NEW HAMPSHIRE SUPREME COURT

1998 TERM
AUGUST SESSION

No. 97-287

Town of Jackson

v.

State Employees Association of New Hampshire, Inc.

BRIEF OF THE TOWN OF JACKSON

(Appeal from the Public Employee Labor Relations Board,
Pursuant to Supreme Court Rule 10)

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QUESTION PRESENTED

WHETHER THE PELRB ACTED UNREASONABLY AND ILLEGALLY WHEN IT INCLUDED IN A PROPOSED BARGAINING UNIT AN EMPLOYEE WHO (1) ACTS IN A CONFIDENTIAL CAPACITY TO PERSONS WHO FORMULATE MANAGEMENT POLICIES IN THE FIELD OF LABOR RELATIONS, AND (2) REGULARLY HAS ACCESS TO CONFIDENTIAL, TACTICAL INFORMATION CONCERNING ONGOING NEGOTIATIONS.

In compliance with Supreme Court Rule 16 (3) (b), reference is made to the Town's original Objection to Petition for Certification, paragraph 3, in which the Town first raised this issue. Evidence and oral argument pertaining to this issue appear on the record. Transcript, pp. 27-39. The Town's Motion for Rehearing and Reconsideration, paragraph 2, preserves this issue for adjudication by this Court.

TEXT OF PERTINENT STATUTE

"**273-A:1 Definitions**. In this chapter:

. . .

IX. 'Public Employee' means any person employed by a public employer except:

. . .

(c) Persons whose duties imply a confidential relationship to the public employer . . . ."

STATEMENT OF THE CASE

On 5 March 1997, the State Employees Association of N.H., S.E.I.U., Local 1984 ("SEA") filed a petition for certification of a proposed bargaining unit composed of clerical, technical, trade and administrative employees in the offices of the Town Manager, the Department of Personnel/Purchasing, and other offices and departments of the Town of Jackson. Counsel for the Town filed exceptions to the petition asserting that the petition included positions that were supervisory, confidential or otherwise improper. Specifically on the ground of confidentiality, the Town objected to the inclusion of the administrative secretary to the Personnel Director, Mr. Kevin Riley, who functions as the Town's chief labor negotiator. The Town argued that Mr. Riley's administrative secretary sees or prepares confidential communications regarding labor negotiations, assists Mr. Riley in preparing for such negotiations, and is therefore a confidential employee.

The PELRB conducted a hearing in Jackson on 10 May 1997. At that hearing, Mr. Riley testified that he is the Town's chief negotiator (Transcript, p. 28), that his administrative secretary routinely gathers information that forms the basis for his negotiation positions (Transcript, pp. 28-29), that she is privy to his notes and his personal thoughts pertaining to the negotiation process (Transcript, p. 29) and that she sees and/or prepares his confidential communications with the Town Manager concerning tactical decisions made in the course of collective bargaining (Transcript, p. 30). The Town Manager corroborated this testimony (Transcript, p. 36), and the SEA produced no evidence to the contrary. Despite the uncontroverted testimony of Mr. Riley and the Town Manager, on 4 May 1997 the PELRB issued a Decision and Order that included in the bargaining unit Mr. Riley's administrative secretary.

On 11 June 1997 the Town filed a Motion for Rehearing and Reconsideration pursuant to RSA 541:3, asserting that the PELRB disregarded uncontroverted evidence and its own clear precedent in including Mr. Riley's administrative secretary in the unit. The Town pointed out that the position in question was intimately involved in assisting Mr. Riley to prepare for and conduct collective bargaining negotiations. The motion made it clear that without the assistance of his administrative secretary, Mr. Riley would be severely handicapped in discharging his own professional responsibilities with regard to collective bargaining. The PELRB denied the Town's Motion for Rehearing and Reconsideration by order dated 18 October 1997. The Town of Jackson brings this appeal.

SUMMARY OF ARGUMENT

Both federal and state law conclusively provide for the exclusion of an employee from a bargaining unit if that employee assists and acts in a confidential capacity to a manager who is intimately involved in labor negotiations. The administrative secretary of the Town of Jackson's personnel director/labor negotiator meets this test as a matter of law.

