



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

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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 briefs 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 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 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 part¹, 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.

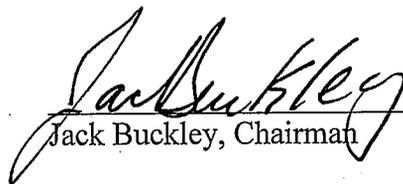
We recognize that Pinkerton has a private board of trustees, owns its real and personal property, and maintains the contractual right of ultimate authority to make decisions and to approve capital expenditures and that the towns are guaranteed a substantial, though apparently not a majority, number of 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:
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