NH Supreme Court affirmed in part, reversed in part this decision on October 14, 1998, Slip Opinion No. 97-279, 143 NH 97 (1998).

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

EXETER EDUCATION ASSOCIATION, NEA-NEW HAMPSHIRE

Complainant

v.

SAU #16, EXETER REGIONAL COOPERATIVE SCHOOL BOARD

Respondent

CASE NO. T-0412:1
(Declaratory Judgment)

DECISION NO. 97-008

APPEARANCES

Representing Exeter Education Association:

James Allmendinger, Esq.

Representing Exeter Regional Cooperative School Board:

Douglas Hatfield, Esq.

Also appearing:

Pamela Abbott, Exeter Regional Cooperative School Board
Paul Flynn, SAU 16, Exeter Regional Cooperative School Board
Ben Larkin, Exeter School District
Jason Schriber, Exeter News Letter
Jo Campbell, UniServ Director, NEA-New Hampshire
Sue Robertson, Exeter Education Association
Brian Waylow, Exeter Education Association
John Teague, Exeter Cooperative School Board

BACKGROUND

The Exeter Education Association, NEA-New Hampshire (Association) filed a Petition for Declaratory Judgment on July 2, 1996 pertaining to its continuing and/or residual rights, if any, as the result of the Exeter School District's having changed into a cooperative school district namely, Exeter Regional Cooperative School District (District), in March of 1996 after voters approved

that change in the communities of Brentwood, East Kingston, Exeter, Kensington, Newfields and Stratham. The Exeter Regional Cooperative School District filed its answer to the petition on July 24, 1996. This matter was then heard by the undersigned hearing officer on December 19, 1996 after prior continuances sought by and granted to the parties for hearing dates on October 8, 1996 and November 7, 1996. At the conclusion of the hearing on December 19, 1996, the record was left open, by agreement of the parties, to permit the filing of post-hearing memoranda on or before January 7, 1997, at which time the record was closed.

FINDINGS OF FACT

1. As of the date of the filing of the Petition for Declaratory Judgment and the date of hearing in this matter, the Exeter School Board was a "public employer" of teachers and other personnel within the meaning of RSA 273-A:1X.

2. The Exeter Education Association, NEA-New Hampshire, is the duly certified bargaining agent for teachers and other personnel employed by the Exeter School Board in the Exeter School District.

3. The Exeter School Board and the Exeter Education Association are parties to a collective bargaining agreement (CBA) for the period September 1, 1996 through August 31, 1999. (Association Exhibit No 3.) The recognition clause of that agreement acknowledges the Association as the exclusive representative of all professional employees of the Exeter School District, "professional" being defined as those positions requiring certification by the State Board of Education and including department heads who teach three (3) or more periods per day, nurses, guidance personnel and librarians. Currently, the Exeter school system provides education for grades K-12, has approximately 3350 students and 265 professional staff.

4. The Exeter Regional Cooperative School Board will become a " public employer" of teachers and other personnel within the meaning of RSA 273-A:1X once it has ten (10) or more employees who have a community of interest as defined by RSA 273-A:8. The Cooperative School District "assumes operating responsibility on July 1, 1997 for grades 6-12," however, a new middle school for grades 6 through 8, funding for which was approved on November 9, 1996, is not expected to be completed until September of 1998. In the interim, sixth graders

will continue to be housed, transported and supported by their respective local municipality school districts. (Association Exhibit No. 8.) Those local school districts have declared that "sixth grade education is the responsibility of the Cooperative School District as of July 1, 1997. Sixth grade teachers will be employees of the Cooperative as of that date. Terms and conditions of employment will be determined by the Coop; however, in order to maintain order and clear procedures, various building policies and procedures of each [local] district will continue to govern the instruction in the classroom and conduct while in the building." (Association Exhibit No. 8.) Cost of sixth grade special education is to be borne by each local district until operations move to the new middle school building.

5. In addition to Exeter, the other local districts have CBA's with their personnel: Brentwood for 1996-99, East Kingston for 9/95 to 9/98, Kensington for 9/95 to 9/97, Newfields for 9/95 to 9/97 and Stratham for 9/94 to 9/97. (Exhibits A through E, inclusive.) The proposed articles of agreement among the six local districts call for the new Cooperative School District to be responsible for grades 6 through 12 and for the local districts to have weighted voting privileges: Brentwood, 11%; East Kingston, 6%; Exeter, 52%; Kensington, 7%; Newfields, 4% and Stratham, 20%. (Exhibit G.)

6. Prior to the formation of the Regional Cooperative School District, the Exeter school system received students for Grade 7 and 8 (junior high) and Grades 9-12 (high school) from the other five named towns. Once fully operational, inclusive of the new middle school faculty, the Cooperative School District will have a responsibility for Grades 6-8 in the new middle school and Grades 9-12 in the high school. Sixth graders, will "likely be schooled in the same buildings and by the same staff for the 1997-98 school year as the 1996-97 school year." (Stipulations 3 and 12.) With the exception and addition of the sixth grade students, the student population of the Cooperative School District will be essentially the same as that of former Grades 7 through 12 of the Exeter School District, that district remaining in existence for grades K-5. (Stipulations 6 and 20.)