There is a separate test of confidentiality, developed by the NLRB and adopted by the United States Supreme Court in *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 179 (1981). This standard excludes an employee, whether or not that employee works closely with a specific manager involved with labor policy, if the employee regularly has access to confidential information concerning anticipated changes that may result from bargaining. The New Hampshire PELRB has more than once stated its approval of the policy considerations from which this separate test springs, but it has not to date used it as an independent basis for exclusion. The administrative secretary to the Town's personnel director/labor negotiator meets this separate test as well.

In advance of the hearing before the PELRB, the parties agreed to exclude the Town Manager's executive secretary on the ground of confidentiality. It appears from the record that the PELRB was under the impression that the Town has a right to only one confidential employee, and that the board was free to include all others, regardless of the degree to which another employee might be involved in labor relations or negotiations. Any such perception on the part of the PELRB is mistaken in law and requires remediation.

ARGUMENT

In deciding to include the administrative secretary of the Town's personnel director/chief negotiator in the proposed bargaining unit, the PELRB demonstrated a misunderstanding of the law, including its own precedent, and failed to apply controlling law to the facts. The remainder of this brief examines the history of the concept of the "confidential employee" in Federal law, traces its development in New Hampshire, applies the appropriate legal standard to the facts stated on the record of this case, and finally, refutes anticipated SEA arguments.

A Review of Federal Law

The notion of excluding confidential employees from bargaining units arose very soon after the Wagner Act became law in 1935. In a 1981 Supreme Court case, *NLRB v. Hendricks County Rural Electric Membership Corp.,* 454 U.S. 170 (1981), Justice Brennan, writing for the majority, traced the history of the concept from 1935 through 1981. In the ten years immediately following passage of the Wagner Act, the NLRB apparently was willing to exclude any employee who had access to confidential, labor relations information. 45 U.S. at 178-79, citing *Brooklyn Daily Eagle,* 13 N.L.R.B. 974, 986 (1939) and *Creamery Package Manufacturing Co.,* 34 N.L.R.B. 108, 110 (1941). This rather broad standard had the effect of excluding too many rank-and-file personnel from the protections of the Wagner Act, so in 1946 the NLRB narrowed the exclusion for confidentiality to include only those employees "who assist and act in a confidential capacity to persons who exercise 'managerial' functions in the field of labor relations." 454 U.S. at 180-81, *citing Ford Motor Co.,* 66 N.L.R.B. 1317, 1322 (1946). This was consistent with the Board's previously announced policy that

> "management should not be required to handle labor relations matters through employees who are represented by the union with which the [c]ompany is required to deal and who in normal performance of their duties may obtain advance information of the [c]ompany's position with regard to contract negotiations, the disposition of grievances, and other labor relations matters."

Hoover Co., 55 N.L.R.B. 1321, 1323 (1944). From 1946 until 1956, the NLRB apparently was inconsistent in remaining true to the narrow "labor-nexus" test articulated in the *Ford Motor Co.* case, 454 U.S. at 189, but in *B.F. Goodrich Co.,* 115 N.L.R.B. 722, 724 (1956), the Board stated its resolve to in the future "limit the term 'confidential' so as to embrace only those employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." *Id., citing* 115 N.L.R.B. at 724. Since *B.F. Goodrich Co.,* the NLRB has consistently excluded those who assist senior management in labor relations. 454 U.S. at 189-90.

This does not mean, however, that the "labor-nexus" standard remained unchanged after 1965. It was destined for one further modification. In 1974, the NLRB decided the case of *Pullman Standard Division of Pullman, Inc*., 214 N.L.R.B. 762 (1974). This case arose from the organization effort of certain employees whose job it was to estimate the cost of constructing railroad cars in preparation for submitting bids. A major ingredient in formulating the final bid price was the projected cost of labor. To aid in accurately predicting this future cost, the company had adopted the practice of internally preparing, for the use of these estimators, a quarterly "labor bulletin." These bulletins contained the cost of labor, projected up to 15 months into the future, based upon wage increases that company management expected to agree to in the course of ongoing labor negotiations. Said the Board,

> "In essence, the labor bulletins reflect[ed] the Employer's future bargaining strategy by revealing labor cost figures which would be the acceptable end result of that strategy."

