Appeal to NH Supreme Court withdrawn on 03-19-2014. (NH Supreme Court Case No. 2013-0517)

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

State Employees' Association of New Hampshire, SEIU Local 1984

and

State of New Hampshire

Case No. G-0115-3
Decision No. 2013-079

Appearances:

Richard E. Molan, Esq. and Robert E. Berry, Jr., Esq., Molan, Milner & Krupski, PLLC, Concord, New Hampshire for the State Employee's Association of New Hampshire, SEIU Local 1984

Michael K. Brown, Esq., Senior Assistant Attorney General, Concord, New Hampshire for the State of New Hampshire

Background:

The State Employees' Association of New Hampshire, SEIU Local 1984 (SEA) is the RSA 273-A certified exclusive representative pursuant to the Public Employee Labor Relations Act (Act) of certain State employees, including employees working in Department of Health and Human Services (DHHS), the Department of Administrative Services (DAS), the Department of Corrections (DOC), the Department of Education (DOE), and the Insurance Department (Ins. Dept.). On August 29, 2012 the SEA filed a petition requesting a declaratory ruling pursuant to Pub 206.01 as to whether the State has the right to unilaterally designate certain bargaining unit employees working at DHHS, DAS, DOC, DOE, and the Ins. Dept. as RSA 273-A:1, IX

"confidential" employees[1] and thereby remove such employees from the bargaining unit and coverage under the parties' collective bargaining agreement.

The State asserts that it is "uniquely within the State's discretion to determine whether an employee is 'confidential.'" According to the State, it has the right to decide and implement, at least on a temporary basis, the RSA 273-A:1, IX "confidential" status of individual employees.[2] The State argues this authority is a component of its management rights per RSA 273-A:1, XI and it is consistent with the parties collective bargaining agreement and past practice.

At the time the petition was filed the State had designated as confidential one employee in the Department of Health and Human Services (DHHS), two employees in the Department of Administrative Services (DAS), one employee in the Department of Corrections (DOC), one employee in the Department of Education (DOE), and three employees in the Insurance Department (Ins. Dept.). The SEA did not agree with these confidential designations but the State asserted the right to make the confidential designations effective without the SEA's agreement and without any order from the PELRB.

On January 30, 2013 the parties appeared for hearing and agreed to submit a stipulated issue for decision on briefs. Both parties have filed briefs, and the decision in this case is as follows.

January 30, 2013 Stipulated Issue for Decision

Under the Act and/or the CBA, whether the State may unilaterally declare an employee to be confidential, which shall take effect immediately, subject to a final

[1] RSA 273-A:1, IX provides that "[p]ublic employee" means any person employed by a public employer except:

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

[2] RSA 273-A bargaining units are comprised of employees who fill specific positions. Usually all employees in the same position have the same bargaining unit status. However, where there are a large number of employees filling the same position it is possible for some of those employees to fall within the bargaining unit while others are excluded from the bargaining unit. This case involves such circumstances, and therefore we consider and discuss the application of RSA 273-A:1, IX in this context.

determination by the PELRB or is the State required to file a (petition for) modification of the bargaining unit, and obtain a ruling, before any such declaration shall take effect.

Findings of Fact

1. The State is a public employer within the meaning of RSA 273-A:1.

2. The SEA is the certified exclusive representative under RSA 273-A of "[a]ll classified employees with the exception of those classified employees excluded from the definition of public employee under the provisions of RSA 273-A:1, IX" in the DOC[3], the DAS, and the Ins. Dept. See PELRB Decisions 2004-037 (May 6, 2004); 2004-044 (May 6, 2004); and 2004-046 (May 6, 2004).

3. The SEA is also the certified exclusive representative under RSA 273-A of "[a]ll classified employees" in the DOE and the DHHS (formerly known as the Department of Health and Welfare). See December 7, 1976 Recognition of an Exclusive Representative, Case No. S-0304 (DOE) and S-0308 (DHHS, formerly Department of Health and Welfare)[4].

4. The State asserts it has discretion to designate bargaining unit employees as "confidential" and to treat such employees as outside the bargaining unit and the collective bargaining unit subject to subsequent PELRB review in the event the SEA's wishes to contest the State's designation. The SEA disagrees and asserts that only the PELRB has authority to determine whether particular employees are "confidential" employees within the meaning of RSA 273-A:1, IX.

5. The parties have resolved by agreement the underlying dispute over the status of the eight employees that gave rise to this petition for declaratory ruling. However, both parties

[3] Exclusive of those employees represented by the Teamsters Local Union 633 as described in PELRB Decision No. 2012-226 (October 4, 2012).
[4] Both are posted on the PELRB website, www.nh.gov/perlb under Certifications.

acknowledge that the basic disagreement (as to the nature and extent of the State's authority and the legal process that must be followed) still exists.

