



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

NEPBA, Inc., Local 270 (Probation and Parole Officer Supervisors Unit); Local 265 (Probation and Parole Officer Unit); Local 255 (Supervisory Corrections Officer Unit); Local 250 (Corrections Officer Unit); Local 260 (Liquor Investigators & Sergeants Unit)

**Consolidated Cases:
G-0106-1, G-0107-1,
G-0108-1, G-0109-1,
G-0110-1**

AND

State of New Hampshire, Department of Corrections and State Employees Association of NH, Inc., SEIU Local 1984

DECISION NO. 2009 - 216

APPEARANCES

Representing: NEPBA, Inc., Local 270 (Probation and Parole Officer Supervisors Unit); Local 265 (Probation and Parole Officer Unit); Local 255 (Supervisory Corrections Officer Unit); Local 250 (Corrections Officer Unit); and Local 260 (Liquor Investigators & Sergeants Unit)
Peter J. Perroni, Esq., Nolan & Perroni PLLC,
Lowell, Massachusetts

Representing: State Employees Association of NH, Inc., SEIU Local 1984
Glenn R. Milner, Esq., Molan, Milner & Krupski, PLLC,
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Representing: State of New Hampshire (Dept. of Corrections/Liquor Commission)
Michael K. Brown, Esq., New Hampshire Department of Justice
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BACKGROUND

On July 1, 2009 the New England Police Benevolent Association, Inc. ("NEPBA") filed certification and modification petitions seeking to create establish five new bargaining units

comprised of positions in the Department of Corrections and the Liquor Commission and to obtain an election to determine representation of employees in the proposed bargaining units. All of the involved positions are currently in bargaining units represented by the State Employees Association of New Hampshire, Inc., Local 1984 (“SEA”).

The SEA filed its exceptions to the petitions on July 16, 2009 and objects to any election proceedings, contending that a collective bargaining agreement was in place at the time the petitions were filed and accordingly the petitions should be dismissed. On July 17, 2009 the SEA filed an Assented to Motion to Consolidate all five cases which was granted. The State did not file a responsive pleading within the applicable fifteen day period. However, the State and the NEPBA subsequently agreed that in the event an election is ordered the State and the NEPBA will either file an agreement as to composition or the State will request a hearing on composition.¹

On July 17, 2009 the PELRB scheduled a pre-hearing conference and hearing in this matter for July 28 and August 12, 2009, respectively, and also requested that the parties notify the board if the consolidated cases could be submitted for decision on stipulated facts and briefs. On July 22, 2009 the parties filed an Assented to Motion for Pre-Hearing Order seeking to submit the matter for decision on stipulated facts and briefs together with a proposed schedule. On July 23, 2009 the PELRB granted this motion, cancelled the pre-hearing conference and hearing, and established deadlines for the filing of stipulated facts and briefs. Upon motion these deadlines were extended several times, and all filings were duly completed by September 1, 2009. The parties’ stipulations are set forth as Findings of Fact 1 through 5.

¹ See July 22, 2009 Assented to Motion for Pre-Hearing Order.

FINDINGS OF FACT

1. Petitions to certify and/or modify were filed by the NEPBA on July 1, 2009 in these consolidated cases (the "Petitions").

2. The Petitions seek to create new NEPBA units to be populated by employees which are currently represented by the SEA. The most recent certifications appear below:

G-0106-1	Probation/Parole Supervisors	12/17/76	S-0324
G-0107-1	Probation/Parole	12/17/76	S-0324
G-0108-1	Corrections	5/6/04	2004-037
G-0109-1	Corrections Supervisors	5/6/04	2004-037
G-0110-1	Liquor Enforcement	12/7/76	S-0311

3. The Petitions pertain to State employees covered by a collective bargaining agreement between the State and SEA. The most recent CBA "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."

4. At the time the consolidated petitions were filed, there was no agreement (tentative or otherwise) regarding a successor collective bargaining agreement between the State and SEA. At the present time, the SEA and the State are attempting to finalize the language of a tentative agreement which would apply to all State employees the SEA represents.