Id. at 762. The NLRB determined that Pullman's objection to the inclusion of the estimators in a bargaining unit was well founded, and took the opportunity to recognize that the Board was not relying on any suggestion that these employees were intimately connected with managers who formulated policy in collective bargaining.

> "We find merit in the Employer's position. The Board has in the past denied eligibility in representation elections to those employees who, in the course of their duties, regularly have access to confidential information concerning anticipated changes which may result from collective-bargaining negotiations. *We regard such employees as specially aligned with the employer's interest in the area of labor relations, even absent the showing of a confidential work relationship with a specifically identifiable managerial employee responsible for labor policy*. Therefore, we have accorded these employees the status of 'confidential' employees and excluded them from participation with other employees in union activities which would necessarily subject them to a critical conflict of interest and impair their trust with the employer."

Id. (emphasis added). The Supreme Court, citing *Pullman* with approval in *Hendricks*, observed that the *Pullman* holding was "consistent with the underlying purpose of the labor-nexus test" to designate as confidential employees

> "persons who, although not assisting persons exercising managerial functions in the labor-relations area, 'regularly have access to confidential information concerning anticipated changes which may result from collective-bargaining negotiations.'"

Hendricks at 189, quoting from 214 N.L.R.B. at 76263.

By 1974, then, the NLRB's labor-nexus test provided for the exclusion of two separate groups of confidential employees: (1) those who assist and act in a confidential capacity to persons who exercise 'managerial' functions in the field of labor relations, and (2) those who

have access to confidential information concerning anticipated changes which may result from collective-bargaining negotiations. In 1981, in *Hendricks*, the United States Supreme Court expressly approved the "labor-nexus" test as having a reasonable basis in law. Said the Court:

> "Clearly the NLRB's longstanding practice of excluding from bargaining units only those confidential employees satisfying the Board's labor-nexus test, rooted firmly in the Board's understanding of the nature of the collective-bargaining process, and Congress' acceptance of that practice, fairly demonstrates that the Board's treatment of confidential employees does indeed have 'a reasonable basis in law.'"

Id. at 190. *See also N.L.R.B. v. Rish Equipment Co*., 687 F.2d 36 (C.A.4, 1982). A list of annotations of NLRB cases tracing the evolution of the rule excluding clerical employees who work closely with labor-relations managers or negotiators appears in 23 A.L.R. Fed. 756, § 22a. A list of annotations of those cases tracing the evolution of the rule excluding employees who have access to labor-relations information is found in 23 A.L.R. Fed 765, § 12a. Those cases in which the NLRB found that the employee's exposure to labor-relations information was incidental, not a function of a close working relationship with a specific labor-relations manager, and therefore insufficient to merit exclusion, are annotated in 23 A.L.R. Fed 756, § 12b.

A Review of State Law

The history of the practice of excluding "confidential employees" from public employer bargaining units in New Hampshire begins in 1975, with the enactment of RSA ch. 273-A, and has its roots in the statute itself. RSA 273-A:1 IX (c) defines "Public employee" to exclude "[p]ersons whose duties imply a confidential relationship to the public employer." Not long after the statute became law, this Court decided *University System of New Hampshire v. State of New Hampshire*, 117 N.H. 96 (1977). That case presented several issues, one of which was whether university department chairpersons should be excluded from the proposed unit on the ground that their duties implied a "confidential relationship" to the university system. The PELRB simply made a finding that the confidential relationship did not exist. On appeal, this Court noted that the NLRB has defined confidential employees as those "who assist and act in a confidential capacity to formulate, determine and effectuate management policies in the field of labor relations." *Id.* at 101, *quoting B.F. Goodrich Co.*, 115 N.L.R.B. 722, 724 (1956). A review of the record showed that the department chairpersons merely had access to personnel files to which others also were privy, so this Court upheld the PELRB.