7. The Cooperative School District will be adopting a budget and employing professional staff for the

school year commencing July 1, 1997. Sixth grade teachers from each of the five local school districts and teaches from the Exeter School District will be offered employment with the Cooperative School District for employment after July 1, 1997. The Exeter School District currently employs approximately 10 1/2 sixth grade teachers. (Stipulations 13, 14 and 26.)

8. Teachers from the five local school districts are not parties to, and have not participated in, the negotiation of the CBA between the Exeter Education Association and The Exeter School Board. Likewise, the Board of the new Cooperative School District has not participated in, or been a party to, the negotiations for a CBA between the Exeter Education Association and the Exeter School District. Ninety-five (95) percent of the professional staff of the new Cooperative School District will come from the Exeter school system who previously were parties to and participated in the negotiation of the CBA between the Exeter Education Association and the Exeter School District. (Stipulations 18, 19 and 21.)

9. Approximately 155 teachers and other professional employees represented by the Exeter Education Association will be employed by the Cooperative School District for the 1997-98 school year. Approximately 9 1/2 teachers will come from towns other than the Town of Exeter. (Stipulation 27.)

10. As the result of funding approved by voters on November 9, 1996, the Exeter Regional Cooperative School Board has withdrawn its motion to dismiss as filed September 18, 1996 because, at that time, the new Cooperative School District had yet to be funded. The parties further stipulated the following issue to be addressed in this declaratory judgment action:

> Is the newly-formed Exeter Regional Cooperative School District bound by the terms of the existing collective bargaining agreement between the Exeter Education Association and the Exeter School District?

DECISION AND ORDER

This case may be assessed from the perspectives of public policy/legislative intent, prior PELRB and court decisions in New Hampshire, and Federal legislation and case law on the issue of

contract integrity and conditions of continuation, albeit primarily in the private sector. All point to the same conclusion.

When the public employee labor relations law was passed in 1975, its avowed purpose, as reflected in Chapter 490 of the Laws of 1975, was "to foster harmonious and cooperative relations between public employers and their employees." It required "public employers to negotiate in good faith and to reduce to writing any agreements reached with employee organizations." Thus, there are two compelling, public policy considerations contained in legislative intent, namely, harmonious relations and integrity of contract. Neither of these is furthered if a public employer has the unilateral ability to change its legal composition, whether by accretion, merger, spin-off or creation of a new entity, and then have the ability to cancel or repudiate its CBA with the certified bargaining agent. Were the services to be rendered to change substantially and were the employees rendering those services to change substantially and/or to be required to render them in a substantially new locale, then there may be a basis for recognizing the independence of the accreted, merged, spun-off or newly created entity. That does not appear to be the case, or to be appropriate, under the facts herein. Moreover, if it were to be the case, it would create a situation where one side could repudiate the CBA while the same prerogative would not be extended to the other. This is damaging to the integrity of the contract and to the parties' need to settle on the terms of a CBA. It is poor public policy and is contrary to the "level playing field" concept supported by the courts in this state. See Appeal of Alton School District, 140 NH 303 at 308 (1995). Likewise, it would unnecessarily and inappropriately shift the "balance of power" contemplated by RSA 273-A. See Appeal of Franklin Education Association, 136 N.H. 332 at 337 (1992). This brings us to PELRB and court decisions in New Hampshire.

In 1976, the N.H. Supreme Court decided American Federation of State County and Municipal Employees v. City of Manchester, 116 NH 665 (1976), which litigated the issue of whether the separation of the traffic division from the department of highways and the creation of a separate department of traffic comprised of the same personnel terminated the rights and benefits of those employees under their pre-existing CBA. The Court said, in pertinent part:

> An ordinary contract will not bind an unconstenting successor to a contracting party. However, this is not true of a collective bargaining contract which is intended to regulate all the aspects of the complicated relationship between employer and employees.... The contract between [AFSCME] and the highway department covered, among other matters, wages and hours, promotions and transfer, causes for discharge, seniority, grievance procedures, annual vacations and many other topics. Even without the compulsion of a statute, *such contracts should continue*

> *in force, if the circumstances warrant it when there is a substantial continuity of identity in the enterprise before and after a change in employers.* AFSCME v. City, 116 NH 665 at 667 (1976) citing to John Wiley & Sons v. Livingston, 376 US 543 at 551 (1964). (Emphasis added.)

The Court continued by saying, "Where there is little change in the employment relationship, such continuity furthers the expectations of the parties to the collective bargaining agreement and is desirable in that it maintains the stability of the employment relationship between the parties."

