



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Non-Supervisory Classified Employees	*	
of NH Employment Security (S-0306-4)	*	
and	*	
Classified Supervisory Employees of	*	
N.H. Employment Security (S-0306-5)	*	
And	*	
Classified Employees of	*	
NH Employment Security (S-0306-6)	*	Case No.s S-0306-4,5&6
	*	
	*	
Petitioners	*	
	*	
And	*	
	*	
State Employees' Association of New Hampshire,	*	
SEIU Local 1984	*	Decision No. 2006-193
	*	
Respondent	*	
	*	

APPEARANCES

Representing Petitioners

Lynn Leslie, New Hampshire Department of Employment Security
Heidi Buck, New Hampshire Department of Employment Security

Representing: State Employees' Association of NH, SEIU Local 1984

John S. Krupski, Esq.
Cook & Molan, PA, Concord, New Hampshire

BACKGROUND

The Petitioners filed for decertification on September 15, 2006. They submitted

decertification petitions for a non-supervisory unit (Case No. S-0306-4), a supervisors' unit (Case No. S-0306-5) and a classified employees unit (Case No. S-0306-6).

The State Employees' Association of New Hampshire, SEIU Local 1984 ("SEA") filed answers to the three petitions on September 30, 2006. The SEA states 1) that the petitioners lack standing; 2) that the petitioners fail to present the requisite 30% showing of interest; 3) that an informal pre-hearing conference should be conducted prior to an adjudicatory hearing to address the SEA's exceptions and objections to the petition; 4) that a full Board of the PELRB must deem the statutory prerequisites satisfied before any pre-election hearing may be held; 5) that the petitions do not adequately describe the bargaining units; and 6) that the submission of decertification signature cards for dual purposes acts as a revocation of each of those purposes and the cards must be rejected.

The undersigned hearing officer conducted a pre-hearing conference on October 2, 2006 and an evidentiary hearing on October 11, 2006, both at the PELRB offices in Concord, New Hampshire.

FINDINGS OF FACT

1. The State of New Hampshire, Department of Employment Security is a public employer within the meaning of RSA 273-A: 1,X.
2. The State Employees' Association of New Hampshire, SEIU Local 1984 ("SEA") is an employee organization that represents employees of the Department of Employment Security ("DES") for purposes of collective bargaining pursuant to RSA 273-A.
3. The SEA is the certified bargaining agent for DES employees in the bargaining unit pursuant to a Recognition of an Exclusive Representative dated December 7, 1976 (Case No. S-0310)(the "1976 classified employees bargaining unit"). The 1976 classified employees bargaining unit, and the recognition of the SEA as the exclusive representative, issued under Chapter 490:3, New Hampshire Laws, 1975 and accordingly no election was held under RSA 273-A.
4. On April 8, 1980, the SEA and the State Negotiating Committee filed a Petition ("Joint Petition") for Modification of Bargaining Unit seeking to create a bargaining unit composed of supervisory employees from 25 different agencies and departments.
5. Pursuant to the Joint Petition 24 unnamed Department of Employment Security ("DES") employees from 11 positions were included in the new supervisors' unit. The SEA is the certified bargaining agent pursuant to the Recognition of an Exclusive Representative dated August 6, 1980 (Case No. S-0349) that issued as a consequence of the Joint Petition (the "1980 supervisors' bargaining unit"). The 1980 supervisors' bargaining unit, and the recognition of the SEA as the exclusive representative, issued under Chapter 490:3, New Hampshire Laws, 1975 and accordingly no election was held. (The involved DES employees were previously members of the 1976 classified employees bargaining unit.)

6. In 1997 the PELRB amended the 1980 supervisory employees bargaining unit certification by adding supervisory employees from the Bureau of Emergency Communications and the Office of the Secretary of State – the 1997 certification does not reflect, list, or state the Employment Security employees or positions in the supervisors' unit as of 1997.
7. The SEA is again identified as the certified bargaining agent pursuant to the Recognition of an Exclusive Representative dated March 31, 1997 (Case No. S-0349)(the "1997 supervisors' bargaining unit"). The 1997 supervisors' bargaining unit certification, recognizing the SEA as the exclusive representative, also issued under Chapter 490:3, New Hampshire Laws, 1975 and accordingly no election was held.
8. Apart from the petition which led to the 1980 supervisors' bargaining unit, there is nothing on file at the PELRB showing which DES employees, if any, either by name or position, belong to the supervisors' unit or to a non-supervisors' unit.
9. The current allocation of DES classified employees between the 1976 classified employees bargaining unit and the 1997 supervisors' bargaining unit cannot be determined based upon the public record at the PELRB.
10. At hearing the SEA reluctantly disclosed that it does not have records which show which DES employees belong to the supervisors' unit.
11. At hearing the SEA eventually disclosed that it has been the understanding of the employer and the SEA (pursuant to offers of proof from Lori Hayes, SEA representative since 2003, and Sara Willingham, State of New Hampshire Manager of Employee Relations) that since at least 2000 all DES classified employees have been members of the 1976 classified employees bargaining unit, have been treated as such, and that the 1997 supervisors' bargaining unit is not populated.
12. This understanding was not communicated to the PELRB until the hearing in this matter. There was no evidence that this understanding was previously reduced to writing and posted for DES employees to see and review, nor was there evidence that before the hearing in this matter DES employees were otherwise ever informed or advised of this understanding between the SEA and the State concerning the bargaining unit allocation or assignment of DES classified employees.
13. In its Position Statement, filed on October 20, 2006, the SEA reiterates this understanding, stating that "[t]he SEA and the State of New Hampshire, by and through Sara Willingham, were in agreement at the Adjudicatory Hearing that the bargaining unit recognized by the PELRB in case number S-0349 is not populated as to the Department of Employment Security. The parties, the SEA and the State of New Hampshire, are in agreement that all positions are currently covered under the certification and recognition of exclusive representative dated December 7, 1976, case number S-0306."