Later that same year, *N. H. Dept. of Rev. Admin. v. Pub. Emp. Lab. Rel. Bd.*, 117 N.H. 976 (1977) was decided. The DRA had sought the exclusion of seven employees on the ground that they were "confidential." The PELRB excluded two from the proposed unit, and included the remaining five. The DRA appealed. This Court refused to decide the confidentiality issue, and remanded the case, because the PELRB had not yet defined "confidential" (or "supervisory")

and did not articulate on the record the standard by which it decided who would be excluded from the DRA unit. *Id.* at 978. The PELRB held a hearing in response to the remand, and affirmed its original decision to exclude two of the seven contested employees on the ground that they were "confidential." Said the Board,

> "[T]he Board finds that the meaning of the statute at a minimum is that confidential employees are those who have access to confidential information *with respect to labor relations*, negotiations, significant personnel decisions and the like. The Board further finds that the number of such employees in any department or other unit of government must be large enough to enable the labor relations activities of the Department and the personnel activities of the Department to be carried on, but must not be so numerous as to deny employees who are entitled to the rights and benefits of R.S.A. 273-A those rights merely on the assertion that they might somehow be connected with activities related to labor relations."

State of New Hampshire, Department of Revenue Administration v. State Employees' Association, Decision No. 780001, Appendix p. 11, 15 (January 1978) (emphasis in the original). Applying this standard to the facts presented, the board determined that

> "In this particular case, two employees of the Revenue Administration Department were excluded from the bargaining unit upon the finding that they were necessary assistants and/or stenographers to the administrators having labor relations authority and as such they had access to such information and were necessary in performing that labor relations function."

Id. The PELRB affirmed its decision to exclude the two, and based upon a conclusion that the other five employees did not meet this test, affirmed its original decision to include them.

Soon thereafter, in express response to this Court's directive in *N. H. Dept. of Rev. Admin. v. Pub. Emp. Lab. Rel. Bd.*, 117 N.H. 976 (1977), the PELRB's Executive Director, Evelyn LeBrun, issued a memorandum discussing and refining the concepts of "supervisory" and "confidential" employees. *Definition of "Supervisor" and "Confidential" under 273-A*, Memorandum of PELRB Executive Director, Appendix p. 1 (1978). With respect to the confidentiality issue, the Executive Director first reviewed a variety of NLRB cases, including *B. F. Goodrich Co.* These cases all supported the definition of "confidential employee" as one who works directly with a manager whose duties include collective bargaining and labor relations policy. She then cited a California law for the proposition that a "confidential employee" is

> "[a]ny employee who is required to develop or present management positions with respect to employer-employee relations *or whose duties normally require access to confidential information contributing significantly to the development of management positions.*"

Id. at 8 (emphasis added). Executive Director LeBrun next referenced The Model State Bargaining Bill, and introduced the concept of the confidential employee as one

> "whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process, would make his membership in the same organization as rank-and-file employees incompatible with his official duties."

Id. She concluded that

> "The best definition would seem to be one which restricts confidential [status] to those employees who actually have a part in the formulation of management policy or access to those decisions in such a way as to be put in an unusually awkward position if they were also a member of the bargaining unit. In addition, excluded employees should be sufficient in number to allow the public employer to run its personnel and labor relations policy without unusual hindrance because of lack of clerical personnel.
>
> . . . .
>
> In conclusion, the Board's definition of confidential employee should balance the need for the inclusion of as many employees as possible in the bargaining unit with the need for the employer to be able to perform the personnel and labor relations function. There must be a direct relationship, a real involvement (albeit not necessarily involving a large percentage of the employees' time), and a recognized incompatibility between the job performed and membership in the bargaining unit.
>
> For both supervisory and confidential employees, percentages of time spent on either function should not be part of any test or rule. Rather, the real supervisory or policy-making power or need for the confidential employees exclusion should be the test."

Id.

At approximately the time of Executive Director LeBrun's memorandum, the PELRB decided the case of *Keene State College PAT Staff Association v. University of New Hampshire, Keene State College*, Decision No. 780007, Appendix p. 18 (23 February 1978). This case continued the process of defining the concept of "confidential" employees. In the context of endorsing yet again the policy of excluding those who serve managers with labor-relations responsibilities, the PELRB announced an additional, separate standard—one that is in essence the same as that articulated by the NLRB in the *Pullman* case. In quoting a California statute with favor, the Board said that the following definition of a "confidential employee" described one of the "critical concepts concerning confidentiality."

