Reverses & remands PELRB Decision No. 2007-153.

THE SUPREME COURT OF NEW HAMPSHIRE

Public Employee Labor Relations Board
No. 2008-032

APPEAL OF STATE EMPLOYEES' ASSOCIATION OF NEW HAMPSHIRE, INC., SEIU, LOCAL 1984
(New Hampshire Public Employee Labor Relations Board)

Argued: November 19, 2008
Opinion Issued: January 14, 2009

Cook & Molan, P.A., of Concord (Glenn R. Milner on the brief and orally), for the petitioner.

Nolan Perroni Harrington, LLP, of Lowell, Massachusetts (Peter J. Perroni on the brief and orally), for the respondent.

DALIANIS, J. The petitioner, the State Employees' Association of New Hampshire, Inc., SEIU, Local 1984 (SEA), appeals an order of the New Hampshire Public Employee Labor Relations Board (PELRB) denying SEA's motion to dismiss the certification petitions filed by the respondent, the New England Police Benevolent Association (NEPBA), in which NEPBA sought to represent a bargaining unit of certain officers employed by the New Hampshire Department of Corrections (DOC). In denying the motion to dismiss, the PELRB ruled that the 2007-2009 collective bargaining agreement between the State and SEA did not bar the certification petitions. See RSA 273-A:11, I(b) (1999). We reverse and remand.

The parties stipulated to or the record supports the following facts. SEA has negotiated with the State on behalf of DOC employees since 1976, when the PELRB recognized SEA as their representative pursuant to State Employees' Assoc. v. New Hampshire Public Employee Labor Relations Board, 116 N.H. 653, 655-56 (1976). See Appeal of State Employees' Assoc. of N.H., 156 N.H. 507, 508 (2007). The most recent collective bargaining agreement (CBA) between the State and SEA was executed on July 19, 2007. Article 21.1 of that agreement provides: "This Agreement as executed by the Parties is effective July 1, 2007 and shall remain in full force and effect through June 30, 2009 or until such time as a new Agreement is executed." The 2005-2007 CBA included a similar provision: "This Agreement as executed by the Parties is effective July 1, 2005 and shall remain in full force and effect through June 30, 2007 or until such time as a new Agreement is executed."

The State and SEA began negotiating the 2007-2009 CBA in January 2007. After more than thirty bargaining sessions, they reached a tentative oral agreement on June 14, 2007, which was reduced to a writing the following day, and finalized on or before June 20, 2007. This tentative agreement was submitted to the joint committee on employee relations for approval, see RSA 273-A:9 (Supp. 2008), and, on June 27, 2007, its cost items were funded by the legislature, see RSA 273-A:3, II (1999). The tentative agreement was submitted to union members on June 22, 2007; voting on ratification closed on July 5, 2007. On July 9, 2007, NEPBA filed the instant petitions. Later that evening, SEA officials counted union member votes and certified that the tentative agreement was ratified by a vote of 1607 to 1405. On July 19, 2007, the Governor and SEA President signed the 2007-2009 CBA.

Even though the 2007-2009 CBA was not actually signed until July 19, 2007, its effective date, pursuant to Article 21.1, was July 1, 2007. As a result, various new terms and conditions of employment became effective for SEA bargaining unit employees before that CBA was signed. For instance, effective July 1, 2007, SEA bargaining unit members received increased reimbursement for certain expenditures and their dental plan began covering dental x-rays at 100%. Similarly, salary increases and employee contribution to health insurance premiums became effective July 6, 2007.

SEA moved to dismiss the NEPBA petitions on the ground that they were barred by the "contract bar rule" set forth in RSA 273-A:11, I(b). The PELRB hearing officer disagreed. SEA moved for rehearing, which the PELRB denied. The representation election was held in January 2008. NEPBA prevailed in the election, and this appeal followed.

When reviewing a decision of the PELRB, we defer to its findings of fact, and, absent an erroneous ruling of law, we will not set aside its decision unless the appealing party demonstrates by a clear preponderance of the evidence that

the order is unjust or unreasonable. Appeal of Merrimack County, 156 N.H. 35, 39 (2007); see RSA 541:13 (2007).

Resolving the issues on appeal requires that we interpret various provisions of RSA chapter 273-A. We are the final arbiters of legislative intent as expressed in the words of a statute considered as a whole. Appeal of Goffstown Educ. Support Staff, 150 N.H. 795, 799 (2004). We begin by examining the statutory language itself, where possible ascribing the plain and ordinary meanings to the words used. Id. We do not look beyond the language of a statute to determine legislative intent if the language is clear and unambiguous. Id. Moreover, we interpret statutes in the context of the overall statutory scheme and not in isolation. Id.

RSA 273-A:11, I(b), which governs the timing of representation elections, states:

> Public employers shall extend . . . to the exclusive representative of a bargaining unit . . . [t]he right to represent the bargaining unit exclusively and without challenge during the term of the collective bargaining agreement. Notwithstanding the foregoing, an election may be held not more than 180 nor less than 120 days prior to the budget submission date in the year such collective bargaining agreement shall expire.

Under this provision, referred to as the "contract bar rule," see Appeal of State Employees' Assoc. of N.H., 156 N.H. at 508, a CBA bars an election for a new representative unless the election occurs "not more than 180 nor less than 120 days prior to the budget submission date in the year such collective bargaining agreement shall expire." RSA 273-A:11, I(b).

While the statutory contract bar rule concerns actual elections, the PELRB has promulgated New Hampshire Administrative Rules, Pub. 301.01 (Rule 301.01), which applies to certification petitions, and provides, in pertinent part:

> (a) A petition for certification as the exclusive representative of a bargaining unit having no certified representative may be filed at any time. A petition for certification as the exclusive representative of a bargaining unit for which a collective bargaining agreement constituting a bar to election under RSA 273-A:11, I (b) presently exists shall be filed no more than 240 days and no less than 180 days prior to the budget submission date of the affected public employer in the year that agreement expires, notwithstanding any provisions in the agreement for extension or renewal.
> (b) Any petition filed less than 180 days prior to the budget

> submission date of the affected public employer shall be accompanied by an explanation of why the petition could not have been filed sooner. The board shall refuse to entertain any petition filed so close to the budget submission date of the affected employer that the board cannot reasonably conduct the election called for in the petition within 120 days of the budget submission date.

Under this rule, where, as here, an exclusive bargaining representative is in place, a certification petition may not be filed sooner than 210 days nor later than 150 days before the employer's budget submission date in the year that the agreement expires. "The purpose for creating such a window is to allow for the conduct of an orderly election and still leave sufficient time, deemed 120 days prior to the budget submission date, for the parties to negotiate a CBA." Donald E. Mitchell, N.H. Public Employee Labor Relations Board, Selected Procedures and Practices before the New Hampshire Public Employee Labor Relations Board, at http://www.nh.gov/pelrb/about.htm#A.%20PETITION%20FOR%20CERTIFICATION%20OF%20BARGAINING%20UNIT. Rule 301.01(a) ensures that "proper certification petitions submitted during the filing window will ultimately result in the conduct of an election within the 'election window'" set forth in RSA 273-A:11, I(b). Classified Employee Petitioners of the New Hampshire Office of Information Technology, No. S-0411-3 (PELRB Oct. 16, 2006), at http://www.nh.gov/pelrb/Decisions/2006/2006-181a.htm.

The parties' dispute centers upon the first sentence of RSA 273-A:11, I(b), which insulates a certified representative from challenge "during the term of the collective bargaining agreement." NEPBA contends that its petitions were not filed "during the term of the collective bargaining agreement," because by July 9, 2007, the 2005-2007 CBA had expired and the 2007-2009 CBA had not yet been executed. Relying upon decisions by the National Labor Relations Board (NLRB) interpreting its contract bar rule, NEPBA asserts that, for a contract to act as a bar to a certification petition, it must be signed by the parties. See Appalachian Shale Products Co., 121 N.L.R.B. 1160, 1162 (1958). Because the 2007-2009 CBA was not signed until after NEPBA filed its petitions, it did not bar them.

SEA counters that, even if we assume, without deciding, that the 2005-2007 CBA expired on June 30, 2007, but cf. Appeal of N.H. Dep't of Safety, 155 N.H. 201, 203 (2007), the 2007-2009 CBA barred the petitions because before NEPBA filed them, this CBA had been reduced to a writing, the legislature had approved legislation to fund all of its cost items, and voting on ratification had closed. Under these circumstances, SEA urges, the 2007-2009 CBA barred NEPBA's petitions.

