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THE SUPREME COURT OF NEW HAMPSHIRE

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Public Employee Labor Relations Board  
No. 2007-105

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

Argued: October 18, 2007  
Opinion Issued: November 9, 2007

Cook & Molan, P.A., of Concord (John S. Krupski on the brief and orally),  
for the appellant.

Certain Individuals Regarded as Classified Employees within the New  
Hampshire Public Utilities Commission filed no brief.

MEMORANDUM OPINION

DALIANIS, J. The appellant, the State Employees' Association of New Hampshire, Inc., SEIU Local 1984 (SEA), appeals the denial of its motion to obtain certain information by the New Hampshire Public Employee Labor Relations Board (PELRB). We reverse and remand.

The record reveals the following: On August 23, 2006, the appellees, who are certain individuals regarded as classified employees within the New Hampshire Public Utilities Commission (PUC), filed a petition to decertify the SEA as the appellees' exclusive representative. On September 25, 2006, the PELRB issued an order of election, which stated, in pertinent part: "[I]n accordance with Pub 303.01(b), the EMPLOYER shall immediately upon receipt of this ORDER forward to PELRB . . . , [and] to the Petitioner, a complete list of

the names and home addresses of the employees in the bargaining unit.” On October 4, 2006, the SEA filed a motion to obtain a list of each potential voter’s name and home address. The Executive Director of the PELRB denied this motion on October 10, 2006. He stated that it was “the PELRB’s strong belief that an employee’s privacy interest in their [sic] home address is an interest that may be breached, if at all, only after sufficient proof is offered of the blanket inability of any union or other party to otherwise reasonably communicate with employees.”

At the October 11, 2006 election, a majority voted to decertify the SEA as the appellees’ exclusive representative. The PELRB issued a notice of decertification on October 17, 2006. Also, on that day, the SEA filed an appeal with the full board of the PELRB, challenging the decision to deny its motion to obtain information. On November 30, 2006, the PELRB affirmed its executive director’s decision, ruling that “his decision reflects the position of the board in this era of elevating the privacy rights of employees over the ability of competing interests in organization activities to obtain the same.” The SEA moved for reconsideration, which the PELRB denied, 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 Town of Hampton, 154 N.H. 132, 134 (2006) (quotation omitted); see RSA 541:13 (2007).

The SEA argues that the PELRB violated its own regulations when it denied the SEA’s motion to obtain information. We agree.

“The law of this State is well settled that an administrative agency must follow its own rules and regulations, and that an agency’s interpretation of its own regulations is erroneous as a matter of law when it fails to embrace the plain meaning of its regulations.” Attitash Mt. Service Co. v. Schuck, 135 N.H. 427, 429 (1992) (quotations and citations omitted).

New Hampshire Administrative Rules, Pub 303.01(b) provides:

Upon receiving the order for election, the public employer shall immediately forward to the board, and to the parties who shall appear on the ballot, a complete list of the names and home addresses of the employees in the bargaining unit agreed to by the parties or previously determined by the board to be eligible for membership as a result of a unit determination hearing. The public employer shall update this voting list by delivering to each party receiving a copy of the original list the name and classification of any person newly eligible for inclusion in the

bargaining unit up to the end of the eligibility period agreed to by the parties or, failing agreement, determined by the board at the pre-election conference.

The language of this regulation is mandatory. Under its express terms, the employer must forward to the PELRB “and to the parties who shall appear on the ballot a complete list of the names and home addresses of the employees in the bargaining unit.” N.H. Admin. Rules, Pub 303.01(b). The ballot in this case asked voters to choose whether they wanted the SEA to be their exclusive representative or to be unrepresented. Because the SEA was listed on the ballot, the SEA was entitled to “a complete list of the names and home addresses of the employees in the bargaining unit.” Id. The PELRB therefore erred when it denied the SEA’s motion to obtain such a list from the PUC.

To the extent that New Hampshire Administrative Rules, Pub 303.01(b) no longer reflects the PELRB’s views, the PELRB may seek to amend it by following proper rule-making procedures. See RSA 273-A:2, VI (1999); see also Appeal of City of Manchester, 149 N.H. 283, 287-88 (2003). The PELRB, however, may not simply choose to disregard its own rules. Attitash Mt. Service Co., 135 N.H. at 429.

