State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Classified Employee Petitioners of the New Hampshire Department of Labor Petitioner v. SEA/SEIU Local 1984 Respondent	*	Case No. S-0310-1 Decision No. 2006-186

APPEARANCES

Representing Petitioners

Gregory Bueddeman
Joseph Dion

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

John S. Krupski, Esq.

BACKGROUND

The Classified Employee Petitioners of the New Hampshire Department of Labor ("Petitioners") filed a petition for decertification on September 15, 2006. On September 29, 2006 the petitioners filed "Pleadings to a Petition for Decertification by the Classified Employee Petitioners of the New Hampshire Department of Labor" setting forth amendments and supplements to the Petition for Decertification.

The SEA/SEIU Local 1984 ("SEA") filed an Objection and Exception in response on September 30, 2006. The SEA claims 1) that the petitioners lack standing; 2) that the petitioners fail to present the requisite 30% showing of interest; 3) that upon information and belief decertification cards have been withdrawn by members coerced to execute the document; 4) that the SEA requests an informal pre-hearing conference to be conducted prior to an adjudicatory hearing to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 5) that a full Board of the PELRB must deem the statutory prerequisites satisfied before any pre-election hearing may be held.

In addition to the foregoing objections, at hearing the SEA specifically cited and developed claims that: 1) probationary employees and unfilled positions should be counted when reviewing decertification cards to determine whether at least 30% of employees in the bargaining unit wish to decertify the SEA pursuant to Pub 301.03 (a); 2) Tim McCabe, an individual whose employment ended with the Department of Labor on September 21, 2006 (but who was an employee at the time the decertification petition was filed) should be excluded from the petitioner's "vote entitled" list (Petitioner Exhibit 1); 3) Ann Livingston is a part-time employee who should be included; 4) petitioner's determination of "vote entitled" employees as shown on Petitioner Exhibit 1 is improper as all Department of Labor employees should be treated as classified employees unless excluded by a modification proceeding by virtue of the December 7, 1976 Recognition of an Exclusive Representative and PELRB Decision No. 2006-174; and 5) no election can occur pursuant to RSA 273-A:11. SEA's claim that Department of Labor employees were coerced into signing decertification cards was withdrawn at the conclusion of the hearing.

The undersigned hearing officer conducted an informal pre-hearing conference on October 2, 2006 and a hearing on October 16, 2006, both at the PELRB offices in Concord, New Hampshire.

FINDINGS OF FACT

1. The State of New Hampshire, Department of Labor is a public employer within the meaning of RSA 273-A: 1,x.

2. The State Employees' Association, SEIU Local 1984, AFL-CIO, CLC ("SEA") is an employee organization that represents employees of the Department of Labor ("DOL") for purposes of collective bargaining pursuant to RSA 273-A.

3. The SEA is the certified bargaining agent for DOL employees in the bargaining unit pursuant to the Recognition of an Exclusive Representative dated December 7, 1976 in Case No. S-0310. (SEA Exhibit A)

4. The petitioner's employee list contained in Petitioner Exhibit 1 is based upon information from Administrative Services, New Hampshire Government web site, and discussions with Kathryn Barger, identified as an Administrator IV and Director of the Department of Labor.

5. Employees 1 and 2 (the Commissioner and the Deputy Commissioner) on Petitioner Exhibit 1 were excluded from the vote entitled column as they were identified as unclassified.

6. Employee 3 (the Director or Administrator IV), although classified, was excluded as confidential.

7. Employees 4 and 5 (Payroll Officer I and Business Administrator I), although

classified, were identified as Human Resource employees and deemed confidential and excluded on that basis.

8. Employee 6 (Secretary II, Part Time - Ann Livingston), although classified, was excluded because she was part-time.

9. All other employees excluded from the "vote entitled" column on Petitioner Exhibit 1 are, according to the petitioners, probationary employees – the SEA contends that as a matter of law these employees must be included for purposes of computing the 30% interest.

10. According to SEA Exhibit B (Lori Hayes Affidavit), the PELRB Executive Director ruled at two pre-election conferences (Case No. S-0415, involving Insurance Department employees and Case No. S-419-1, involving Public Utilities Commission employees) that probationary employees would be counted when computing the 30% interest.