> "One . . . whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process, would make his membership in the same organization as rank-and-file employees incompatible with his official duties."

Id. at 22-23. The Board was careful to point out that mere access to information *used* in the labor-relations process is not a sufficient basis for exclusion from a bargaining unit unless the access is accompanied by other aspects of confidentiality that would place the employee in an untenable position. *Id.* at 23. The Board closed its discussion of the meaning of "confidential" with a warning that employers will not succeed in excluding employees by simply assigning labels and writing self-serving job descriptions. "It is need and actual function which shall control findings of exclusion on the basis of "confidentiality." *Id.*

In 1984, the PELRB included an allegedly "confidential" secretary in a unit because

> "although she had access to personnel files and other matters which could be classified as confidential, it is found that one has to act in a confidential capacity with other persons involved in formulating, determining and effectuating labor relations policies before he/she could be deemed a "confidential" employee for the purposes of labor relations."

State Employees' Association of New Hampshire, Inc. v. Town of Littleton, Decision No. 84-66, Appendix p. 25 (18 September 1984).

In 1986, the PELRB excluded the Secretary to the Administrative Assistant of the Town of Pelham because that person was "involved in all aspects of labor relations, not only with this unit, but also with other certified units within the Town . . . ." *American Federation of State, County and Municipal Employees v. Town of Pelham*, Decision No. 86-24, Appendix p. 27, 28 (18 March 1986).

Three years later, in 1989, the PELRB decided *Manchester Educational Support Personnel Association/NEA-New Hampshire v. Manchester School Department*, Decision No. 89-28, Appendix p. 30 (29 March 1989). In support of its decision to exclude the secretaries of both the Superintendent of Schools and the Assistant Superintendent, the PELRB said that

> "The standard for what constitutes a 'confidential' relationship has been established by the N. H. Supreme Court in *University System, supra,* when the court said that a confidential employee is one 'who assist[s] and act[s] in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations'. Further, the court indicated that access to personnel files alone would not require a finding that one is a confidential employee."

Id. at 31. Comparing the facts to this standard, the Board observed that the confidential relationship between the two secretaries and their respective administrators was

> "quite evident as they are privy to information from all administrators who formulate, determine and effectuate management policies in the field of labor and personnel relations. Their functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in the employee organization incompatible with their official duties."

Id. at 31-32.

The preceding paragraphs set forth such PELRB pronouncements and discussion of the "confidential relationship" as the Town has been able to locate. The Board's position on the issue summarizes as follows: The PELRB has from the beginning accepted and, until now, has uniformly applied the *B. F. Goodrich* rule that an employee is excluded if he or she works closely with a manager whose duties include collective bargaining. In addition, the PELRB recognizes significant access to confidential collective bargaining information (information not generally available to the public or other employees and relating to the development of management bargaining positions) as an additional, free-standing basis for finding that a "confidential relationship" exists. In her 1978 memorandum, Executive Director LeBrun identified such access as sufficient, by itself, to support a finding of a "confidential relationship." In the *Keene State College PAT Staff Association* case, the PELRB recognized as important whether an employee's access to confidential bargaining information would make membership in the bargaining unit incompatible with his or her official duties.

Application of the Law to the Facts

If Mr. Riley's administrative secretary assists him in a confidential capacity in the collective bargaining process, then as a matter of law her position must be excluded from the proposed unit. *NLRB v. Hendricks County Rural Electric Membership Corp.* 454 U.S. 170 (1981); *B.F. Goodrich Co.*, 115 N.L.R.B. 722, 724 (1956); *University System of New Hampshire v. State of New Hampshire*, 117 N.H. 96 (1977); *Keene State College PAT Staff Association v. University of New Hampshire, Keene State College*, Decision No. 780007, Appendix p. 18 (23 February 1978). The record compels the conclusion that she does. The first question, of course, is whether Mr. Riley is involved in labor negotiations for the Town of Jackson. On this point, the hearing transcript discloses the following:

"SEA Counsel:	If I may, I don't want to interrupt, but I would be happy to stipulate That Mr. Riley is deeply involved in collective bargaining Throughout the Town of Jackson and I will stipulate to whatever he wants to testify to about that.
PELRB Chair:	Are you the chief negotiator?
Mr. Riley:	I guess I am. That's one of the hats I wear.