Based upon our review of the relevant statutory scheme, construed as a whole, we hold that SEA's position best comports with the legislature's intent as expressed in the plain meaning of the pertinent statutes. We conclude, therefore, that the PELRB erred when it ruled that the 2007-2009 CBA could not act as a bar to NEPBA's petitions because the CBA had not been executed when those petitions were filed.

RSA chapter 273-A governs collective bargaining for state employees. This chapter obligates the State to negotiate with the certified representative of its employees regarding all cost items and "terms and conditions of employment affecting state employees in the classified system." RSA 273-A:9; see RSA 273-A:3 (1999). A cost item, as defined by RSA 273-A:1, IV (1999), is "any benefit acquired through collective bargaining whose implementation requires an appropriation by the legislative body of the public employer with which negotiations are being conducted." Any party seeking to bargain must serve written notice of this intent at least 120 days before the State's budget submission date. See RSA 273-A:3, II(a). Bargaining must begin "not later than 120 days before the deadline for submission of the governor's proposed operating budget." Id.

Assuming that the parties reach agreement, they must then submit the cost items contained therein to the proper legislative body. RSA 273-A:3, II(b); see Appeal of Inter-Lakes Sch. Bd., 147 N.H. 28, 34 (2001). CBAs negotiated between a public employer and the union representing its employees are unenforceable until the proper legislative body ratifies the agreement's cost items. See Appeal of Timberlane Reg. School Bd., 142 N.H. 830, 835 (1998). A public employer commits an unfair labor practice by refusing to negotiate in good faith with the exclusive representative of its employees as well as by failing to submit to the legislative body any negotiated cost item. RSA 273-A:5, I(e) (1999).

The New Hampshire legislature is the legislative body that approves the cost items in CBAs affecting state employees. See RSA 273-A:9, V(d). The joint committee on employee relations reviews the items first and then submits recommendations to the legislature. See RSA 273-A:9, V. If the legislature rejects any part of the submission or takes any action that would result in modifying the terms of the cost items submitted to it, "either party may reopen negotiations on all or part of the entire agreement." RSA 273-A:3, II(b).

"Every agreement negotiated under the terms of this chapter shall be reduced to writing and shall contain workable grievance procedures." RSA 273-A:4 (Supp. 2008). Moreover, fourteen days after the parties to a CBA execute it, they must file it with the PELRB. See RSA 273-A:16 (Supp. 2008).

Nothing in this legislative scheme suggests that a CBA remains unenforceable until it is executed. While the scheme contemplates that such agreements will be signed, see RSA 273-A:16, it does not require that execution take place before they are enforceable. There is no requirement, for instance, that the legislature act only upon signed CBAs. Compare RSA 273-A:3 with Mass. Gen. Laws ch. 150E, § 7 (West Supp. 2008). Execution, under these circumstances, is merely a ministerial act. See 10 E. McQuillin, The Law of Municipal Corporations § 29.23, at 349 (3d ed. 1999).

Given this legislative scheme, we conclude that the PELRB erred when it ruled that the 2007-2009 CBA could not bar NEPBA's petitions because it was unsigned when NEPBA filed them. The record shows that when NEPBA filed its petitions, not only was the CBA reduced to a writing, as required by RSA 273-A:4, but its cost items had been approved by the legislature, see RSA 273-A:3, II(b), and union members had completed voting on whether to ratify it. Under these circumstances, we hold that NEPBA's petitions were filed "during the term" of the 2007-2009 CBA, and, thus, that the 2007-2009 CBA could bar them despite the fact that it was unsigned.

NEPBA argues that the PELRB's decision is correct, in part, because it is consistent with decisions of the NLRB. See University System v. State, 117 N.H. 96, 99 (1977) (urging newly created PELRB to look for guidance to NLRB decisions). Before we address this contention on its merits, by way of background, we explain the NLRB's contract bar rule.

Under the NLRB's contract bar rule, a contract of definite duration that is reduced to a writing and executed by the parties "will act as a bar for up to 3 years of its term to an election petition filed by an employee or rival union after the contract is executed." City Markets, 273 N.L.R.B. 469, 469 (1984). The NLRB, however, has established a thirty-day period during which petitions may be filed, notwithstanding the existence of a valid CBA. See N.L.R.B. v. F & A Food Sales, Inc., 202 F.3d 1258, 1260 n.1 (10th Cir. 2000). Accordingly, "a valid contract not exceeding three years in duration will bar a representation election unless a petition is filed more than 60 and less than 90 days before the end of the contract." N.L.R.B. v. Dominick's Finer Foods, Inc., 28 F.3d 678, 683 (7th Cir. 1994). At the conclusion of this window period, "the final 60 days of [an] existing collective bargaining agreement is an 'insulated period' during which the contract bars petitions for elections." Crompton Company, Inc., 260 N.L.R.B. 417, 418 (1982).

The contract bar doctrine is designed to promote stability in the collective bargaining relationship and, at the same time, afford employees a reasonable opportunity to change or eliminate their bargaining representative. East Manufacturing Corporation, 242 N.L.R.B. 5, 6 (1979). "Basic to the whole . . . contract-bar policy is the proposition that the delay of the right to select

representatives can be justified only where stability is deemed paramount." Paragon Products Corporation, 134 N.L.R.B. 662, 663 (1961).

Because the NLRB's contract bar "prevents employees from freely choosing representation over a specified period" not to exceed three years, N.L.R.B. v. Arthur Sarnow Candy Co., Inc., 40 F.3d 552, 557 (2d Cir. 1994), the NLRB has required that, to serve as a bar, the agreement "must contain substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship," and be signed by the parties before a petition is filed, "even though the parties consider it properly concluded and put into effect some or all of its provisions." Appalachian Shale Products, Co., 121 N.L.R.B. at 1162-63. To satisfy the signature requirement, however, "the document signed need not be a formal collective-bargaining agreement, nor must the signatures appear on the same document." Waste Management of Maryland, Inc., 338 N.L.R.B. 1002, 1002 (2003). "Recognizing that parties do not always ceremonially sit down to sign a formal, final, document upon the successful conclusion of negotiations, the [NLRB] has held that informal documents laying out substantial terms and conditions of employment can serve as a bar, so long as those informal documents are signed." Id. at 1002-03.

"The rule of Appalachian Shale, that only a written agreement will bar the processing of an election petition, is essentially an effort to avert the danger that unions and employers may collude to defeat employees' representational wishes on the basis of illusory or fabricated agreements." YWCA of Western Massachusetts, 349 N.L.R.B. 762, 764 (2007). "Requiring evidence of an executed, written agreement is designed to assure that employee rights are protected from such deception." Id.

Under the NLRB's contract bar rule, if a petition is filed before the execution date of a contract that is effective either immediately or retroactively and is otherwise timely, the contract subsequently entered into will not bar the processing of the petition and the holding of an election. City Markets, 273 N.L.R.B. at 469. If the incumbent union prevails in the election, any contract executed with the employer is valid and binding. Id. If, however, the incumbent union loses, the contract is null and void. Id. at 469-70.

Significantly, the NLRB's contract bar rule, unlike New Hampshire's contract bar rule, is not mandated by statute. Rather, it "is an administrative device early adopted by the [NLRB] in the exercise of its discretion as a means of maintaining stability of collective bargaining relationships." Direct Press Modern Litho, Inc., 328 N.L.R.B. 860, 860-61 (1999) (quotation omitted). Because it is an administrative device, "[t]he [NLRB] has discretion to apply a contract bar or waive its application consistent with the facts of a given case, guided by [its] interest in stability and fairness in collective-bargaining

agreements." Id. at 861. By contrast, the New Hampshire contract bar rule is a creature of statute, and the PELRB has no discretion to waive it. See Appeal of State Employees' Assoc. of N.H., 156 N.H. at 511.

Given the NLRB's broad discretion to waive its own contract bar rule, including its self-imposed requirement that to act as a bar, a contract must be signed, we have no way of knowing whether, if faced with identical facts involving a private sector employer, the NLRB would have ruled as the PELRB did. We, therefore, are not persuaded that the PELRB's decision is consistent with the NLRB's jurisprudence. Had the NLRB been faced with these facts -- a statutory mandate that bargaining take place within a certain time frame and that all cost items be approved by a legislative body, approval by the legislature of the legislation necessary to fund the agreement's cost items, and a written CBA which union members had already voted to ratify -- it may well have waived its own contract bar rule. Under these circumstances, the interest in stability in labor relations appears to outweigh the employees' interest in a change of bargaining representative. Collusion is not an issue under these circumstances, and, thus, "the policy considerations justifying the Appalachian Shale rule do not arise in this case." YWCA, 349 N.L.R.B. at 764.