5. The State's budget submission date is February 15th.

DECISION

DECISION SUMMARY

For purposes of PELRB election proceedings the board finds that the most recent collective bargaining agreement between the SEA and the State expired on June 30, 2009. The SEA's objection that the NEPBA election petitions are barred by RSA 273-A:11 (b) is accordingly without merit, as are the SEA's remaining arguments against and objections to the

conduct of election proceedings in these cases. Any composition issues between the NEPBA and the State as to the proposed bargaining units shall be addressed according to the time table outlined in more detail in this decision, and an Order of Election shall immediately issue in these cases.

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:

The board's authority to conduct elections involving a challenge to an incumbent exclusive representative is set forth in RSA 273-A:10, VI (c), Pub 301.01 and 301.03. The board's authority to determine appropriate bargaining units, including the modification of existing bargaining units, is reflected in RSA 273-A:8 and Pub 302.05. Pub 301.03 (c) specifically addresses the process for challenging an incumbent exclusive representative like the SEA, *see also* RSA 273-A:10, VI (c), and provides that:

If a group of employees in a bargaining unit seeks to decertify an existing certified bargaining agent and to replace it with a new certified bargaining agent, the group shall file a petition for certification under the applicable provisions of Pub 301.01.

Pub 301.01 (a) provides that:

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.

With respect to the process to follow to modify an existing bargaining unit in conjunction with a challenge to an incumbent representative, Pub 302.05 (d) provides that:

An employee organization, other than the exclusive representative, may file a petition for modification only during time periods or under conditions when it would be entitled by statute or these rules to petition for an election to be certified as the exclusive representative. At other times, only the employer or exclusive representative may file a petition for modification of a bargaining unit.

The NEPBA contends that its election petitions were timely submitted since they were filed with the PELRB on July 1, 2009, which, according to the NEPBA, is after the most recent collective bargaining agreement between the State and the SEA had expired. The SEA asserts that the most recent collective bargaining agreement had not expired as of July 1, 2009 and argues that the most recent collective bargaining agreement will not expire until a successor collective bargaining agreement has been executed. The SEA's challenge to the timing of the NEPBA election petitions is based upon RSA 273-A:11 (b) and certain "continuation" language contained in the most recent collective bargaining agreement. RSA 273-A:11 (b) provides that as the incumbent exclusive representative the SEA is entitled to:

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.

A collective bargaining agreement's expiration date is the basis for computing when elections may be held during the term of a collective bargaining agreement under RSA 273-A:11, (b)(180 to 120 days prior to the budget submission date in the year the contract shall expire); when election petitions seeking elections during the term of an existing bargaining agreement may be filed under Pub 301.01 (240 to 180 days prior to the budget submission date in the year the contract shall expire); and when election petitions may be filed and elections held following the agreement's expiration. Under RSA 273-A:11, (b) and Pub

301.01 the SEA is not entitled to any protection from challenges like the current NEPBA election petitions after the expiration or term of a collective bargaining agreement even though the SEA retains its status as exclusive representative and may be in the process of negotiating a successor contract. Accordingly, the proper and orderly administration of representation proceedings once an exclusive representative has been duly certified requires that any resulting collective bargaining agreement have a clear and readily ascertainable expiration date.

The record reflects that the most recent collective bargaining agreement “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*” (emphasis added). The legal significance of such continuation language in election proceedings is addressed in Pub 301.01 and *Maintenance and Custodial Employees of Concord School District v. American Federation of State, County and Municipal Employees, Local 1580*, PELRB Decision No. 84-82 (November 14, 1984). These authorities establish that such continuation language should not be used to determine the expiration date of collective bargaining agreements in representation election proceedings like these pending cases.

Parties to collective bargaining agreements have been subject to the board’s decision in the *Maintenance and Custodial Employees of Concord School District* for twenty five years, as the board’s ruling has not been altered or diminished by court decision, statutory amendment, or rule change. Likewise, as a duly promulgated administrative rule, Pub 301.01 (as well as Pub 301.03 and 302.05) is valid and binding in accordance with RSA 541-A:22, which provides that:

Rules shall be valid and binding on persons they affect, and shall have the force of law unless amended or revised or unless a court of competent jurisdiction determines

otherwise. Except as provided by RSA 541-A:13, VI, rules shall be prima facie evidence of the proper interpretation of the matter that they refer to.

