure Pinkerton of a long-term revenue source constituting a large majority of Pinkerton's operating budget and assure the towns they can provide required educational opportunities for grades 9-12 with an educational facility, faculty, equipment and materials sufficient to operate within the regulations of the State Board of Education. Pinkerton is subject to other state and federal requirements, (*e.g.* RSA 198:45 regarding attendance information; Admin. Rules Part Ed 306 regarding minimum state standards; and teacher certification requirements of the N. H. Department of Education; as well as provisions of the so-called federal "No Child Left Behind Act"; see also our Finding of Fact #33 for other statutory ties to the federal regulatory function) because of its present mission. All of these are not inconsequential control mechanisms to regulate other aspects of this essential government function as provided by the towns.

We recognize that Pinkerton has a private board of trustees, owns its real and personal property, and maintains the contractual right of ultimate authority to make decisions and to approve capital expenditures and that the towns are guaranteed a substantial, though apparently not a majority, number of board members be residents representative of the respective towns. We further recognize that Pinkerton does not have the statutory power to raise and appropriate money from taxpayers. The fiscal aspect of the public education function is provided, to a large degree, by the towns of Derry, Chester and Hampstead. If the expenses of educating the students exceed the initial funds provided by the towns to Pinkerton, the towns must raise additional revenues to cover the deficit. We recognize that Pinkerton provides the classrooms for the students. We further recognize that the towns provide the transportation for the students to get to the classrooms. We recognize that Pinkerton purchases its own business vehicles. We further recognize that they are provided with government registrations for those vehicles. We also

recognize that Pinkerton's trustees retain the ultimate authority to make decisions. However, we further recognize that the trustees are required to have three joint meetings with the towns' school boards to discuss matters of curriculum, financial matters and other policies. It is reasonable to find that since the towns provide the funds for the operation of Pinkerton and if there wasn't substantive input allowed to the towns through these joint meetings sufficient to meet with the approval of these respective towns, the towns could provide notice of their intent to terminate the parties' relationship. Our last tandem observation of Pinkerton's operation is our acknowledgment that it is a private corporation, albeit a non-profit one, performing a public function and the towns are sub-divisions of the state performing most public functions except providing education for grades 9-12; a function that it would otherwise provide if it did not rely on Pinkerton. Our determinations in this regard do not fall far from some of those expressed by Edward D. Bureau, president of Pinkerton in his letter of November 14, 2001 (see Respondent Exhibit G, pp.2-3) albeit written for a different purpose at that time.

The Respondent raises issues in its arguments that ask us to abandon our primary jurisdiction, which is to apply the provisions of RSA 273-A. This responsibility requires that we determine jurisdiction in this matter by applying the term "quasi-public corporation" for the simple reason that if we find that Pinkerton is a quasi-public corporation as contemplated within our statute, then it is a "public employer" subject to the rights and obligations of the statute. We are not called upon here to determine if Pinkerton is a "non-governmental employer" as that term might be applied in determining the applicability of the definition of an "employer" to maintain eligibility to participate in a government retirement plan within the meaning of § 414(d) of the United States Internal Revenue Code of 1986, as amended. *See* Pinkerton Academy et. al v. Board of Trustees of the New Hampshire Retirement System, No. 94-C-314, (May 5, 1995) Likewise, we think it unnecessary for us to be drawn away from what we do know, RSA 273-A, its purposes, provisions and terms, and venture into considerations of whether or not a specific act by Pinkerton, be it suspending a student *See* Doe v. Hackler, 316 F. Supp 1144 (D. N. H. 1970) or terminating a teacher, classifies it's conduct for purposes of a civil suit as "state action." For its part, the Petitioners raise issues in their arguments that ask us to examine cases involving access to information held by "public bodies." *See* Professional Firefighters of New Hampshire v. Healthtrust, Inc. ___ N.H. ____ (2004); Union Leader Corp. v. N. H. Housing Finance Authority, 142 N.H. 540, 546 (1997). While we have reviewed the legal arguments at length, we believe we are not called upon by reason of the petition before us to apply tax law, or retirement law, or right-to-know law, or unrelated federal constitutional issues. Those are legal conclusions beyond the expertise of this board and the purview of the instant case. Given the pluralistic nature of the intergovernmental mix that exists today we do not find it unusual that an entity may fit the definition and purpose of one law and not fit the definition and purpose of another.

We believe the legislature intended, as detailed above, to define as "public employer" those entities performing essential governmental functions to include a "quasi-public corporation" as we find Pinkerton to be. Therefore, we hereby rule that the Respondent, Pinkerton Academy, is a public employer for the purposes of RSA 273-A and order the parties to proceed on that basis. A notice of the continuation of this hearing to consider the issues raised by the unfair labor practice complaint will be issued to the parties in due course.

So Ordered.
Signed this 18th day of May, 2005

Jack Buckley, Chairman

By unanimous vote. Chairman Jack Buckley presiding, with Board Members Seymour Osman and Richard E. Molan also voting.

Distribution:
James F. Allmendinger, Esquire
Linda Johnson, Esquire

NH Supreme Court vacated and remanded with instructions Decision No. 2005-062 on 2-21-2007. Slip Op. No. 2005-627. (NH Supreme Court Case No. 2005-627)

State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Pinkerton Academy Teachers Association, Steven Roderick, John Pelkey, and NEA – New Hampshire Petitioners/Complainants v. Pinkerton Academy Respondent	*	Case No(s): E-0008-1 E-0008-2 Decision No. 2005-088

ORDER ON MOTION TO SUPPLEMENT THE RECORD AND ON MOTION FOR REHEARING

The Board conferred for the purpose of considering the Complainants' Motion to Supplement the Record and the Respondent's Motion for Rehearing and took the following actions:

1. It reviewed the Complainants' Motion to Supplement the Record filed on June 30, 2005 and the Respondent's Response filed on July 20, 2005 indicating it had no objection to the supplemental evidence offered by the complainants.

2. It reviewed Pinkerton Academy's Motion for Rehearing filed on June 15, 2005 pursuant to RSA 541 and N.H. Admin R. Pub 205.02 and Pinkerton Academy Teachers Association, Steven Roderick, John Pelkey, and NEA-New Hampshire's Objection thereto filed on June 30, 2005.

3. It examined the previous Decision #2005-062 issued on May 18, 2005.

4. It reviewed the previous filings of the parties in this matter.

5. It GRANTED the Complainants' Motion to Supplement the Record.

6. It DENIED Pinkerton Academy's Motion for Rehearing.

So Ordered.

Signed this 28th day of July, 2005

JACK BUCKLEY
Chairman

By unanimous decision. Chairman Jack Buckley presiding. Members Richard E. Molan and Seymour Osman voting.

Distribution:
Linda S. Johnson, Esq.
James Allmendinger, Esq.