11. The two pre-election conferences were not recorded proceedings, and no one submitted a written request for a ruling concerning probationary employees, and the Executive Director did not issue a written ruling concerning probationary employees.

12. A review of the petitions, objections and exceptions, and orders leading up to the pre-election conferences in Case No. S-0415 and S-419-1 show that the determination of whether the 30% interest requirement had been satisfied did not depend on whether probationary employees were included when the 30% computation was done – both matters proceeded to election.

13. The Hayes affidavit does not mention that subsequent to these two pre-election conferences and before the October 16, 2006 hearing, the PELRB Executive Director further discussed with Lori Hayes, attorney Krupski, and others, the issue of counting probationary employees for purposes of computing the 30% interest.

14. At the hearing, the Hearing Officer specifically asked whether such further communications with the PELRB Executive Director had occurred and attorney Krupski and Lori Hayes acknowledged that they had, but that in substance they did not understand that the Executive Director was changing his view as it was expressed during the pre-election conferences.

15. The petitioners were not present at the Insurance Department and Public Utilities Commission pre-election conferences – the petitioners objected to the Hayes affidavit because of late disclosure and because there is no written order by the PELRB Executive Director on the subject.

16. The PELRB Executive Director was not present on the day of the hearing so there was no opportunity to provide him with the opportunity to address his communications with Lori Hayes and attorney Krupski concerning probationary

employees and the 30% requirement – the record was specifically left open on this issue because of this circumstance.

17. Tim McCabe (employee 44 on Petitioner Exhibit 1) was a DOL employee as of September 15, 2006 (the date the certification petition was filed) but his employment at DOL ended on September 21, 2006.

DECISION AND ORDER

Jurisdiction

The PELRB has jurisdiction over decertification petitions involving public employers, public employees, and employee organizations pursuant to the general provisions of RSA 273-A and the specific provisions of Pub 301.03.

Discussion

Pub 301.01 (f) provides that "[a] petition filed under this section shall also contain a statement that at least 30% of the employees in the proposed bargaining unit wish to be represented by the employee organization named in the petition." In the case of decertification proceedings commenced under Pub 301.03, the PELRB has interpreted Pub 301.01 (f) to require a decertification petition to show that at least 30% of the employees in the bargaining unit at issue no longer wish to be represented by the incumbent exclusive representative. The PELRB is charged with determining whether this requirement has been satisfied based upon the PELRB's review of the confidential decertification cards. This general requirement and process is not disputed in this case, but there is a dispute as to the meaning of the word "employees" as it is used in Pub 301.01 (f). The SEA contends that the word "employees" includes unfilled positions and probationary employees and the petitioners argue to the contrary.

With respect to"unfilled positions," it is noted that there do not appear to be any "unfilled positions" involved in this proceeding (see Petition for Decertification and Petitioner Exhibit 1) with the possible exception of the position previously occupied by Tim McCabe. The SEA's argument that "unfilled positions" should be considered "employees" for purposes of Pub 301.01 (f) is not persuasive. The words "employee" and "unfilled position" are not interchangeable and are not commonly understood to mean the same thing. The word "employee" connotes a known individual actively filling an identifiable position. The phrase "unfilled position" suggests the presence of a position but the absence of a known individual. This difference is manifested in a number of ways, including the fact that an employee can sign a decertification card and vote in an election - an unfilled position can do neither. Consider the circumstance of a bargaining unit with 45 unfilled positions out of a total of 60. Under the SEA's theory, the 15 known individual employees could never establish the requisite 30% interest, despite the fact that they are in complete agreement as to their wish to no longer be represented by the incumbent exclusive representative. This seems a nonsensical and illogical result which has the practical effect of insulating an incumbent exclusive representative from any challenge through the election process.

The SEA cites PELRB Decision No. 1999-120 (involving the SEA and the Town of Ashland) to support its argument. In that case the Town of Ashland argued it had no obligation to bargain once the number of employees in the certified bargaining unit dropped below 10 despite the fact that the PELRB had duly certified the SEA as exclusive representative following a certification election. The PELRB rejected this argument and stated that:

> "we take a 'snapshot' of the status of the bargaining unit as of the time it is organized and recognized, whether by mutual agreement or by decision. If this 'snapshot' passes the 'rule of ten' test, then the obligation to bargain attaches; to hold otherwise would make that obligation an unacceptable 'moving target.'"