PELRB Chair: OK, I think that sums it up very nicely. Do you represent the Town in labor negotiations?

Mr. Riley: Yes I do.

PELRB Chair: Okay."

Transcript, p. 28. In addition, the Town entered into evidence Mr. Riley's job description (originally introduced as part of Exhibit C), which cites intimate involvement in labor negotiations as part of his duties.

With respect to his administrative secretary's role in assisting him to formulate labor policies and bargaining positions, Mr. Riley testified that she

(a) functions as his assistant in the collective bargaining process (Transcript, p. 28),

(b) assists him by gathering wage surveys, benefit surveys, and wage and benefit information from other communities (Transcript, p. 29),

(c) advises him, based upon her considerable historical knowledge, concerning how various Town master agreements have been interpreted over time (Transcript, p. 29),

(d) advises him, based upon her considerable historical knowledge, concerning how various provisions of the Town's personnel rules and regulations have been interpreted over time (Transcript, p. 29).

These services are all consistent with the administrative secretary's job description, which provides that he or she may "serve in a confidential capacity with respect to labor relations and confidential labor negotiations." (This job description was originally introduced as part of Exhibit C.) Had Mr. Riley testified to nothing further, the *B.F. Goodrich* test would be met, and the administrative secretary position would be excluded from the proposed unit as a matter of law; but Mr. Riley went on to describe her access to his, and the Manager's, tactical and strategic thoughts. He testified that she

(a) is privy to his personal thoughts relative to the collective bargaining process (Transcript, p. 29),

(b) sees his personal notes relative to positions to be taken at the bargaining table, prior to their disclosure to the union or others (transcript, p. 29), and

(c) sees and/or prepares confidential communication to and from the Town Manager relative to the formulation of bargaining positions and responses to positions presented by the union (Transcript, p. 29).

As a result of his administrative secretary's access to his and the Town Manager's confidential thoughts on bargaining issues, Mr. Riley testified that he would "feel very uncomfortable" if she were in the proposed bargaining unit. Transcript, p. 29. The position in question, then, is one that regularly places the employee directly in the flow of "confidential information concerning anticipated changes which may result from collective-bargaining negotiations." *Pullman Standard Division of Pullman, Inc.* 214 N.L.R.B. 762, 762 (1974). She is therefore specially aligned with the Town's interests in the area of labor relations, even absent a showing of a confidential work relationship with the Town's personnel director/chief negotiator. *Id.* To place such a person in the proposed bargaining unit creates a critical conflict of interest for the employee and impairs the employer's trust. *Id. See also NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981); *Definition of "Supervisor" and "Confidential" under 273-A*, Memorandum of PELRB Executive Director, Appendix p. 1 (1978); *Keene State College PAT Staff Association v. University of New Hampshire, Keene State College*, Decision No. 780007, Appendix p. 18 (23 February 1978); *Manchester Educational Support Personnel Association/NEA-New Hampshire v. Manchester School Department*, Decision No. 89-28, Appendix p. 30 (29 March 1989). In refusing to exclude an employee who has routine access to the thought processes involved in the development of management's collective bargaining strategy, the PELRB acted unjustly and illegally, and was unfair to both employer and employee.

Discussion of SEA Arguments

At the hearing on 10 May 1997, and later in its Objection to Motion for Rehearing and Reconsideration, the SEA offered the following arguments:

(1) Mr. Riley's administrative secretary does nothing more for him than gather survey information that is readily available to the public.

(2) The Town Manager's executive secretary is confidential and one such employee in the Town is enough.

(3) The inclusion of Mr. Riley's administrative secretary in the proposed bargaining unit would not affect his ability to perform his responsibilities.