NEPBA argues as well that the PELRB's decision is correct because it is consistent with the decisions of other jurisdictions. NEPBA, however, has not directed us to any jurisdiction with a statutory scheme similar to New Hampshire's that has adopted the NLRB's requirement that a CBA be signed before it may bar a petition. To the contrary, the three jurisdictions to which NEPBA points, Maine, Massachusetts and Vermont, have statutory schemes that differ from ours.

Maine's contract bar rule, set forth by statute, see 26 Me. Rev. Stat. Ann. § 967(2) (West 2007), is expressly based upon the NLRB's rule. See MSAD 16 Support Staff Assoc./MEA/NEA, No. 00-UD-04 (M.L.R.B. Apr. 26, 2000), at http://janus.state.me.us/mlrb/decisions/rep/00-ud-04.htm. Thus, the fact that Maine has adopted the NLRB's signature requirement is consistent with its overall intent to mirror the NLRB's contract bar rule. See id.

By contrast, the Vermont contract bar rule is merely an administrative rule that the Vermont Labor Relations Board may apply or waive as the facts of a given case may demand. See Vt. Labor Relations Board, Case Law Summary of Labor Relations Decisions, at http://www.state.vt.us/vlrb/NCaseLaw_II.htm#A.

Similarly, the Massachusetts rule is an administrative rule that the Massachusetts Division of Labor Relations may waive for good cause shown. See 456 Code Mass. Rules § 14.06(1)(a), available at http://www.lawlib.state.ma.us/456CMR14.pdf. Moreover, the statutory

scheme in Massachusetts expressly requires that a public sector CBA be executed before it is submitted to the Massachusetts Labor Commission for review and to the legislature for approval of its cost items. See Mass. Gen. Laws ch. 150E, §§ 1, 7 (Supp. 2008). Accordingly, that Massachusetts requires a collective bargaining agreement to be signed before it may act as a bar is consistent with the statutory scheme there.

Because we conclude that the PELRB erred when it ruled that the 2007-2009 CBA could not bar NEPBA's petitions because it was not signed before they were filed, we reverse its ruling and remand for further proceedings consistent with this opinion. We do not address whether, even though NEPBA filed its petitions during the term of the 2007-2009 CBA, they were nonetheless timely as having been filed "no more than 240 days and no less than 180 days prior to the budget submission date of the affected public employer in the year that agreement expires," N.H. Admin. Rules, Pub 301.01, because this issue is not before us. Nor do we address whether the January 2008 election took place "not more than 180 nor less than 120 days prior to the budget submission date in the year such collective bargaining agreement shall expire." RSA 273-A:11, I(b). These are among the issues that the parties may address on remand.

Reversed and remanded.

BRODERICK, C.J., and DUGGAN, GALWAY and HICKS, JJ., concurred.

NH Supreme Court reversed and remanded this decision on 01-14-2009, Slip Op. No. 2008-032
(NH Supreme Court Case No. 2008-032)

State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

NEPBA Local 255/NH Supervisory Corrections Officers, IUPA, AFL-CIO Petitioner and State of New Hampshire, Department of Corrections Respondent	*	Case No. S-0438-1
NEPBA Local 250/New Hampshire Corrections Officers Unit, IUPA, AFL-CIO Petitioner and State of New Hampshire, Department of Corrections Respondent	*	Case No. S-0437-1 Decision No. 2007-153

APPEARANCES

Representing New England Police Benevolent Association, Inc. Local 250 and 255

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Representing: State of New Hampshire, Department of Corrections

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BACKGROUND

On July 9, 2007 NEPBA Local 255/NH Supervisory Corrections Officers, IUPA, AFL-CIO and NEPBA Local 250/New Hampshire Corrections Officers Unit, IUPA, AFL-CIO ("NEPBA") filed two petitions for modification and certification on July 9, 2007. The petitions seek to create two bargaining units composed of certain Department of Corrections employees. The NEPBA also requests that the PELRB hold elections to allow employees in the proposed bargaining units to choose their bargaining representative.

The State Employees Association, Inc., Service Employees International Union, Local 1984 ("SEA"), the incumbent representative, appeared and filed exceptions and motions to dismiss in both cases on July 24, 2007. Pursuant to the Notice of Waiver of Claims filed on September 5, 2007, the SEA has waived all its objections to the petitions except for the 30% showing of interest requirement and the issue of timeliness. The SEA opposes NEPBA's request that employees in the proposed bargaining units be provided with the opportunity to vote to choose their bargaining representative.

The undersigned hearing officer conducted a hearing on the petitions on September 12, 2007 at the PELRB offices in Concord. The State of New Hampshire, Department of Corrections, did not make any filings or appearance in this matter until the morning of September 12, 2007, when counsel for the State appeared and filed a motion to dismiss, in substance making the same arguments as those raised by the SEA. The State did not offer witnesses or exhibits at the hearing, and the State confirmed on the record that it did not object to the composition of the proposed bargaining units. As anticipated by the pre-hearing order, *see* Decision 2007-131, the NEPBA and the SEA submitted the case on stipulated facts, oral argument, and written briefs. The NEPBA also objected to the State's motion to dismiss as untimely.

The parties' stipulations are contained in Findings of Fact 1 through 24, set forth below. The parties' written stipulation with attachments is Joint Exhibit One.

FINDINGS OF FACT

1. Article 21.1 of the 2005-2007 collective bargaining agreement between the State of New Hampshire ("State") and SEA provides as follows:

> "Duration: This Agreement as executed by the Parties is effective July 1, 2005 and shall remain in full force and effect through June 30, 2007 or until such time as a new Agreement is executed."

2. The SEA and State commenced negotiations in January 2007 for a successor collective bargaining agreement.

3. On June 14, 2007, a verbal tentative agreement was reached between the SEA and State.

4. On June 14, 2007, the SEA bargaining senate and council voted to endorse the tentative agreement. (Attachment A to Joint Exhibit One)

5. On June 15, 2007, an SEA bargaining representative, Diana Lacey, emailed to the State (Sara Willingham and Thomas Manning), a written document outlining the terms of the tentative agreement. (Attachment B to Joint Exhibit One).

6. Following discussions between the SEA and State (Attachment C to Joint Exhibit One), the written tentative agreement is finalized on June 20, 2007. (Attachment D to Joint Exhibit One, hereinafter the "Tentative Agreement"). Attachment D was never signed by the parties.

7. On June 22, 2007, the State, through its bargaining representative Thomas Manning, noticed a hearing to be conducted by the Joint Committee on Employee Relations (see, RSA 273A:9) to consider and vote on the tentative agreement. (Attachment E to Joint Exhibit One).

8. On June 22, 2007, the SEA mails the Tentative Agreement to its members for ratification. (Attachment F to Joint Exhibit One).

9. On June 25, 2007, the Joint Committee on Employee Relations met and voted to recommend the Tentative Agreement to the full House and Senate. In making its recommendation to fund the contract, the State's bargaining team told the legislature that the State had reached a Tentative Agreement with SEA. (Attachment G to Joint Exhibit One).

10. On June 25, 2007, the Department of Corrections' employees (employees subjects of the instant petition) ratified changes to their subunit agreement. (Attachment H to Joint Exhibit One) This vote did not constitute ratification of SEA/State Master Agreement and the terms thereof which are applicable to these employees.

11. On June 27, 2007, the Legislature passed HB 1 & HB2 funding all cost items contained in the Tentative Agreement.

12. On June 28, 2007, the SEA sends to members a second ballot package. (Attachment I to Joint Exhibit One).

13. Voting by SEA members for ratification closed on July 5, 2007.

14. Subsequent to the filing of the instant petitions, during the evening of July 9, 2007, SEA officials count and certify the ratification vote of 1607 to 1045 ratifying the Tentative Agreement. (Attachment J to Joint Exhibit One). The SEA's policy on ratification is Exhibit L to Joint Exhibit One.