Further, while always subject to court review, the board's "interpretation of its regulations is to be accorded great deference." *In re Land Acquisition, L.L.C.*, 145 N.H. 492, 495-96 (2000).

One of the important purposes of Pub 301.01, Pub 301.03, RSA 273-A:11, (b) and the board's decision in *Maintenance and Custodial Employees of Concord School District* is to preserve and provide public employees with an ascertainable and periodic opportunity to resolve representation issues through the election process. The right to maintain such challenges is statutory, *see* RSA 273-A:10, VI (c), and an incumbent exclusive representative's right to avoid such challenges is limited per RSA 273-A:11, (b). The language and purpose of Pub 301.01 in particular, as well as this board's prior decision in *Maintenance and Custodial Employees of Concord School District*, establish that the right of public employees to obtain representation elections to challenge an incumbent exclusive representative like the SEA cannot be abridged or otherwise diminished through the use of contractual devices like the continuation language contained in the SEA and the State's most recent collective bargaining agreement. Using such continuation language to identify the collective bargaining agreement's expiration date means that an expiration date as of the time these petitions were filed cannot be determined. The expiration date will not be known until the execution of a successor contract, an anticipated but still a future event. The board concludes that in accordance with these applicable and controlling authorities on the subject the SEA is not entitled to raise and rely upon the continuation language to defer the most recent collective bargaining agreement's expiration date and thereby delay or prevent the conduct of elections in these cases. For purposes of these representation election

proceedings the most recent collective bargaining agreement expired on June 30, 2009. Accordingly, the NEPBA election petitions were timely and properly filed.

The SEA also cites Pub 302.02 and objects to the proposed bargaining units, contending that a proliferation of bargaining units will result and create an inefficiency in government operations. Pub 302.02 sets forth “Additional Criteria for Determining Appropriate Bargaining Units,” and provides in Pub 302.02 (c) as follows:

In addition to considering the principle of community of interest, the board shall also consider:

- (1) The effect of forming any particular bargaining unit on the efficiency of government operations as contemplated in RSA 273-A:1, XI; and
- (2) The potential for employees within the proposed bargaining unit experiencing a division of loyalties between the public employer and the employees' exclusive representative.

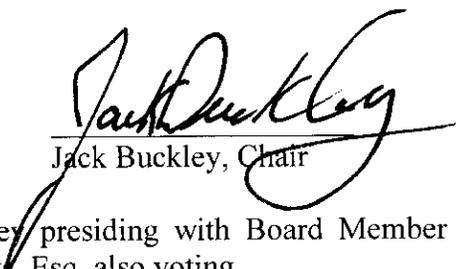
The board has received objections from public employers to proposed bargaining units in other cases based upon fragmentation concerns which might adversely impact the efficiency of government operations. *See, e.g., State Employees' Association of New Hampshire, S.E.I.U., Local 1984 v. State of New Hampshire, Division of State Police, Department of Safety, PELRB Decision No. 90-69 (August 7, 1990)*(board allowed modification of larger Department of Safety bargaining unit to create separate bargaining unit of sworn state police personnel, notwithstanding State's objection that the modification request would result in an inappropriate fragment and inefficiencies). In this case the State, as public employer, has not raised a proliferation or fragmentation objection to the modification petitions, and the board concludes that the State is not concerned that the proposed bargaining units will result in inefficient government operations as contemplated RSA 273-A:1, XI. Additionally, the board is not persuaded that there is sufficient evidence in the record to establish that proliferation or fragmentation of bargaining units is a matter of legitimate concern given the criteria set forth in

RSA 273-A:8 (Determining Bargaining Unit) and Pub 302.02 (Additional Criteria for Determining Appropriate Bargaining Units). Accordingly, the SEA's proliferation objection is insufficient to require dismissal of the NEPBA petitions and prevent these matters from proceeding to election.

An Order of Election shall issue in these cases. A Notice of Adjudicatory Hearing shall issue forthwith scheduling a hearing on any objections to composition the State files.

So ordered.

October 8, 2009



Jack Buckley, Chair

By unanimous vote. Chair Jack Buckley presiding with Board Member Kevin E. Cash and Alternate Board Member Sanford Roberts, Esq. also voting.

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