Decision and Order

Decision Summary:

Under the provisions of RSA 273-A:1 *et. seq.* and N.H. Admin. Rules Pub 100-300 the PELRB, and not public employers or employee organizations, has the jurisdiction and authority to determine the composition of bargaining units through bargaining unit certification and modification proceedings. The PELRB's jurisdiction includes the authority to decide whether individual bargaining unit employees or positions are no longer covered by an existing bargaining unit certification and any related collective bargaining agreement. This authority encompasses circumstances where a public employer, like the State, asserts that employees have become RSA 273-A:1, IX confidential employees. Public employers like the State do not have the authority to unilaterally designate certain bargaining unit employees as confidential employees, effectively remove them from an existing bargaining unit, and thereby implement such a designation without prior PELRB approval.

Jurisdiction:

The PELRB issues declaratory rulings pursuant N.H. Admin. Rule Pub 206, which provides as follows:

> **Pub 206.01 Petition for Declaratory Ruling.**
>
> (a) Any public employer, any public employee or any employee organization may petition the board under RSA 541-A for a ruling regarding the specific applicability of any statute within the jurisdiction of the board to enforce, or any rule or order of the board, by filing with the board a petition for declaratory ruling setting out:
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> (1) The specific statute, rule or order whose applicability is in question; and

(2) A clear and concise statement of the facts giving rise to the petition.

(b) The board shall determine within 30 days of filing whether it shall dismiss such a petition or issue a ruling, and it shall subsequently give a ruling on all such petitions properly before it as expeditiously as possible.

(c) The board shall dismiss any such petition whose subject matter:

(1) Is substantially the same as that of a petition for declaratory ruling previously dismissed; or

(2) Was the subject of a previous ruling on the merits, absent a showing that the circumstances attending the previous ruling or dismissal have changed substantially in the intervening period.

(d) The board shall determine whether briefs will assist in issuing a ruling on a declaratory ruling petition and in the event briefs will be received shall establish a schedule for their submission.

Discussion:

Under the legislative and administrative rule framework reflected in RSA 273-A *et. seq.* and N.H. Admin. Rule Pub 100-300, the PELRB is charged with the determination of bargaining units. This means the PELRB is responsible for resolving bargaining unit composition issues (which positions will be included or excluded from a proposed bargaining unit) through the adjudicatory hearing process as necessary. See RSA 273-A:8, I "[t]he board or its designee shall determine the appropriate bargaining unit and shall certify the exclusive representative thereof when petitioned to do so under RSA 273-A:10." See also Pub 302.01-04. The PELRB's exercise of this authority is reflected in numerous decisions available for review on the PELRB's official website at http://www.nh.gov/pelrb/decisions/board/index.htm.

The process pursuant to which public employers and employee organizations may request changes to previously certified and approved bargaining units is governed by Pub 302.05 (Modification of Bargaining Units), which provides as follows:

(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.

(b) A petition shall be denied if:

(1) The question is a matter amenable to settlement through the election process; or

(2) The petition attempts to modify the composition of a bargaining unit negotiated by the parties and the circumstances alleged to have changed, actually changed prior to negotiations on the collective bargaining agreement presently in force.

(c) The petition shall set out the same categories of information, including the present bargaining unit positions, which is required of a petition filed under Pub 301.01 except no showing of interest shall be required to accompany a petition filed under this section. The petition shall set out a clear and concise statement of the circumstances prompting the filing of the petition. This information may be provided on a modification petition form, copies of which may be obtained from the board pursuant to Pub 103.01.

(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.

Modification decisions are also available for review on the PELRB website.

Finally, questions and disputes as to the application of PELRB orders, provisions of RSA 273-A, and PELRB administrative rules (Pub 100-300) to specific facts are determined, as in the present case, through Pub 206.01 declaratory ruling proceedings.

The PELRB considers a number of facts when resolving the question of the inclusion or exclusion of positions or employees based upon the RSA 273-A:1, IX (c) confidential employee:

"Confidential employees" are "'those employees who have access to confidential information with respect to labor relations, negotiations, significant personnel decisions and the like.' " *Appeal of City of Laconia*, 135 N.H. 421, 422 (1992)

> (quotation, brackets and emphasis omitted) (quoting *State of New Hampshire Dept. of Rev. Administration v. State Employees' Ass'n,* Decision No. 780001 at 5 (PELRB Jan. 1978)). RSA 273-A:1, IX(c) excludes confidential employees from the definition of "public employee."