15. During the day of July 9, 2007, the petitions in this case were filed with the PELRB.

16. On July 16, 2007, State Bargaining Representative, Sara Willingham, delivered a notice regarding the Tentative Agreement and the effective dates contained therein. The notice provided as follows:

Attached please find the Tentative Agreement language for the 2007-2009 Collective Bargaining Agreement with the State Employees' Association. The $.51 pay raise and the $25 per pay period contribution to health benefit will be implemented at the start of the pay period beginning July 6, 2007 and reflected in checks dated August 3, 2007. Other provisions with specific dates, such as future pay raises or changes to the health plan design, are effective as stated in the Tentative Agreement. The remaining provisions in the CBA are effective July 1, 2007 or upon implementation. For example, certain new provisions requiring prospective implementation (including but not limited to changes in work schedules and domestic partner benefits) are effective upon implementation.

Please contact me if you have any questions.

Sara J. Willingham, Manager of Employee Relations
NH Division of Personnel
25 Capitol Street
Concord, NH 03301
(603) 271-3359 FAX (603) 271-1422
Sara.Willingham@nh.gov (Attachment K to Joint Exhibit One)

17. On July 19, 2007, Governor John Lynch and SEA President, Gary Smith, held a ceremonial signing of the 2007-2009 collective bargaining agreement and executed the contract on this date.

18. The 2007-2009 collective bargaining agreement between the SEA and State provides at Article 21.1 as follows:

"Duration: This Agreement as executed by the Parties is effective July 1, 2007 and shall remain in full force and effect through June 30, 2009 or until such time as a new Agreement is executed."

19. Neither the 2007-2009 CBA nor the 2005-2007 CBA contain any language requiring ratification by SEA members as a condition precedent to the contracts' effectiveness.

20. The 2007-2009 collective bargaining agreement requires, and the State and the SEA undertook the following:

a. Effective July 6, 2007: SEA bargaining unit members were paid salary increases as provided by the collective bargaining agreement;

b. Effective July 1, 2007: SEA bargaining unit members were paid increased amounts for travel and meal expenses pursuant to the terms of the collective bargaining agreement;

c. Effective the pay period beginning July 6, 2007: all SEA bargaining unit employees began paying $25.00 per pay period as a health insurance premium cost share pursuant to the terms of the collective bargaining unit;

d. Effective July 1, 2007: the State began a prescription drug bidding program saving the State millions of dollars per year in prescription drug costs, pursuant to the terms of the collective bargaining agreement; and

e. Effective July 1, 2007: the State's dental plan began covering dental x-rays at 100% (formerly the level was 80%).

21. As to the negotiations for the 2007-2009 CBA, Richard Molan, Esquire served as the Chief Negotiator for the SEA and Mr. Thomas Manning served as Chair of the State Negotiating Committee. Attorney Molan has served in this role during the negotiations of 11 of the 17 CBA's undertaken by the SEA and the State, beginning with the first CBA in 1976.

22. During the course of this thirty year period, Mr. Manning has been involved in each of these negotiations on behalf of the State, with the sole exceptions of years 1983 and 2003.

23. There were over thirty negotiation sessions for the 2007-2009 CBA which concluded on June 14, 2007 when the parties reached a tentative agreement. Thereafter, a tentative agreement memorandum was generated, discussed and its terms and language agreed upon on or before June 20, 2007 (the "Tentative Agreement"). This Tentative Agreement document was then submitted to the Joint Committee of Employee Relations for approval and thereafter funded by the full Legislature. The Tentative Agreement document was never signed by the parties.

24. The SEA and State did not enter into formal ground rules for the conduct of the 2007 negotiations nor is it the parties' common practice to do so. The parties have not made it a practice to initial or sign tentative agreements prior to the formal execution of the contract.

25. The State of New Hampshire, Department of Corrections ("State"), is the public employer in this matter and appeared in this case on the date of the September 12, 2007 hearing. The State did not file any exceptions or objections to the composition of the proposed bargaining units, and counsel for the State confirmed at the hearing that the State does not have any such objections or exceptions.

DECISION AND ORDER

Jurisdiction

The PELRB has jurisdiction over certification and modification petitions involving public employers, public employees, and employee organizations pursuant to the general provisions of RSA 273-A and the specific provisions of Pub 301.01, 301.03(c), and 302.05.

Discussion

A review of the confidential interest cards filed in support of the petitions and the employee list submitted by the State demonstrates that the NEPBA petitions are supported by the requisite 30% showing of interest as required by RSA 273-A:10, I (a) in the two new proposed bargaining units. The remaining general issue for consideration is whether the NEPBA petitions are untimely for the reasons raised by the SEA and also cited by the State in its filings. Although the State's appearance and motion to dismiss were filed late, there is no unfair prejudice to the NEPBA by allowing those objections into the record as the State's motion to dismiss only reiterates objections already raised by the SEA. The SEA relies upon RSA 273-A:11 (b), pursuant to which the SEA/SEIU Local 1984, as an exclusive representative of a bargaining unit certified under RSA 273-A:8, has:

> The right to represent the bargaining unit exclusively and without challenge during the term of the collective bargaining agreement. Notwithstanding the foregoing, an election may be held not more than 180 nor less than 120 days prior to the budget submission date in the year such collective bargaining agreement shall expire.

The SEA argues that at the time the NEPBA petitions were filed on July 9, 2007 it had a collective bargaining agreement with the State which bars the NEPBA petitions under RSA 273-A:11 (b). This defense is commonly known as "contract bar." The term contract bar is unique and specific to collective bargaining law. It specifically arises in the context of the certification or representation election proceedings that are a fundamental component of both public and private sector collective bargaining. The contract bar defense is typically raised by an incumbent union or representative in an effort to prevent an election wherein employees will have the chance to determine their bargaining representative, if any, through the election process.

In this case, the SEA relies primarily on the July 1, 2007 to June 30, 2009 contract executed on July 19, 2007 to prove its contract bar defense. However, in its July 24, 2007 motion to dismiss the SEA also relies to some extent on the immediately previous July 1, 2005 to June 30, 2007 contract to prove contract bar.[1] In its July 24, 2007 motion to dismiss the SEA

[1] The SEA also suggests, in its brief, that the petitions in this case could only be filed during the "filing window" set forth in Pub 301.01 (a), regardless of whether the July 1, 2005 to June 30, 2007 had expired or been replaced by a successor contract. As support, the SEA cites *Rockingham County Corrections Officers' Association v. SEA of NH, Inc., Local 1984 SEIU*, PELRB Decision No. 2006-160. However, in the *Rockingham County* case the petition was filed on June 29, 2006, *before* the July 1, 2003 to June 30, 2006 contract expired. *Rockingham County* did not involve a representation or certification petition filed after the June 30, 2006 expiration date. Accordingly, the SEA's argument reliance upon *Rockingham Couny* is misplaced. *Rockingham County* does not state that

appears to contend that by virtue of the extension clause the earlier contract serves as a bar even as to certification or representation election petitions filed *after* the June 30, 2007 expiration date. However, in its September 12, 2007 brief the SEA clarifies that it does not rely on the extension clause to prove a contract bar. In any event, to the extent the SEA is making an argument based upon the extension clause the argument fails for the reasons set forth in *Maintenance and Custodial Employees of Concord School District v. American Federation of State, County and Municipal Employees, Local 1580*, PELRB Decision No. 84-82 (ruling that an extension clause cannot be used to defeat an election request contained in an otherwise properly filed petition for decertification).

That leaves the question of whether the SEA has proven a contract bar by virtue of the July 1, 2007 to June 30, 2009 contract. The parties disagree as to the evidence required to prove that the July 1, 2007 to June 30, 2009 contract is a bar to election proceedings in this matter. The SEA contends that contract bar does not require an executed agreement, that in fact the SEA and the State had an agreement sufficient to prove contract bar as of the time the NEPBA petitions were filed on July 9, 2007, that union ratification of the July 1, 2007 to June 30, 2009 collective bargaining agreement is not required, and that if union ratification is required the ratification process should be deemed complete as of July 5, 2007, the date voting by mail ballot closed, and not the evening of July 9, 2007, the time when the votes were counted and the certification of the election results prepared. The NEPBA contends that there is no contract bar since it filed its petitions after the expiration of the July 1, 2005 to June 30, 2007 contract and before the July 19, 2007 execution of the successor contract. The NEPBA alternatively argues that the SEA has not otherwise proven a contract, since the contract ultimately executed on July 19, 2007 was consistently referenced by both the SEA and the State as a "tentative" and "proposed" agreement during the relevant time periods and additionally the contract had not been ratified at the time the NEPBA petitions were filed.