14. The petitioners utilized the Decertification Card form provided on the PELRB website – a blank copy of this form was marked as Joint Exhibit One and provided to the parties at hearing. At hearing the SEA was advised that the decertification cards filed with the PELRB (and which are confidential) do not have any additional information beyond what appears on Joint Exhibit One except for the information filled in by employees in the spaces provided.
15. At the close of the hearing the SEA requested permission to file a post-hearing brief and stated in substance that any delay would not affect the Petitioners' request to have a decertification election because decertification elections are not subject to the 120 day election window set forth in RSA 273-A. Although the hearing officer did not find that it was necessary for the SEA to file a post-hearing brief, the SEA was nevertheless granted leave to file a brief by October 20, 2006 because of its statements and position concerning the conduct and timing of decertification elections. The SEA filed its "Position Statement" on October 20, 2006.

DECISION AND ORDER

Jurisdiction

The PELRB has jurisdiction over decertification petitions involving public employers, public employees, and employee organizations pursuant to the general provisions of RSA 273-A and the specific provisions of Pub 301.03.

Discussion

Pub 301.01 (f) provides that "[a] petition filed under this section shall also contain a statement that at least 30% of the employees in the proposed bargaining unit wish to be represented by the employee organization named in the petition." In the case of decertification proceedings commenced under Pub 301.03, and consistent with RSA 273-A:10, I (a), a decertification petition must show that at least 30% of the employees in the bargaining unit at issue no longer wish to be represented by the incumbent certified exclusive representative. The PELRB is charged with determining whether this requirement has been satisfied based upon the PELRB's review of the confidential decertification cards. Probationary employees will not be counted for purposes of the 30% interest question, nor are they eligible to sign decertification cards or vote at election. The same is true with respect to unfilled positions. See PELRB Decision No. 2006-186 (October 19, 2006)(Decertification proceeding involving Department of Labor employees).

The SEA's arguments that the decertification cards must be disregarded because the Petitioners filed three petitions is not persuasive; the purpose of the cards is demonstrate to the PELRB that a minimum number of employees no longer wish to be represented by the SEA. This showing is not diminished or altered because the certification history for the Department of Employment Security prompted the Petitioners to proceed with three petitions, a prudent course

of action in the circumstances, nor is it diminished or altered depending on which DES bargaining unit or units, if any, the PELRB finds are eligible for a decertification election. If there are enough cards given the number of eligible employees in the bargaining unit or units at issue, the PELRB may hold an election on the question, and the eligible employees will then have an opportunity to vote (for the first time) on whether they wish to have the SEA continue as their exclusive representative.

The Petitioners proceeded reasonably and appropriately by filing three petitions based upon the information available to them from the public record at the PELRB and otherwise. Given the certification history concerning DES employees and the absence of information in the public record at the PELRB and the other circumstances in this case, it was not improper for the petitioners to file alternative petitions and utilize one original set of decertification cards to support the alternative petitions. It was clear that at least one, if not two, of the units identified in the petitions were the correct units for the purposes of conducting a decertification election.

The SEA's concerns about the decertification cards are otherwise unfounded. The Petitioners utilized the decertification card form provided by the PELRB on its website. See Joint Exhibit One. Joint Exhibit One was marked at the hearing because of SEA inquiries concerning the card – the only information omitted is the information provided by employees when completing the cards in the spaces provided. This information is deemed confidential, and is not subject to review by the SEA. The SEA's claim that it was deprived of the chance to inspect the cards is without merit. Neither RSA 273-A nor PELRB rules grant the SEA a right to inspect decertification cards, in redacted form or otherwise. Further, in this case the SEA was in fact provided with a sample of the decertification cards actually submitted.