None of these arguments has any basis in law or fact. With respect to the first of these, certainly Mr. Riley's administrative secretary gathers survey information from a variety of sources, but the Town has never relied on this function in making its case that she is "confidential." The essence

of her "confidential relationship" with her employer is that she prepares and/or sees Mr. Riley's private notes pertaining to positions that he plans to take at the table and arguments that he plans to make in support of those positions. She prepares correspondence and memoranda to the Town Manager that discuss positions, arguments, and tactical considerations pertaining to ongoing negotiations. She is privy to correspondence and memoranda from the Town Manager to Mr. Riley on these same topics. Transcript. P. 34. To argue that Mr. Riley's administrative secretary does no more than assemble survey data is to misrepresent the facts.

In contending that one confidential employee is enough for the Town of Jackson, the SEA converts the issue of the "confidential relationship" from a question of law and fact to a numbers game. Unfortunately, the PELRB has aided and abetted this transformation. In the course of the hearing, the PELRB Chairman engaged the Town Manager as follows:

PELRB Chair:	If you had your choice of one being exempt in the total structure, would you give it to the personnel director or to your own office? One administrative secretary. If you had a choice.
Town Manager:	I'd prefer not to have a choice, Mr. Chairman, for reasons outlined I believe the secretary that serves my office is sufficiently busy and not able to produce any other document for any office outside of mine, that's why we believe it necessary to have this one particular administrative secretary position excluded from the bargaining unit.
PELRB Chair:	Well, I guess I really didn't ask you that question. I asked you if you had a choice, which one would you pick.
Town Manager:	I tried my best, Mr. Chairman, to answer your question, without providing me with a choice.
Mr. Riley:	Would you ask me which one I would pick?
PELRB Chair:	I'm not asking you that question, I'm asking the Town Manager, which one would you pick as most involved with labor contracts. I would be disruptive of labor negotiations, if you please, or any way affecting it.
Town Manager:	Allow me to answer this way. The executive secretary for the manager sees everything that goes to the policy makers, the Town Council and would produce documents that would be distributed to the chief labor negotiator. Those documents that I would receive from the chief labor negotiator have to be produced by somebody and my secretary is not capable of producing those documents, doesn't have the time. That's why our request is before the Board.

PELRB Chair: Okay, you really don't want to answer the questions, I guess, and I don't blame you. I don't think I would either if I were sitting in your shoes. Okay further inquiry of the witness.

Transcript, p. 36. It appears from this exchange that at least the PELRB Chairman, if not the remainder of the Board, is prepared to adopt a "one-confidential-exclusion-per-municipality" rule. In this case, such an unstated rule was imposed. There was a time when the PELRB understood that

> "the number of such [confidential] employees must be large enough to enable the labor relations activities of the [employer] and the personnel activities of the [employer] to be carried on . . . ."

State of New Hampshire, Department of Revenue Administration v. State Employees' Association, Decision No. 780001, Appendix p. 11, 15 (January 1978). Executive Director LeBrun expressed the same principle when she wrote:

> "[E]xcluded employees should be sufficient in number to allow the public employer to run its personnel and labor relations policy without unusual hindrance because of lack of clerical personnel."

Definition of "Supervisor" and "Confidential" under 273-A, Memorandum of PELRB Executive Director, Appendix p. 1, 10 (1978). The Town asks only that this rule of reason, which springs from the PELRB itself, be applied to the facts in this case. It can lead only to one result. The Town has shown that the Town Manager and the Town's senior personnel administrator and negotiator routinely communicate on a wide range of labor negotiation topies, including tactical discussions on bargaining issues. In order to carry out their responsibilities, they need the protection of confidentiality at both ends of their line of communication. The PELRB has determined that they shall have it at only one end. This is arbitrary and capricious. The Town asks this court to provide to its personnel director/negotiator the same protection that the Town Manager needs and has.