The evidence required to prove a contract bar has been the subject of public sector collective bargaining litigation in Maine, Vermont, and Massachusetts. It has also been addressed by the National Labor Relations Board with respect to private sector collective bargaining. These authorities all agree that the moving party must show that the contract which is the purported bar was executed before the certification or representation petition seeking an election was filed. This circumstance is absent in this case, since the successor contract was not executed until July 19, 2007, 10 days after the NEPBA petitions were filed.

The justification for the executed contract requirement was reviewed in some detail by the National Labor Relations Board in 1958:

> The Board has been reexamining its contract bar rules with a view toward simplifying and clarifying their application wherever feasible in the interest of more expeditious disposition of representation cases and of achieving a finer balance between the statutory policies of stability in labor relations and the exercise of free choice in the selection or change or bargaining representatives...

---

certification or representation petitions like the one filed in this case can only be submitted during the filing window described in Pub 301.01 (a).

> It is well established that oral agreements cannot serve as a bar. It is equally well established that contracts not signed before the filing of a petition cannot serve as a bar. These rules are simple, easily understood, and require no change. In the application of the second of these rules, however, a problem has arisen that merits reconsideration. Thus, although a contract is signed by the parties after the filing of a petition, it has been held to be a bar where the parties considered the agreement properly concluded and put into effect some of its important provisions. The Board has reexamined its prior decisions in this respect and has concluded that the effectiveness of its contract bar policies can best be served by eliminating this exception to the rule that a contract not signed before the filing of a petition cannot serve as a bar...to constitute a bar a contract must be signed by all the parties before a petition is filed and that unless a contract signed by all the parties precedes a petition, it will not bar a petition even though the parties consider it properly concluded and put into effect some or all of its provisions.

Appalachian Shale Products Co., 121 N.L.R.B. 1160, 1162-63 (1958)(citations omitted). In *Appalachian Shale* the Board also ruled that ratification is only a "condition precedent to contractual validity" if ratification is required by "express contractual provisions." *Id.* at 1162-63.

Factually, *Appalachian Shale* is similar to the circumstances presented in this case. This is especially so as to the gist of the SEA's argument, which is the assertion that the SEA and the State in effect "considered the agreement properly concluded and put into effect some of its important provisions" before July 9, 2007. The logic of the *Appalachian Shale* contract bar rule has stood the test of time. It was reviewed with approval in *Terrace Gardens Plaza, Inc. v. National Labor Relations Board*, 91 F.3d 222 (1996)(noting the bright line test was adopted to simplify and clarify the contract bar rule and "avoid protracted litigation, which had frustrated the Board's policy of expediting representation proceedings")(citations omitted). In particular, the *Terrace Gardens* court stated that:

> [T]he contract bar rule was devised by the Board in order to accommodate two potentially conflicting objectives: (1) stabilizing the collective bargaining relationship; and (2) effectuating the employee's choice with regard to representation. It is not irrational for the Board, in pursuit of these two goals, to provide that a contract that has not been signed, for whatever reason, is no bar to its holding a representation election. A signed agreement more strongly suggests a stable bargaining relationship that, as the Board says in its brief, "warrants insulation from election proceedings." While any such bright line rule may be either over- or under-inclusive or both, *the Board's experience is that a more discriminating approach invites employers and unions to engage in prolonged litigation over nice questions about the binding character of their CBA, which could both destabilize the bargaining relationship and postpone the realization of the employee's preference.*

Terrace Gardens at 227-28 (emphasis added). The virtues of requiring a contract executed prior to the filing of a certification or representation election petition are evident, as it allows for a more orderly and less litigious processing of election petitions.

In 1979, the Maine Labor Relations Board employed the *Appalachain Shale* contract bar rule to decertification/certification proceedings pursuant to which the Teamsters, Local 48 sought an election to replace the Jay Police Benevolent Association.

> We believe that the rule that unsigned or oral agreements are not valid collective bargaining agreements for purposes of barring decertification petitions is well considered, and we hereby adopt it. *The rule, which has proved satisfactory to the N.L.R.B. for a number of years, reduces the opportunity for fraud on the part of unscrupulous parties who wish to abridge the right of employees to select their bargaining representative, and also has the salutary effect of relieving the Board of the task of attempting to determine whether there has been a meeting of minds, an exercise in which the Board has no special expertise. In addition, the rule should be easily understood and applied by public employers, public employees, and public employee organizations.*

Town of Jay and Teamsters Local Union No. 48, State County, Municipal and University Workers, MLRB No. 78-A-11 (1979)(emphasis added). Accordingly, the Board upheld the election proceedings at issue. The Maine Labor Relations Board also made a point of emphasizing that it is not stating that "an unsigned or oral agreement could not be a valid collective bargaining agreement for some purpose other than barring the filing of a decertification petition." *Id.*

In Vermont, it is also necessary to show that the "contract was fully executed, signed and dated prior to the filing of the decertification petition" in order to prove a contract bar. *Town of Castleton and AFSCME, AFL-CIO*, 13 VLRB 127, 137 (1990). In Massachusetts, the Labor Relations Commission addressed whether "the contract bar doctrine should preclude a representation petition where no contract has been executed although the principal substantitive terms of an agreement have been implemented at the time the petition is filed." *Town of Burlington*, 14 MLC 1632 (1988). The Commission ruled that in such circumstances contract bar does not apply. The Commission cited *Appalachain Shale*, stating that the "'relatively simple' requirement of a signed writing in order for a contract to constitute a bar to processing a representation petition...best facilitates expeditious handling of representation cases, while at the same time protecting the stability of continuing bargaining relationships." *Id.*

It is evident that the SEA argues for an application of the contract bar rule that is contrary to the weight of a number of well reasoned and persuasive authorities. The SEA relies on New Hampshire Supreme Court cases stating the general proposition that principles of common law contract construction and interpretation apply to collective bargaining agreements. Therefore, the SEA argues that the executed contract requirement should not control the analysis of the SEA's contract bar defense, because under New Hampshire law, contracts do not have to be signed to be binding and enforceable. However, whether accepted principles of contract construction and interpretation apply in general to collective bargaining agreements is not the

issue and in fact is not in dispute in this case. The question is what evidence is required to prove contract bar in the context of a certification or representation election proceeding. None of the authorities cited by the SEA address this specific question.

It has been true for many years that in public and private administrative agency proceedings involving contested election matters like the present case, the executed contract requirement in contract bar cases represents the most efficacious interpretation and application of the contract bar doctrine. The previously discussed reasons and justifications for following the executed contract requirement are as applicable to public sector labor law in New Hampshire as they are elsewhere. There is nothing about New Hampshire public sector labor relations law which requires a different analysis. Accordingly, I find that because the NEPBA petitions were filed on July 9, 2007, ten days before the July 1, 2007 to June 30, 2009 contract was executed, the contract does not act as a bar to the requested elections. This is true even if some of the important contract provisions had effective dates earlier than July 9, 2007 or if some of the contract provisions were implemented prior to July 9, 2007. The authorities are in accord that such facts do not constitute an exception to the executed contract requirement.

Nothing in this decision is meant to say that the common law contract standards cited by the SEA do not generally apply to public sector collective bargaining agreements, and the previously discussed authorities do not stand for this proposition. Other jurisdictions have recognized as much. For example, the Maine Labor Relations Board has enforced the executed contract requirement in contract bar cases but has also said that an unsigned or oral agreement may constitute a valid collective bargaining agreement in another context. Likewise, the Vermont Labor Relations Board, when dealing with non-contract bar matters, applies "the general rules of contract construction developed by the Vermont Supreme Court." 25 VLRB 185 (2002). In other words, there is no inherent conflict or inconsistency between the application of the executed contract requirement in contract bar cases and the use of general rules of contract construction and interpretation in other areas of public sector labor law.