It appears that the same principles should apply in this case. Notwithstanding that the Cooperative School District is a newly created entity, the identical functions will be performed in the delivery of educational services to virtually the same students by a workforce that is more than 90% identical to the secondary teachers currently employed by the Exeter School District. If this alone is not sufficiently compelling, one must also consider the desirability of contract stability through August of 1999, an agreement that was negotiated in a collective bargaining environment which has created expectations on both sides and which has been the product of give-and-take by them. Since the 1996-99 agreement is currently in force and would have stayed in force for secondary teachers in Exeter through 1999 had the voters not approved the new Cooperative School District, it also enjoys the very positive attribute of already having been funded.

In 1991, the PELRB decided Hollis-Brookline Cooperative Support Staff Association et al., Decision No. 91-31 (June 1, 1991) after both the Hollis-Brookline Cooperative Support Staff Association and the Hollis-Brookline Cooperative Teachers Association filed petitions for certification to coincide with the operating date of responsibility for the newly formed Holl-Brookline Cooperative School District on July 1, 1991. The Cooperative School Board opposed the petitions for certification because the former local school districts would continue to exist to provide education in grades K through 6. As is the case in Exeter, in Hollis-Brookline, the Cooperative School District offered contracts to current junior and senior high school teaching staff, intended to and did operate in the same buildings as formerly operated by the Hollis school department for the grades involved and served the same student population. The PELRB ruled that the Cooperative School Board was obligated to honor the existing CBA "in keeping with the spirit and intent of RSA 273-A and its policy to foster harmonious and cooperative relations between employees and employers by encouraging orderly and uninterrupted operation of government." The Exeter Cooperative School District has failed to show why there should be a departure from these time-honored principles.

As for federal insight, Warrior & Gulf Navigation Co., 363 U.S. 574 at 580 (1960) frequently cited for issues of arbitrability via Westmoreland, 132 NH 103 (1989) and City of Nashua, 132 NH 669 (1990), also speaks to the primacy of the labor agreement.

> "The choice [of entering into a contractual relationship in the form of a labor agreement] is generally not between entering or refusing to enter into a relationship, for that in all probability pre-exists the negotiations. Rather it is between having that relationship governed by an agreed-upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces."

Noting that employees and their union ordinarily do not take part in negotiations leading to a change in corporate ownership, the United States Supreme Court, in John Wiley & Son v. Livingston, 376 US 543 at 549 (1964), said, "The objectives of a national labor policy...require that the rightful prerogative of owners independently to rearrange their businesses and *even to eliminate themselves as employers* be balanced by some protection to the employees from a sudden change in the employment relationship." (Emphases added.) The Court reached this conclusion after the "wholesale transfer" of the former employer's employees to Wiley "apparently without difficulty." 376 US 543 at 551.

In NLRB v. Burns Security Services, 406 US 272 (1972), Burns was the successor to a CBA between Wackenhut Corporation and United Plant Guard Workers. The U.S. Supreme Court affirmed the NLRB'S bargaining order because the bargaining unit remained unchanged, 27 of 42 Wackenhut guards were hired by Burns, and the operational structures and practices were essentially the same between Wackenhut and Burns. "It has been consistently held that a mere change of employers or ownership...is not such an 'unusual circumstance' as to affect the force of the Board's certification...if a majority of employees after the change of ownership or management were employed by the preceding employer." 406 US 272 at 279. Conversely, the Board vacated the NLRB's order for Burns to implement and observe the CBA which the Guards had negotiated with Wackenhut. Several of the reasons given for not enforcing the Wackenhut CBA on Burns were: (1) there was no merger or sale of assets, (2) there were no dealings between Wackenhut and Burns, (3) Burns purchased nothing from Wackenhut and (4) became liable for none of its financial obligations. 406 US 272 at 286. The opposite is true in this case: (1) assets were sold by the Exeter School District to the Cooperative, (2) contracts exist between the two entities, (3) the Cooperative School District contracted with Exeter School District for purchases and (4) for assumption of debt. (Exhibit G, Proposed Articles of Agreement.)

Given these differences or distinguishing characteristics to Burns, the PELRB decision in Hollis-Brookline and the N.H. Supreme Court decision in City of Manchester, supra, the issue stipulated must be answered affirmatively. The Exeter Regional Cooperative School District will be bound by the terms of the existing CBA between the Exeter School District and the Exeter Education Association when it has ten or more teachers and professional employees, currently covered by the Exeter Education Association CBA, for whom it is obligated to pay wages and benefits. The parties are reminded that this declaratory judgment pertains only to the continuation of the CBA involving the Exeter Education Association and the preeminent role of its employees in the Cooperative School District. It does not apply to the other local districts; hence, the Appeal of The City of Franklin, 137 NH 723 (1993), and Appeal of Sanborn Regional School Board, 133 NH 513 (1990), arguments pertaining to funding and funding approval (Cooperative District Memorandum pp 2-3.) do not apply and are not addressed. Those requirements appear, however, to have been satisfied for the 1996-99 Exeter CBA. Likewise, there is no prohibition to agreed to contract reopeners for the five other local school districts to address contract inconsistencies or how to resolve any issues to be raised by the parties prior to their scheduled CBA expiration dates.

So ordered.

Signed this 18thday of FEBRUARY, 1997.

PARKER DENACO
Hearing Officer