



**STATE OF NEW HAMPSHIRE**  
Public Employee Labor Relations Board

**State Employees' Association of New Hampshire, Inc.,  
SEIU Local 1984**

**and**

**Merrimack County Department of Corrections**

**and**

**National Correctional Employees Union, Inc.**

**Case No. G-0192-8 and G-0192-7  
Decision No. 2016-265**

Order

**I. Background:**

On October 5, 2016 the National Correctional Employees Union (NCEU) filed a modification petition (Case No. G-0192-6) and a petition for certification (Case No. G-0192-7). The petitions relate to the following Merrimack County Department of Corrections (MCDOC) bargaining unit<sup>1</sup> represented by the State Employees' Association of New Hampshire, Inc., SEIU Local 1984 (SEA):

**Unit:** Shift Supervisor, Corrections Officer, Medical Services Coordinator, Corrections Nurse, Maintenance Engineer, Maintenance Worker II, Training Officer, and Group II Case Manager.

**Excluded:** Charge Nurse, Administrator, Director of Operations, Director of Safety and Security, Director of Inmate Work Program, Director of Rehabilitation, Secretary, and Administrative Secretary.

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<sup>1</sup> Since 2010 there have been five cases filed involving requests by the NCEU or the SEA for an election to settle a question of representation of MCDOC employees. See PELRB Case Nos G-0149-1, G-0192-1, G-0192-2, G-0192-3, and G-0192-5. Case G-0192-1 was withdrawn, and the other four cases proceeded to a representation election as per PELRB Decisions 2010-208 (November 17, 2010); 2012-200 (May 11, 2012); 2013-064 (May 2, 2013); and 2015-124 (June 16, 2015).

The NCEU requests that the PELRB modify the existing bargaining unit by removing the Shift Supervisors, identified as Corporals, Sergeants, and Lieutenants. The NCEU has also requested that the PELRB approve a proposed bargaining unit comprised of Corporals, Sergeants, and Lieutenants and conduct a representation election to determine the bargaining unit's exclusive representative, if any.

The SEA objects to the modification petition under RSA 273-A:11, I (b), N.H. Admin. Rules, Pub 302.05 (d) and Pub 301.01. The SEA argues that the modification petition is untimely and barred by the contract bar rule and that a representation election cannot be conducted "not more than one hundred eighty and no less than one hundred twenty days prior to the budget submission date in the year such collective bargaining agreement expires." The SEA also describes a proposed new bargaining unit of MCDOC Supervisory Employees consisting of all full-time and regular part-time employees: Sergeants and Corporals, with the remainder of the original bargaining unit to consist of all other remaining positions except for Lieutenant and Training Officer. Additionally, the SEA has filed authorization cards under N.H. Admin. Rules, Pub 301.02 signed by at least 20% of the employees in the NCEU-proposed unit in order to secure the SEA's appearance on an election ballot.

For its part, the County has no objection to the modification petition, but it does object to the inclusion of the Lieutenant position in the NCEU proposed bargaining unit on the grounds that the position should be excluded as a statutory supervisor under RSA 273-A:8, II ("persons exercising supervisory authority involving the significant exercise of discretion may not belong to the same bargaining unit as the employees they supervise").

In response to the SEA and County filings, the NCEU argues that because the SEA and County objections were filed on October 21, 2016, more than fifteen days after the petitions were filed, they are untimely and should be disregarded under N.H. Admin. Rules, Pub 301.01 (p).

The NCEU also cites *Hudson Police Employee Association and Town of Hudson and AFSCME Council 93*, PELRB Decision No. 2010-219 (November 23, 2010) to counter the SEA's contract bar and related timing arguments. The NCEU states that the modification petition was properly filed and is timely since it was filed after the most recent collective bargaining agreement expired on December 31, 2015.

The undersigned conducted a conference call with the parties on November 4, 2016 to review these cases. Although the parties could not reach agreement on unit composition, they did agree that in the circumstances (one position, Lieutenant, filled by one employee, in dispute) the election process and a determination on the bargaining unit status of the Lieutenant position could proceed simultaneously.<sup>2</sup> The undersigned also informed the parties that any other legal issues, such as the SEA's argument that the modification petition is untimely, will be addressed in an order subsequent to the conference call, which is the purpose of this decision.