In accordance with the foregoing, the motions to dismiss are denied. The provisions of RSA 273-A:11 (b) do not bar the requested elections in this case. NEPBA's petitions to certify and modify two bargaining units are granted. These matters shall proceed to election. The bargaining units are as follows:

> Corrections Officers, Case No. S-0437-1: All Corrections Officers (457) and Corrections Officer Corporals (107), employed by the State of New Hampshire, Department of Corrections, but excluding the positions of Corrections Officer Major; Corrections Officer Captain; Corrections Officer Lieutenant and Corrections Officer Sergeant.
>
> Supervisory Corrections Officers, Case No. S-0438-1: All Corrections Officer Majors (4); Corrections Officer Captains (5); Corrections Officer Lieutenants (30); and Corrections Officer Sergeants (74) employed by the State of New Hampshire, Department of Corrections.

Pursuant to Pub 301.03 (f)(1), whoever prevails at election shall administer the July 1, 2007 to June 30, 2009 collective bargaining agreement executed on July 19, 2007 through its date of termination.

So ordered.

October 25, 2007

Douglas L. Ingersoll, Esq.
Hearing Officer

Distribution:

Peter J. Perroni, Esq.
Glenn R. Milner, Esq.
Commissioner William L. Wrenn
Michael K. Brown, Esq.

NH Supreme Court reversed and remanded this decision on 01-14-2009, Slip Op. No. 2008-032
(NH Supreme Court Case No. 2008-032)

State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

NEPBA Local 255/NH Supervisory Corrections Officers, IUPA, AFL-CIO Petitioner and State of New Hampshire, Department of Corrections Respondent	*	Case No. S-0438-1
NEPBA Local 250/New Hampshire Corrections Officers Unit, IUPA, AFL-CIO Petitioner and State of New Hampshire, Department of Corrections Respondent	*	Case No. S-0437-1 Decision No. 2007-157

AMENDED DECISION

The October 25, 2007 decision (No. 2007-153) in this matter inadvertently failed to reflect the agreement between the State of New Hampshire, Department of Corrections, and NEPBA Local 255/NH Supervisory Corrections Officers, IUPA, AFL-CIO to exclude the position of major from the proposed supervisory bargaining unit. Therefore, finding of fact 25 in the decision is amended to read as follows:

> 25. The State of New Hampshire, Department of Corrections ("State"), is the public employer in this matter and appeared in this case on the date of the September 12, 2007 hearing. The State did not file any exceptions or objections to the composition of the proposed bargaining units, and counsel for the State confirmed at the hearing that apart from the inclusion of the position

of major in the proposed supervisory bargaining unit, the State does not have any such objections or exceptions. The State and the NEPBA reached agreement during a hearing recess to exclude the position of major from the proposed supervisory bargaining unit.

Accordingly, the description of the supervisory bargaining unit which appears at p. 10 of the decision is amended to read as follows:

> Supervisory Corrections Officers, Case No. S-0438-1: All Corrections Officer Captains (5); Corrections Officer Lieutenants (30); and Corrections Officer Sergeants (74) but excluding the position of Corrections Officer Major employed by the State of New Hampshire, Department of Corrections.

So ordered.

November 1, 2007

Douglas L. Ingersoll, Esq.
Hearing Officer

Distribution:

Peter J. Perroni, Esq.
Glenn R. Milner, Esq.
Commissioner William L. Wrenn
Michael K. Brown, Esq.

NH Supreme Court reversed and remanded this decision on 01-14-2009, Slip Op. No. 2008-032
(NH Supreme Court Case No. 2008-032)

State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

NEPBA Local 255/NH Supervisory Corrections Officers, IUPA, AFL-CIO Petitioner and State of New Hampshire, Department of Corrections Respondent	*	Case No. S-0438-1
NEPBA Local 250/New Hampshire Corrections Officers Unit, IUPA, AFL-CIO Petitioner and State of New Hampshire, Department of Corrections Respondent	*	Case No. S-0437-1 Decision No. 2007-160

ORDER ON REQUEST FOR REVIEW OF DECISION OF HEARING OFFICER, OBJECTION TO ORDERS OF ELECTION AND TO THE CONDUCT OF PRE ELECTION CONFERENCE, AND OBJECTION TO ORDERS OF ELECTION

The Public Employee Labor Relations Board ("PELRB") has reviewed the case record, including the:

1. State Employees' Association of NH/SEIU Local 1984 ("SEA") Request for Review of Decision of Hearing Officer pursuant to Pub 205.01, filed with the PELRB on November 1, 2007;
2. SEA's Request for Review of Amended Decision of Hearing Officer, filed with the PELRB on November 9, 2007;
3. SEA's Objection to Orders of Election, filed with the PELRB on November 9, 2007;

4. SEA's Objection to Orders of Election and to the Conduct of Pre Election Conference, filed with the PELRB on November 9, 2007;
5. The previous filings in this matter, including the Hearing Officer's Decision (PELRB Decision No. 2007-153), dated October 25, 2007, including all findings of fact and legal conclusions, and the subsequent Hearing Officer's Amended Decision (PELRB Decision No. 2007-157), dated November 1, 2007;
6. The Order of Election issued October 30, 2007;
7. The Order of Election (Corrected) issued November 1, 2007;
8. The Notice of Pre Election Conference issued November 1, 2007;
9. The PELRB November 9, 2007 email to Commissioner Wrenn and counsel re: employee home address information; and
10. The parties' submissions in this matter.

The SEA's Request for Review of Decision of Hearing Officer was filed under Pub 205.01, which provides as follows:

> **Pub 205.01 Review of a Decision of Hearing Officer.**
>
> (a) Any party to a hearing or another person with an interest affected by the hearing officer's decision may file with the board a request for review of the decision of the hearing officer within 30 days of the filing of that decision and review shall be granted. The request shall set out a clear and concise statement of the grounds for review.
>
> (b) The board shall review the case record and the decision. The review of the board shall result in approval, reversal or modification of the decision.
>
> (c) The review shall be made administratively without a hearing de novo unless the grounds for review include mistake in material fact, in which case, a hearing shall be scheduled.
>
> (d) Absent a request for review, the decision of the hearing officer shall become final in 30 days.
>
> (e) The request for review of the hearing officer's decision shall precede, but shall not replace, the motion for rehearing of the board's decision pursuant to Pub 205.02 and RSA 541-A:5.

Under Pub 205.01, the board's review "shall be made administratively without a hearing de novo unless the grounds for review include mistake in material fact, in which case, a hearing shall be scheduled." Even though this is a request for review under Pub 205.01, the SEA asserts it is entitled to a hearing on its request for review under Pub 201.06.

Pub 201.06 relates to the review of reports by a hearing examiner, not a hearing officer decision. Under Pub 205.01 (d), hearing officer decisions become final without any action by the board in the absence of a timely request for a Pub 205.01 review. There is no corresponding rule with respect to a report from a hearing examiner. Additionally, Pub 201.06 is placed with other rules primarily concerned with unfair labor practice adjudicatory hearings, and not with Pub 205.01 and 205.02, which relate to necessary final steps before a party may appeal by petition to the supreme court pursuant to RSA 541:6. There are no express cross references between Pub 205.01 and Pub 201.06. Accordingly, the board's interpretation of its rules is that Pub 205.01 (c) controls the board's review procedures of hearing officer decisions, including whether a hearing is required in connection with such a review, and not Pub 201.06.

The SEA also claims that it is entitled to a hearing because the hearing officer decision contains a "mistake of fact." This portion of the SEA's argument relates to the agreement reached at hearing between the State as public employer and the petitioner ("NEPBA") that the position of "major" would be excluded from the supervisors' bargaining unit. However, the hearing officer's first decision did not reflect this agreement in the description of the supervisors' bargaining unit. The hearing officer subsequently corrected this oversight in his amended decision. It appears that if anyone should complain about these circumstances it is the State and the NEPBA, not the SEA, since the SEA did not litigate or contest the bargaining unit composition in these proceedings. In any event, the board views this event as ministerial in nature, and not a mistake in material fact which requires a de novo hearing. The amended decision properly rectified the situation and no further action by the board is required.

The SEA also argues that the board should conduct a hearing de novo because of the subject matter of the hearing officer's decision. The board disagrees. In this case, 24 of the 25 Findings of Fact contained in Decision No. 2007-153 and 2007-157 are the result of a stipulation between the SEA and the NEPBA. Finding of Fact 25 documents the State's participation in this proceeding and the State/NEPBA agreement as to bargaining unit composition matters. Both parties filed pleadings and briefs addressing in detail their respective positions. The record reflects that the only testimony at hearing was provided by Gary Smith, the president of the SEA. Mr. Smith was examined by NEPBA's counsel concerning ratification procedures. He was not questioned by counsel for the SEA or the State. The board understands the factual circumstances of this case and the relevant legal issues. Upon due consideration of the SEA's points and the hearing officer's decisions, the board concludes that a de novo hearing is neither necessary nor required.