We will not set aside the PELRB’s decision for a procedural irregularity, however, unless an appellant demonstrates that the PELRB’s decision materially prejudiced it. Id. at 430-31. We hold that where an employer has not complied with New Hampshire Administrative Rules, Pub 303.01(b) by forwarding the names and home addresses of the employees within the bargaining unit, material prejudice is presumed. New Hampshire Administrative Rules, Pub 303.01(b), like the similar rule adopted by the National Labor Relations Board in Excelsior Underwear, Inc., 156 N.L.R.B. 1236, 1239-40 (1966), helps to ensure that employees are fully informed about arguments concerning representation and can freely and fully exercise their statutory rights to organize. See Washington Fruit & Produce Co., 343 N.L.R.B. 1215, 1227 (2004). Just as “a failure to comply with the Excelsior requirement will, by itself, constitute grounds for setting aside an election,” Auntie Anne’s, 323 N.L.R.B. 669, 669 (1997), so too does the failure to comply with New Hampshire Administrative Rules, Pub 303.01(b) constitute grounds for setting aside the election in this case. We therefore reverse the PELRB’s decision and remand for a new election.

Reversed and remanded.

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



State of New Hampshire  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

New Hampshire Public Utilities Commission		*	
		*	
Petitioner		*	Case No. S-0419-1
v.		*	
		*	
SEA/SEIU Local 1984, AFL-CIO		*	Decision No. 2006-159
		*	
Respondent		*	
		*	

APPEARANCES

Representing Petitioner

Jody O'Marra, N.H. Public Utilities Commission  
Lynn Fabrizio, N.H. Public Utilities Commission

Representing Respondent

John Krupski, Esq., Cook & Molan, P.A.

Representing the State of New Hampshire

Michael K. Brown, Esq., Senior Assistant Attorney General, Civil Bureau

BACKGROUND

The New Hampshire Public Utilities Commission ("PUC") filed a petition for decertification on August 23, 2006. The petitioner is identified as the PUC, which the PELRB understands to refer to the employees identified in the petition, who submitted interest cards, and who are members of the bargaining unit or units at issue.

The SEA/SEIU Local 1984 ("SEA") filed a responsive pleading on September 7, 2006. SEA claims 1) that only a unit member or group of unit members may file a decertification petition; 2) that the employees of the PUC belong to two separate units, consisting of a supervisory employees unit certified by the Board in 1980 and a non-supervisory employee unit certified by the Board in

2004 (Decision No. 2004-041); 3) that Jody O'Marra is a member of the supervisory unit and therefore improperly signed and is identified as the representative in the petition; 4) that the petition fails to establish the 30% requisite showing of interest; 5) that these irregularities and nonconformance with PERLB rules have irreparably harmed the rights of the certified exclusive bargaining representative; 6) that the SEA requests an informal pre-hearing conference to be conducted prior to an adjudicatory hearing to address the SEA's exceptions and objections to the petition; and 7) that a full Board of the PELRB must deem the statutory prerequisites satisfied before any pre-election hearing may be held.

The undersigned hearing officer conducted an informal pre-hearing conference on September 15, 2006 at the PELRB offices in Concord, New Hampshire and the case is scheduled for a merits hearing on September 25, 2006. On September 21, 2006 the SEA filed a motion seeking to withdraw its request for adjudicatory hearing without prejudice as a matter of right per Pub 201.04. The Petitioner filed an objection arguing that the SEA was not entitled to withdraw its request without prejudice. In Decision 2006-158 the PELRB denied the SEA motion.

On September 21, 2006 Senior Assistant Attorney General Brown filed a special appearance for the State of New Hampshire as well as an Objection to Motion to Add State of New Hampshire By the Governor's Office as a Necessary and Indispensable Party.

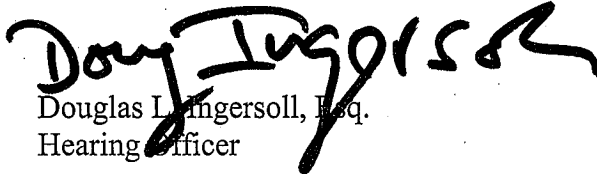
On September 25, 2006 the SEA filed a Motion to Cancel Adjudicatory Hearing Due to Lack of Subject Matter Jurisdiction. At the start of the September 25, 2006 hearing the case was introduced and a recess taken to discuss the status of this matter off the record. Based on the off the record discussion, the following order is issued.