For purposes of this decertification proceeding, the PELRB accepts and recognizes the longstanding understanding and agreement between the SEA and the employer that DES employees are covered by the 1976 classified employees bargaining unit, and not by the 1980 or 1997 supervisors' bargaining units. The SEA's claims that the Petitioners' have failed to meet their burden in this case, or that the PELRB improperly required the SEA to carry the burden of describing the proposed unit, are without merit. The SEA was not required to carry the Petitioners' burden of proof. The Petitioners in fact filed proper petitions supported by decertification cards together with a list of employees. At hearing the Petitioners reviewed the basis for the decertification petitions.

During the course of the hearing, which for the most part proceeded upon offers of proof and discussion, the SEA was asked to explain the basis for its claim that the supervisors' unit was not populated (and conversely, its position that all classified DES employees belonged to the 1976 classified employees bargaining unit). The purpose of this inquiry was to gather more information concerning the SEA's conclusory statements that the 1980 and 1997 supervisors' units were not populated and the 1976 classified employees bargaining unit was the controlling unit, a necessary inquiry given the certification history currently on file with the PELRB (as discussed in Findings of Fact 3-9). The fact that the SEA was asked by the hearing officer to provide this information during the course of the hearing does not mean that SEA was improperly required to "carry the burden of describing the proposed bargaining unit." This is especially evident when due consideration is given to the circumstances and history of the

certifications in this case, the fact that the Petitioners did describe the bargaining units in each of their petitions, and the fact that the SEA, as the certified bargaining agent, should be able to furnish this information.

It should also be noted that with respect to the 1976 classified employees bargaining unit, only the Petitioners filed a list of DES employees and identified which employees should be considered part of the unit and which employees should be excluded. The SEA did not file any such list or exhibit, nor did the SEA provide testimony identifying by name and position the individual DES employees and the bargaining units to which such employees belonged. The Petitioners identified 321 DES employees, including 10 confidential employees and 4 unclassified employees, leaving 307 classified employees in the 1976 bargaining unit certification (Case No. S-0306-6). The SEA did not contest the Petitioners' characterization of confidential and unclassified employees. The Petitioners satisfy the 30% interest requirement even if the employees whom the Petitioners have identified as unclassified or confidential were to be including in the showing of interest computation.

The SEA asserts that professional and non-professional employees are required to vote and submit decertification cards separately, and that the Petitioners failed to make this distinction when collecting cards. However, neither RSA 273-A nor PELRB impose this requirement. While it is true that during formation of a bargaining unit composed of professional and non-professional employees, professional and non-professional employees must submit interest cards separately and vote separately, there is no corresponding requirement in the event of decertification proceedings. See RSA 273-A:II and Pub 301.01 (g)(it is debatable whether these provisions even apply since this case involves "grandfathered" units). Further, there is otherwise no reason to treat professional and non-professional employees differently during decertification proceedings, as this is inconsistent with the result of the process by which professional and non-profession employees may be grouped together into one bargaining unit. By the time of a decertification proceeding a single bargaining unit has been formed and recognized by the PELRB, and any professional and non-professional employees in the single bargaining unit have, by choice, been grouped together into a single bargaining unit and are thereafter to be treated as members of a single bargaining unit for all purposes. There is nothing in the statute or PELRB rules which requires otherwise.

Although the SEA stipulated at the hearing that decertification proceedings are not subject to the 120 day election window imposed by RSA 273-A:11, the PELRB finds that it is proper in any event for this matter to proceed to election. First, the issuance of a decision in this matter was delayed so that the SEA could file a post-hearing brief. Second, the instant cases were among a number that were filed within the decertification filing window on September 15, 2006 and earlier, and Petitioners are entitled to proceed to election for the same reason as the other cases which have already been processed and approved for election.

The PELRB finds the provisions of RSA 273-A:11 do not preclude an election in this case for the reasons discussed in Case No.s S-0431 & 0432 involving petitions filed by New England Police Benevolent Association ("NEPBA") to modify and create two new bargaining units consisting of employees of the Law Enforcement Division of the Department of Fish and

Game. In that case the PELRB decision addressed the interplay of the filing window and the election window as follows:

“The NEPBA petitions were timely filed and these matters will now proceed to election. Pub 301.01 (a) sets the time frame for the filing of certification petitions at “no more than 210 days and no less than 150 days prior to the budget submission date of the affected public employer” (the “filing window”). As noted in other proceedings, the budget submission date for the State is February 15. It is reasonable to conclude that one of the underlying presumptions of the filing window is that proper certification petitions submitted during the filing window will ultimately result in the conduct of an election within the “election window,” which is “not more than 180 nor less than 120 days prior to the budget submission date.” See RSA 273-A:11, I (b). However, in this case it may be necessary to conduct the election inside the 120 day deadline (but the Order of Election can issue within the 180 to 120 day period).