Appeal of Town of Moultonborough, 164 N.H. 257, 262 (2012). The question of a particular employee's confidential status is usually addressed at the time of the original bargaining unit composition hearing. However, subsequent questions sometimes arise as to the appropriateness of a position or employee's continued inclusion in a previously approved bargaining unit. In this case there were questions[5] as to a number of employees in five previously approved State bargaining units.[6]

We are not convinced that the State, or any other public employer, enjoys the right to unilaterally remove individual employees from a bargaining unit (and therefore coverage under any collective bargaining agreement and RSA 273-A) by a "confidential" employee designation, even on a temporary basis. First, such public employer unilateral action is not expressly authorized or otherwise sanctioned by the Act or the administrative rules. Second, the PELRB's general jurisdiction over bargaining unit composition issues is not diminished when questions arise as to the confidential status of a particular position or employee during the time period subsequent to the date of the initial certification. In other words, there is nothing in the Act or the administrative rules that shifts the authority to determine bargaining unit composition issues, in whole or in part, from the PELRB to the public employer once the PELRB has determined the original bargaining unit.[7] Third, a public employer's managerial prerogative is subject to the

[5] The status of the particular employees has been resolved, but the parties still dispute the nature and extent of the State's authority to act unilaterally under the Act.

[6] The DOE and DHHS units were grandfathered and certified by the PELRB in 1976. The DOC, DAS, and Ins. Dept. unit descriptions were amended in 2004 when the parties filed agreed upon modification petitions.

[7] The State raised in its reply brief a past practice argument. Assuming that procedurally that argument is properly before us, we note that the parties waived a formal hearing, and we conclude there is insufficient evidence (i.e. stipulated facts or exhibits) in the record to support a finding of a binding past practice which grants to the State the authority to unilaterally act as claimed. Further, a past practice cannot divest the PELRB of its jurisdiction and

express authority of the PELRB to administer the provisions of the Act, which authority includes the exclusive power to determine bargaining units and resolve disputes concerning the composition of proposed bargaining units and previously approved bargaining units. Neither the State's nor any other public employer's managerial power is so great that it includes the authority to usurp the jurisdiction of the PELRB in these areas. We appreciate the State's desire to control the application of RSA 273-A:1, IX to its employees, at least on a temporary basis. It is obvious that such authority would allow for convenient and decisive management action. But, we find this interpretation of management rights goes too far because it conflicts with express statutory provisions (RSA 273-A:8) and administrative rules (Pub 302.05 and Pub 206.01), as well as the general framework of the Act, that vests the PELRB, and not public employers, with authority over such matters. There are sufficient PELRB procedural options in place pursuant to which the PELRB can determine bargaining unit issues like the confidential status of bargaining unit employees.

As to the stipulated issue for decision, the State may <u>not</u> unilaterally declare an employee to be confidential and have that declaration take effect, even on a temporary basis. Neither public employers nor employee organizations has the authority to unilaterally settle questions of the kind presented in this case on a temporary or a permanent basis. Instead, the parties are instructed to proceed as follows:

> 1. Questions and disputes as to the future status of a position or employee both parties agree is currently within (or outside) an existing bargaining unit certification should be raised via the filing with the PELRB of a Pub 302.05 modification petition. If the parties reach agreement on such matters they should still file a modification petition (agreed upon) in order to update the official bargaining unit certification on record with the PELRB. Although the PERLB gives significant weight to public employer and employee organization bargaining unit agreements, both with respect to proposed new units and

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authority over bargaining unit issues, including the authority to determine exclusions from bargaining units of certain employees pursuant to RSA 273-A:1, IX.

modifications of existing units, such petitions may be subject to further review in the event questions arise;

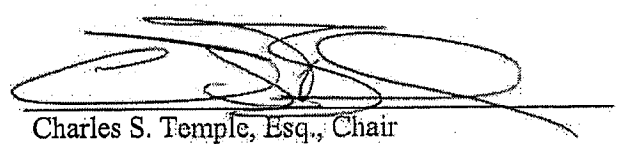
2. Disagreements about whether a particular position or employee is currently included or excluded from an existing bargaining unit certification should be addressed by a Pub 206.01 petition for declaratory ruling; and

3. Given the State's comments in its brief expressing some reluctance to utilize PELRB process to address issues like the application of RSA 273-A:1, IX to particular employees, we suggest that the parties contact the PELRB's Executive Director to informally discuss the mechanics of the PELRB process in greater detail.

The parties are further directed to prepare and file with the PELRB within sixty days an "exclusion list" identifying by position number those employees whom the parties have agreed are currently excluded pursuant to RSA 273-A:1, IX from SEA state bargaining units. This exclusion list will be reviewed and, if approved, maintained with the existing bargaining unit certifications at the PERLB. The parties shall update the exclusion list at least annually, if not more frequently, to ensure that PELRB existing bargaining unit descriptions are current.[8]

So ordered.

Date: May 28, 2013.



Charles S. Temple, Esq., Chair

By unanimous vote. Chair Charles S. Temple, Esq. presiding with Board Member Kevin E. Cash and Board Member Carol Granfield also voting.

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[8] This requirement is not unique to the State; submitting appropriate filings with the PELRB in order to maintain an accurate bargaining unit description is a process that applies to all bargaining units.