#### DECISION

1. The SEA does not object to the conduct of a pre-election conference and an election based upon one unit consisting of all classified employees of the Public Utilities Commission with the exception of those classified employees excluded from the definition of public employee under the provisions of RSA 273-A:1, IX per the amended certification dated May 6, 2004, Decision No. 2004-041.
2. The SEA's objections and exceptions filed to date in this matter are hereby dismissed with prejudice in this case, but without prejudice to any objections or exceptions the SEA may have on file or may file in other pending cases. The PELRB acknowledges that it is not treating the SEA's decision to allow the instant petition to proceed to election to constitute a waiver or relinquishment of its objections and exceptions on file in other pending cases and in particular that the doctrines of collateral estoppel and res judicata cannot be utilized against the SEA in other cases on account of the SEA's agreement to allow this matter to proceed to election. However, the SEA will not be permitted to raise or litigate further any of the objections or exceptions it has raised and filed to date in this matter, as it was provided with the opportunity to do so on September 25, 2006 and the SEA elected not to proceed.

3. At the pre-election conference the SEA will be allowed to raise objections to voter eligibility provided those objections are not within the scope of the objections or exceptions the SEA has raised in pleadings filed with the PELRB to date. The PELRB specifically recognizes the SEA's right to contest the probationary status of Public Utilities Commission employees and whether certain employees are ineligible to vote because they belong to the Office of the Consumer Advocate.
4. The parties agree that the SEA's Motion to Add State of New Hampshire By the Governor's Office as a Necessary and Indispensable Party is moot. The PELRB notes paragraph 1 of the SEA's Motion to Cancel Adjudicatory Hearing Due to Lack of Subject Matter Jurisdiction is incorrect, as the PELRB did receive and review the petitioner's objection (filed with the PELRB on Friday, September 22, 2006) before issuing its order in Decision No. 2006-158. Unfortunately, the SEA did not receive its copy of the petitioner's objection until the time of the September 25, 2006 hearing. Based on the agreement and understanding reached with the parties concerning the next activity in this case (proceeding to pre-election conference and to election), the PELRB finds that the SEA's Motion to Cancel Adjudicatory Hearing Due to Lack of Subject Matter Jurisdiction is moot.
5. It was also agreed that the PELRB would accept petitioner's exhibits filed in connection with the hearing of September 25, 2006 and those exhibits will be kept as marked and full exhibits in the file.
6. An Order of Election will be issued simultaneously with this decision. A pre-election conference is scheduled for October 2, 2006 at 12:00 p.m. at the PELRB offices in Concord, New Hampshire.

So Ordered.

  
Douglas L. Ingersoll, Esq.  
Hearing Officer

Date Issued: September 25, 2006

Distribution:

Jody O'Marra and Lynn Fabrizio  
John Krupski, Esq.  
Michael Brown, Esq.

NH Supreme Court reversed & remanded this decision on 11-09-2007, Slip Op. No. 2007-105, (NH Supreme Court Case No. 2007-105)



**State of New Hampshire**  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Classified Employee Petitioners of the  
Public Utility Commission

Complainant

v.

State Employees' Association of NH, Inc.,  
SEIU Local 1984

Respondent

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Case No. S-0419-1

Decision No. 2007-006

ORDER ON MOTION FOR REHEARING/RECONSIDERATION

The Board has considered the State Employees' Association of New Hampshire, Inc., SEIU Local 1984 "Motion for Reconsideration/Rehearing" and took the following actions:

1. Pursuant to RSA 541 and N.H. Admin R. Pub 205.02, it reviewed State Employees' Association of NH, Inc., SEIU Local 1984 Motion for Rehearing filed on December 28, 2006.
2. It examined its previous decision, PELRB Decision No. 2006-216, issued in this matter on November 30, 2006.
3. It reviewed the previous filings of the parties in this matter.
4. It DENIED the State Employees' Association of NH, Inc., SEIU Local 1984 Motion for Rehearing/Reconsideration.

So ordered.  
Signed this 11<sup>th</sup> day of January, 2007.

DORIS M. DESAUTEL, Chair

By unanimous decision. Alternate Chair Doris M. Desautel, Member E. Vincent Hall and James M. O'Mara, Jr. present and voting.

Distribution:  
John Krupski, Esq.  
Ms. Jody O'Mara  
Commissioner Thomas Getz