There is precedent for conducting elections after the 120 time period imposed by RSA 273-A:11, I (b). See The State Employees' Association of New Hampshire Inc. v. Elizabeth W. Cheney and Public Employee Labor Relations Board, 119 N.H. 822, 825 (1979) and PELRB Decision No. 79009. In Cheney the PELRB addressed whether a decertification election could be conducted after the expiration of the election window:

“The Board, therefore, finds that the petition having been timely filed, and the budget submission date being September 21 in the year the contract expires, namely 1979, that an election is proper. Difficulties in arranging for hearings and the extension granted to the employees earlier makes the holding of such an election within the 120 days prior to the budget submission date impossible. The Board finds, however, that, as with many of the time periods in the statute, the administration of the law must be made to fit its purposes. When there is doubt as to the choice of employees in a bargaining unit as has been raised properly in this case by the petition for decertification, and especially when there is a unit representation for which (sic) was established prior to the effective date of RSA 273-A:3, and given the special circumstances of this case, the setting of the election date prior to the 120 days and not the actual election prior to 120 days is found by the Board to be in keeping with the spirit of the law. An election, therefore, will be scheduled by the Board for June 12, 1979.”

PELRB Decision No. 79009 at 3. On appeal the New Hampshire Supreme Court affirmed the PELRB's decision, stating:

“There is ‘no doubt that this court is the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole.’ We have, however, consistently recognized that the legislature has vested the PELRB with authority to define the terms of RSA ch. 273-A and to fill in the ‘interstices.’ Although the board's

determinations are not controlling, they are nevertheless persuasive, and are considered to be *prima facie* lawful and reasonable, and will be upheld unless they constitute a clear abuse of discretion. The PELRB rulings at issue find adequate support in the record and are in keeping with the spirit of the law. Under the circumstances presented, wherein the public employees had no voice in choosing the SEA as their bargaining representative under RSA ch. 273-A, the PELRB's application of the statute was proper and reasonable. We cannot say that its rulings were erroneous or constituted a clear abuse of discretion."(citations omitted)(emphasis in original)

As was true in the Cheney case, there has never been an election for the underlying bargaining unit in this case. In the present case, any delay in the conduct of the actual election is not attributable to NEPBA, as NEPBA filed its petitions within the prescribed time period. *The delay in the actual conduct of election proceedings in this case, if any, is attributable to the fact that there have been multiple petitions filed within a short time frame, all concerning bargaining units currently represented by the SEA, and which seek either a decertification election, or modification and a certification election.* Counsel for the SEA is familiar with these other pending matters by virtue of the representation he has provided to the SEA in those cases. The SEA has responded to these filings by submitting multiple objections and exceptions and by requesting the conduct of informal pre-hearing conferences and adjudicatory hearings on its exceptions and objections, all of which the SEA is entitled to do, but all of which slows the processing of pending matters. During this time period the PELRB has also received related unfair labor practice complaints as well as unrelated filings, all of which have to be processed as well. The reasoning of Cheney is as applicable to the present certification proceedings as it is to decertification proceedings – both types of proceedings are subject to the same filing and election window. The circumstances of this case justify these matters proceeding to election, even if the election takes place beyond the election window, for the reasons discussed." (emphasis added)

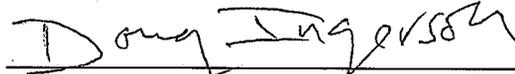
PELRB Decision No. 2006-174 at 8-9 (October 12, 2006). The instant case is one of the "multiple" petitions referenced in the NEPBA & Fish and Game decision. The instant case is eligible and qualified to proceed to election for the reasons articulated in the NEPBA & Fish and Game decision. As was true in Cheney and the PELRB Fish and Game matter, there was no election in connection with 1976 classified DES employees bargaining unit certification (or the 1980 and 1997 supervisors' bargaining unit certifications for that matter).

Accordingly, this matter shall proceed to pre-election conference and election, even though the election itself will take place after the close of the election window (on or about October 18, 2006). The petitioner has satisfied the requirements of RSA 273-A and PELRB rules, including the requisite showing of a 30% interest under Pub 301.01 (f).

A pre-election conference shall be held on October 31, 2006 at 3:00 p.m. at the PELRB in Concord, New Hampshire and an election shall be held on November 15, 2006 at a time and location to be established. The probationary status of the DES classified employees will be addressed at the pre-election conference - in connection with the preparation of the final list of

eligible voters at the time of the pre-election conference the presiding officer may, in his discretion and at the request of a party, revisit the issue of confidential and unclassified employees based upon information supplied by the State at the time of the conference.

So Ordered.



Douglas L. Ingersoll, Esq.
Hearing Officer

Date Issued: October 26, 2006

Distribution: Lynn Leslie
Heidi Buck
John Krupski, Esq.