In its Objections to Order of Election and Conduct of Pre Election conference, the SEA complains that election activities, such as the executive director's issuance of an order of election[1] and his scheduling[2] of a pre election conference for November 20, 2007, cannot take place per Pub 204.01 pending the board's ruling on the SEA's Pub 205.01 request for review of decision of hearing officer. The board believes these objections are mooted by the issuance of this order.

Additionally, the board notes that elections can and do eliminate possible legal disputes. *See New Hampshire Department of Revenue Administration v. Public Employee Labor Relations Board & The State Employees Association of New Hampshire, Inc.*, 117 N.H. 976, 979 (1977). Pub 302.04 specifically provides that "[o]rders of election shall not be final orders of the board subject to appeal until after the election is conducted and the results are certified because grounds for appeal might become moot consequential to the election results." There is no language in Pub 205.01 which prohibits election activity for any period of time following a hearing officer decision.

[1] The order of election is an administrative 1 page document reiterating the hearing officer's order that elections be held. The order of election does not establish an election date.

[2] Agency staff notifies the parties of the date on which a pre election conference will be held.

The board notes that there is another consideration at play in considering the SEA's argument that election proceedings involving hearing officer decisions must be suspended for at least 30 days. This consideration relates to the processing of election petitions filed in the 210-150 day time period prior to the employer's budget submission date in the year the agreement expires per Pub 301.01. RSA 273-A:11, I (b) states that elections on such petitions may be held "not more than 180 nor less than 120 days prior to the budget submission date in the year such collective bargaining agreement shall expire." This establishes a relatively short period of time, barely more than 30 days in some cases, within which any necessary hearings can be conducted and approved elections held. At times there is an interval of 45 to 60 days between the time a petition is filed and the issuance of a hearing officer decision approving a matter for election.

The SEA's interpretation of the board's rules, which would suspend election proceedings involving hearing officer decisions for at least 30 days, would seriously impair the board's ability to conduct elections within specified time frames and in fact would likely result in no elections in a not insignificant number of cases. The board endeavors to interpret its rules in a more harmonious manner, one which takes into consideration all rules and statutory provisions relating to the election process. Further, the SEA is familiar with the board's interpretation that election proceedings are not suspended following the issuance of hearing officer decisions by virtue of the SEA's participation in contested election proceedings approximately one year ago. Those cases also involved the NEPBA, and elections were conducted *before* the SEA submitted its filings under Pub 205.01 and 205.02. *See* PELRB Case No.s P-0787 and P-0788 (affirmed by the Supreme Court on November 14, 2007, Case No. 2007-0114) and PELRB Case No.s S-0431 and S-0432 (pending appeal at the Supreme Court, Case No. 2007-0112 [SEA appeal issue is board conduct of election approximately 10 days after election deadline set by RSA 273-A:11, I (b)]).

Further, Pub 204.01 only requires that the board delay acting on a recommendation of a hearing officer if this is a "case where the decision of the hearing officer is required to be filed with the board." Nothing in RSA 273-A or board rules require that the hearing officer's decision in this case be formally "filed with the board" for action. The board finds that the kind of decisions which are required to be filed with the board are those rendered pursuant to the process set forth in RSA 541-A:34. Under RSA 541-A:34, such decisions are known as *"proposed"* decisions, and board "action" is required to render a final decision. This is in contrast to the hearing officer decision in this case, which does not require any board action to become final. See Pub 205.01 (d).

The SEA's complaints concerning the content of the Order of Election were addressed by the PELRB staff via a November 9, 2007 email to Commissioner Wrenn and all counsel, stating that:

> In accordance with Pub 303.01 and the New Hampshire Supreme Court decision in Appeal of State Employees' Association of New Hampshire, Inc. dated November 9, 2007, upon receiving the order for election, the public employer is required to provide to all parties who will appear on the ballot (the NEPBA and the SEA) a complete list of the names and home addresses of the employees in the bargaining unit determined by the board.

Accordingly, upon review, the board upholds and approves the decisions of the hearing officer and denies and overrules the SEA's Objections to the Orders of Election and Conduct of Pre Election Conference.

It is so ordered.

Signed this 19TH day of November, 2007.

Jack Buckley
Chair

By unanimous decision. Chair Jack Buckley. Member E. Vincent Hall and Member James M. O'Mara Jr. present and voting.

Distribution:

Peter J. Perroni, Esq.
Glenn R. Milner, Esq.
Commissioner William L. Wrenn
Michael K. Brown, Esq.

NH Supreme Court reversed and remanded this decision on 01-14-2009, Slip Op. No. 2008-032
(NH Supreme Court Case No. 2008-032)

State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

NEPBA Local 255/NH Supervisory Corrections Officers, IUPA, AFL-CIO Petitioner and State of New Hampshire, Department of Corrections Respondent	*	Case No. S-0438-1
NEPBA Local 250/New Hampshire Corrections Officers Unit, IUPA, AFL-CIO Petitioner and State of New Hampshire, Department of Corrections Respondent	*	Case No. S-0437-1 Decision No. 2007-181

ORDER ON MOTION FOR REHEARING

On December 7, 2007 the State Employees Association, Inc., Service Employees International Union, Local 1984 ("SEA") filed a Motion for Rehearing under Pub 205.02 of the board's November 19, 2007 decision denying the SEA's prior Request for Review of Decision of Hearing Officer. In that order, the board upheld the hearing officer's decision that there was no contract bar to the NEPBA Local 255/NH Supervisory Corrections Officers, IUPA, AFL-CIO and NEPBA Local 250/New Hampshire Corrections Officers Unit, IUPA, AFL-CIO ("NEPBA") petitions seeking elections because an executed collective bargaining agreement was not in place prior to the time the petitions were filed. See PELRB Decisions 2007-160 and 2007-153. In its motion for rehearing, the SEA argues that a contract executed subsequent to the filing of election petitions like the ones NEPBA submitted in this case is effective to bar the petitions from

proceeding to election. Alternatively, the SEA argues that the hearing officer's decision and the analysis contained therein should only apply in future cases, and not to these pending proceedings.

The NEPBA election petitions were filed on July 9, 2007 and the collective bargaining agreement between the State and the SEA was executed on July 19, 2007. At the September 12, 2007 hearing, and in their hearing briefs, both parties concentrated on the status of the disputed collective bargaining agreement as of the date the NEPBA petitions were filed. In its previously filed Request for Review of Decision of Hearing Officer submitted under Pub 205.01, the SEA described the issue in this case as follows:

> RSA 273-A:11 provides, in pertinent part, that the SEA has "the right to represent [these] bargaining unit[s] exclusively and without challenge during the term of the collective bargaining agreement." Thus, the single factual issue at play here is whether a collective bargaining agreement was in place on July 9, 2007. The evidence overwhelmingly shows that a binding contract existed before that date.

See November 1, 2007 SEA Request for Review of Decision of Hearing Officer at 3-4. The present motion for rehearing is the first time the SEA has claimed that the NEPBA petitions are barred by a contract executed after the filing of the petitions.

RSA 273-A:11, (b) confers upon the SEA the "right to represent the bargaining unit exclusively and without challenge during the term of the collective bargaining agreement." Pub 301.01 (a) states that:

> "A petition for certification as the exclusive representative of a bargaining unit for which a collective bargaining agreement constituting a bar to election under RSA 273-A:11, I (b) presently exists shall be filed no more than 210 days and no less than 150 days prior to the budget submission date of the affected public employer in the year that agreement expires, notwithstanding any provisions in the agreement for extensions or renewal."

The SEA relies upon the recent New Hampshire Supreme Court decision in *Appeal of State Employees' Association of New Hampshire*, No. 2007-112 (December 6, 2007 slip opinion)(the court's "Fish and Game" decision) to support its argument that a subsequently executed contract bars the NEPBA election petitions. The court decision in the Fish and Game case related to the timing of an election during the time period *prior to* the expiration of an undisputed 2005-2007 collective bargaining agreement involving employees. Like the Fish and Game employees, the involved Department of Corrections' employees have never had an election under RSA 273-A.[1] However, the Fish and Game case did not involve the issue presented in this case, which is whether the NEPBA petitions seeking elections were barred

[1] The Department of Corrections' bargaining units have their genesis in a December 7, 1976 Recognition of an Exclusive Representative issued to the SEA in Case No. S-0317 under the Laws 1975, Chapter 490:3 (which established RSA 273-A) and *State Employees Ass'n v. N.H. Pub. Employee Labor Relations Bd.*, 116 N.H. 653 (1976).

when they were filed by a collective bargaining agreement pursuant to RSA 273-A:11 (b) and Pub 301.01 (a).