The third SEA argument, that the Town's personnel director/labor negotiator can get along fine without a confidential assistant, defies reason. It is obvious from the record that Mr. Riley prepares for negotiations through the use of personal notes and other documents, and that his administrative secretary assists him in this process and prepares or sees his notes and documents. These notes and documents contain matter which, if known to the union, would severely prejudice the Town's bargaining position. Further, it is clear that the Town Manager and Mr. Riley communicate in writing as they evolve labor-relations policy and negotiation strategy and tactics. The Town Manager expects to be kept informed of Mr. Riley's preparations for bargaining and routinely to hear from Mr. Riley his candid assessments as to the progress at the table. Preparing for negotiations, formulating strategy and tactics with the Town Manager, and keeping the Town Manager confidentially informed of the progress of negotiations

are critical services that Mr. Riley renders to his employer. To perform these functions, Mr. Riley requires the assistance of his administrative secretary. In view of the nature of the information that Mr. Riley's administrative secretary either sees or prepares, she cannot be a bargaining unit member. Mr. Riley should not be burdened with the concern that in apprising the Town Manager of his perceptions of the progress of negotiations, he is also informing his adversary.

At least implicit in this third SEA argument is the suggestion that if the labor-relations/negotiations aspect of the administrative secretary's duties occupies relatively little of her time, there is no need to exclude her. First, Mr. Riley's administrative secretary's duties relative to collective bargaining and labor relations are a function of his own. As the SEA has readily admitted, "Mr. Riley is deeply involved in collective bargaining throughout the Town of Jackson . . . ." Transcript, p. 28. Second, both the NLRB and the PELRB have rejected the notion that the percentage of time spent on labor-relations issues determines whether the job is "confidential." In *Raymond Baking Co.,* 249 N.L.R.B. 1100 (1980), the issue was the exclusion of a "receptionist/typist/floater" who worked for no particular individual, but in the course of her employment from time to time typed letters and proposals pertaining to bargaining. The NLRB ruled that

> "[t]he fact that she spends a relatively small percentage of her working time performing such duties does not detract from her status as a confidential employee."

Id. Nor was the Board persuaded to rule otherwise merely because others in the organization had also performed labor-relations related functions. *Id.* at n. 4. Two years before the *Raymond Baking Co.* case was decided, the New Hampshire PELRB adopted the same position. In her 1978 memorandum, Executive Director LeBrun stated that "[f]or both supervisory and confidential employees, percentages of time spent on either function should not be part of any test or rule." *Definition of "Supervisor" and "Confidential" under 273-A,* Memorandum of PELRB Executive Director, Appendix p. 1, 10 (1978). That same year, in *Keene State College PAT Staff Association v. University of New Hampshire, Keene State College,* Decision No. 780007, Appendix 18 (23 February 1978), the PELRB said that

> "the Board will not play a numbers game with its definitions. The percentage of a person's time spent on confidential matters is not crucial to a finding of confidentiality. There is no magic number or percent of personnel who will be found to be required as confidential to perform the labor relations functions."

Id. at 23. For all of these reasons, the SEA's third argument fails as a matter of law.

CONCLUSION

The PELRB's decision in this case is absolutely contrary to its own precedent and well-settled federal law. Justice requires reversal. Kevin Riley is in charge of labor relations for the Town of Jackson, one of the largest municipal employers in the state. Any manager in his position needs at least one person, under his immediate supervision, to assist him to prepare for negotiations, formulate labor-relations policy, and communicate with the Town Manager on labor-relations and negotiations issues. The person who works most closely with him, his administrative secretary, is "confidential" in every sense of the word. In finding otherwise, the PELRB has deprived Mr. Riley of adequate and reasonable assistance in the performance of his duties. The Town of Jackson asks this Court to find and rule that Mr. Riley's administrative secretary bears a "confidential relationship" to her employer within the meaning of RSA 273-A:1 IX (c).

Respectfully submitted,
THE TOWN OF JACKSON
By its Attorney

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CERTIFICATION

I hereby certify that on this 12th day of August 1998, I provided copies of this brief, with Appendix, to Attorney Wilbur Shaw, General Counsel for the SEA, and to the Office of the PELRB, by first class mail, postage prepaid.

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James L. Burke

REQUEST FOR ORAL ARGUMENT

The Town of Jackson respectfully requests the opportunity to be heard in oral argument. Counsel estimates that the argument will take no longer than 20 minutes. Attorney James L. Burke will appear for the Town.

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James L. Burke