With respect to the NCEU's argument that the SEA and County objections and responses to the petitions are untimely, the disputed SEA and County filings were all submitted by the October 21, 2016 date specified in the PELRB October 6, 2016 PELRB Notice of Filing (issued in both cases). The Notice of Filing, issued by the undersigned, effectively extended the usual 15 day deadline by one day, and both the SEA and the County were entitled to rely on the stated October 21, 2016 date. The NCEU's argument that these filings were submitted too late and should be disregarded is rejected.

The SEA's claim that the petitions are time barred or untimely is not persuasive. The relevant provisions of RSA 273-A and N.H. Admin. Rules, Pub 300 provide as follows:

RSA 273-A:11 Rights Accompanying Certification.

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<sup>2</sup> If necessary, the Lieutenant will be provided with a challenge ballot at election.

I. Public employers shall extend the following rights to the exclusive representative of a bargaining unit certified under RSA 273-A:8:

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(b) 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.

Pub 302.05 Modification of Bargaining Units.

(a) Where the circumstances surrounding the formation of an existing bargaining unit are alleged to have changed, or where a prior unit recognized under the provisions of RSA 273-A:1 is alleged to be incorrect to the degree of warranting modification in the composition of the bargaining unit, the public employer, or the exclusive representative, or other employee organization if the provisions of section (d) are met, may file a petition for modification of bargaining unit.

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(d) 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.

Pub 301.01 (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.

There are no issues of material and relevant fact in dispute that require an adjudicatory hearing with respect to these SEA arguments. See N.H. Admin. Rules, Pub 201.06 (a). The collective bargaining agreement, on file with the PELRB pursuant to RSA 273-A:16, I, provides on the first page that it is for the period January 1, 2013 through December 31, 2015. Article 25.1 states that it "shall remain in full force and effect ending at 11:59 p.m. on December 31, 2015, or until it is replaced by a successor agreement, whichever is later." The NCEU petitions in this case were filed on October 5, 2016, ten months after the stated expiration date of December 31, 2015.

An "extension clause" in a collective bargaining agreement, like the "until it is replaced

by a successor agreement" language in this case, is insufficient to create a bar to the NCEU petitions under RSA 273-A:11, I (b). It is also insufficient to trigger the Pub 301 (a) requirement that petitions filed during the term of a contract "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." For the purposes of these proceedings, the petitions were filed after the term of the contract. In *NEPBA, Inc., Local 270 et al and State of New Hampshire, Department of Corrections and State Employees Association of NH, Inc., SEIU Local 1984*<sup>3</sup>, the PELRB rejected the SEA's attempt to use contract extension language to set up a bar to the NEPBA modification and certification petitions. In that case the petitions were filed on July 1, 2009, the day after the stated term of the contract (which was "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 PELRB ruled that the SEA, as the incumbent exclusive representative, was "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 . . ." The Board explained:

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 . . . 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 PELRB has issued similar orders in prior cases involving the NCEU and the SEA. See *National Correctional Employees Union and County of Merrimack and State Employees*

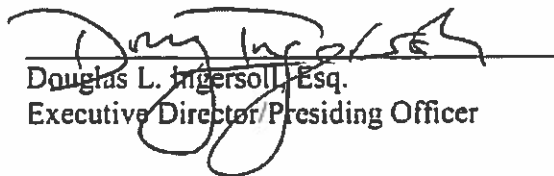
<sup>3</sup> PELRB Decision No. 2009-216, appeal withdrawn, Supreme Court Case No. 2010-100.

*Association of New Hampshire, Inc. SEIU Local 1984, PELRB Decision No. 2012-100 (May 11, 2012) and National Correctional Employees Union and County of Merrimack and State Employees Association of New Hampshire, Inc. SEIU Local 1984, PELRB Decision No. 2010-208 (November 17, 2010).*

In accordance with the foregoing, the NCEU petitions are not barred by either RSA 273-A:11, I (b) or Pub 301.01 (a). The modification petition is granted. The certification petition is granted, with an evidentiary hearing on the final bargaining unit status of the Lieutenant position in the new bargaining unit to take place as scheduled on November 14, 2016 at 9:30 a.m. Pending the decision in that hearing, the Lieutenant shall be included on the list of eligible voters and allowed to vote subject to the "Challenges" procedure under Pub 303.08. The pre-election conference will be scheduled for November 14, immediately prior to the hearing. An Order of Election will issue, and there will be three choices on the ballot: National Correctional Employees Union, State Employees' Association of New Hampshire, Inc., SEIU Local 1984, and No Representative.

So ordered.

Date: November 9, 2016

  
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