In the Fish and Game case the New Hampshire Supreme Court affirmed the board's order relating to the conduct of an election involving law enforcement personnel of the Fish and Game department in the fall of 2006. The court specifically held that on the facts of the case the board properly applied an earlier New Hampshire Supreme Court decision, *State Employees' Assoc. v. Cheney*, 119 N.H. 822 (1979), when it scheduled and conducted the October 27, 2006 election. The court did not find that the board had "failed to follow the explicit rules set forth by RSA 273-A:11, (b)" as suggested by the SEA in its motion. That quotation relates to a board decision dating to 1979 which was upheld upon review by the New Hampshire Supreme Court at that time. See *State Employees' Assoc. v.* Cheney, 119 N.H. 822 (1979). The court in the Fish and Game decision stated as follows:

> SEA principally argues that *Cheney* is "easily distinguishable" from the case at hand. We disagree, and find that the facts of this case parallel the legally significant facts in *Cheney*. Both cases involved timely petitions to change the composition of a bargaining unit and the certified representative of that unit. Due to "[d]ifficulties in arranging for hearings," *id.* At 825 (quotation omitted), neither set of petitions could proceed to representation elections until the deadline established by the contract bar rule had passed. Furthermore, in both cases the employees in the proposed bargaining units had never elected the union actually representing them. On such facts, we were satisfied in *Cheney* that the PELRB's scheduling of an election for just under 120 days prior to budget submission was proper; we cannot say that the PELRB's reliance upon that case here was either erroneous or unreasonable. Accordingly, we affirm the board's order.

See *Appeal of State Employees' Association of New Hampshire*, No. 2007-112 (December 6, 2007 slip opinion). The board believes the SEA's current argument concerning the significance of a subsequently executed collective bargaining agreement was available to it as of the September 12, 2007 hearing, and certainly as of November 1, 2007, the date of the SEA's Request for Review of Decision of Hearing Officer. This argument does not depend upon nor arise from the court's December 6, 2007 Fish and Game decision, as that decision has no specific application to the circumstances of this case.[2]

The board also concludes that the SEA's reliance upon a subsequently executed collective bargaining agreement is otherwise without merit. The more helpful authorities on this question are discussed at length in the hearing officer's decision. The board finds the hearing officer's citation to the National Labor Relations Board decision in *Appalachian Shale Products Co.* 121 N.L.R.B. 1160 (1958) to be particularly instructive:

[2] The fact that the SEA is claiming for the first time in its motion for rehearing that a subsequently executed collective bargaining agreement is sufficient to bar the NEPBA election petitions is enough to justify denial of this portion of the SEA's motion for rehearing; however, the board will nevertheless consider the claim on its merits. *In re Appeal of Working on Waste*, 133 N.H. 312 (1990).

> The Board has been reexamining its contract bar rules with a view toward simplifying and clarifying their application wherever feasible in the interest of more expeditious disposition of representation cases and of achieving a finer balance between the statutory policies of stability in labor relations and the exercise of free choice in the selection or change or bargaining representatives... It is well established that oral agreements cannot serve as a bar. *It is equally well established that contracts not signed before the filing of a petition cannot serve as a bar.* These rules are simple, easily understood, and require no change. In the application of the second of these rules, however, a problem has arisen that merits reconsideration. Thus, although a contract is signed by the parties after the filing of a petition, it has been held to be a bar where the parties considered the agreement properly concluded and put into effect some of its important provisions. The Board has reexamined its prior decisions in this respect and has concluded that the effectiveness of its contract bar policies can best be served by eliminating this exception to the rule that a contract not signed before the filing of a petition cannot serve as a bar...to constitute a bar a contract must be signed by all the parties before a petition is filed and that unless a contract signed by all the parties precedes a petition, it will not bar a petition even though the parties consider it properly concluded and put into effect some or all of its provisions.

Appalachian Shale Products Co., 121 N.L.R.B. 1160, 1162-63 (1958)(citations omitted)(emphasis added). It is important to note that the manner in which contract bar has been applied by the National Labor Relations Board in the private sector is neither unique nor an aberration in collective bargaining law. Maine, Vermont, and Massachusetts all apply contract bar in the same manner in the context of public sector collective bargaining. See Hearing Officer Decision, PELRB No. 2007-153 at 9.

The board concludes that the hearing officer has applied contract bar in accordance with the provisions of RSA 273-A:11 (b) and Pub 301.01 (a). In effect the hearing officer determined that the NEPBA challenges were not filed during the term of a presently existing collective bargaining agreement. Accordingly, the restrictions imposed by RSA 273-A:11 (b) and reflected in Pub 301.01 (a) do not apply in this case. The board also observes that the consequences of allowing subsequently executed contracts to bar election petitions would lead to undesirable disruption and uncertainty in labor relations. Participants to election proceedings in cases such as this typically include this agency, public employees and employers, as well as employee organizations. A considerable amount of time, effort, and resources are involved in processing election petitions and conducting election proceedings. The parties to election proceedings in cases like this would be compelled to proceed knowing the entire process could be upset and set aside at any moment in the event an incumbent and public employer executed a successor collective bargaining agreement. The SEA's argument would allow for the disruption and cessation of such election proceedings at any time, presumably up to and possibly during the balloting and tallying process. This would result in an obvious waste of time and resources. It could also have a chilling effect on the willingness of employees to exercise their right to seek an election to determine their representative, if any. Neither of these are desirable circumstances, nor does it appear that they are conditions imposed, albeit as an unintended consequence, by the applicable law.

The SEA's other argument in its motion for rehearing is that the hearing officer's analysis and application of contract bar under RSA 273-A:11 (b) should not apply in this case. As support, the SEA suggests that to do so would upset 30 years of established practice in the formation of binding collective bargaining agreements. However, the analysis employed in the hearing officer's decision does not represent a departure from any established board or court decisions concerning the application of contract bar in cases such as this. Further, it is consistent with how contract bar has been interpreted, understood, and applied in the private sector for nearly 50 years by the National Labor Relations Board and in the public sector for up to 20 years and longer in the public sector in Vermont, Maine, and Massachusetts. The board finds the hearing officer properly determined whether the involved Department of Corrections officers are entitled to an election in the present cases, and the board cannot identify any legitimate reason why those elections should not proceed.[3]

Finally, in its request for relief, the SEA asks that "the Board not conduct any elections in this case until this case is considered by the New Hampshire Supreme Court." However, the New Hampshire Supreme Court has previously made clear that any such appeal is premature until after the completion of the election. Elections can and do eliminate possible legal disputes. See *New Hampshire Department of Revenue Administration v. Public Employee Labor Relations Board & The State Employees Association of New Hampshire, Inc.*, 117 N.H. 976, 979 (1977). The board's rules are to the same effect, as Pub 302.04 specifically provides that "[o]rders of election shall not be final orders of the board subject to appeal until after the election is conducted and the results are certified because grounds for appeal might become moot consequential to the election results."

The pre-election conference, conducted over a 2 day period on November 20 and December 7, 2007, is complete. Accordingly, the elections now scheduled for January 15 and 17, 2008 shall proceed. The SEA's Motion for Rehearing is denied.

It is so ordered.

Signed this 6th day of December, 2007.

Jack Buckley
Chairman

By unanimous decision. Chair Jack Buckley. Member E. Vincent Hall and Member James M. O'Mara Jr. present and voting.

[3] Even if the board were to agree with the SEA and find that the hearing officer's decision should not apply to these cases, such a ruling would not necessarily mean that there will be no elections. The SEA's assertions in its November 1, 2007 Request for Review of Decision of Hearing Officer that in effect the hearing officer made a determination that the SEA otherwise proved that the NEPBA election petitions had been filed during the term of a presently existing collective bargaining agreement are not supported by the hearing officer's decision. The hearing officer's decision also reflects that the NEPBA did not concede the issue. Therefore, the hearing officer would still have to determine this issue on the basis of the evidence submitted at the September 12, 2007 hearing.

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