The PELRB did not count "unfilled positions" as employees in the Town of Ashland case, nor did the PELRB otherwise authorize the counting of unfilled positions when determining whether the 30% interest requirement has been satisfied.

The SEA also contends that probationary employees should be considered "employees" under Pub 301.01 (f) and counted when computing the 30% interest. The SEA relies on RSA 273-A:8, the dissenting opinion in Appeal of International Brotherhood of Police Officers, 148 N.H. 194 (2002), and the affidavit of Lori Hayes (SEA Exhibit B)(claiming that the PELRB Executive Director has established that probationary employees should be counted when addressing the 30% interest question).

Neither RSA 273-A nor PELRB rules require the inclusion of probationary employees when computing whether the 30% interest requirement has been met. RSA 273-A:1, IX (a) defines public employee, and specifically provides:

> "'Public employee' means any person employed by a public employer except:
>
> (a) Persons elected by popular vote;
> (b) Persons appointed to the office by the chief executive or legislative body of the public employer;
> (c) Persons whose duties imply a confidential relationship to the public employer; or
> (d) Persons in a probationary or temporary status, or employed seasonally, irregularly or on call. For the purposes of this chapter, however, no employee shall be determined to be in a probationary status who shall have been employed for more than 12 months or who has an individual contract with his employer, nor shall any employee be determined to be in a temporary status solely by reason of the source of funding of the position in which he is employed."

These statutory provisions establish that probationary employees are not considered public employees for purposes of the statute, an understanding of the statute that is in accord with the decision in Appeal of Town of Conway, 121 N.H. 372 (1981)("Because the statute specifically excludes probationary employees from the definition of 'public employee,' the board erred in including probationary employees in the bargaining unit for the purpose of determining whether the requisite number of employees existed.")

Today there are, however, two recognized exceptions to RSA 273-A:1, IX's exclusion of probationary employees from the definition of public employee. The first is set forth in RSA 273-A:8, I (d), and reflects amendments to the statute in 1983 following the decision in Appeal of Town of Conway. This portion of the statute addresses determination of bargaining units. Sub-section (d) provides:

> "In no case shall the board certify a bargaining unit of less than 10 employees with the same community of interest. *For purposes of this section, probationary employees shall be counted to satisfy the 10 employee minimum requirement.*" (emphasis added)

This statutory language only authorizes the counting of probationary employees to meet the 10 employee minimum requirement. The amended statute also contains limiting language ("for purposes of this section") which is inconsistent with the treatment of probationary employees as public employees for all purposes as urged by the SEA.

The only other established exception to the rule that probationary employees are not public employees is set forth in Appeal of International Brotherhood of Police Officers, 148 N.H. 194 (2002), and the SEA cites to the dissenting opinion in support of its argument. This case involves RSA 273-A:5, I (c), the portion of the statute which defines unfair labor practices, and whether probationary employees are protected under this statutory provision. It did not involve the term "employees" as used under Pub 301.01 (f), nor did it involve the 30% interest issue. The court ruled that probationary employees are covered by the prohibition against discrimination in hiring set forth in RSA 273-A:5, I (c):

> "[u]sually, a person applying to be hired by a public employer will not already be a 'public employee.' Therefore, we conclude that the legislature intended to prohibit a public employer from refusing to hire an applicant on account of the applicant's views or activities, despite the fact that an applicant is not a 'public employee.' Thus, the prohibition in RSA 273-A:5, I (c) extends beyond discrimination by a public employer against 'public employees.' We hold that subsection I (c) prohibits discrimination against probationary employees as well."

Id. at 195-96(citations omitted)

The limited ruling in Appeal of International Brotherhood of Police Officers does not apply to this case. Nothing in the decision requires that probationary employees should be treated as public employees under Pub 301.01 (f) for purposes of computing whether the 30% requirement has been satisfied. It is very clearly limited to the specific provisions of RSA 273-A:5. The dissenting opinion only states, with reference to the 1983 amendment to RSA 273-A:8, I, that the amendment "clarified that while the positions of probationary employees could be counted for purposes of certifying a bargaining unit, probationary employees could not vote in any certification election." Appeal of International Brotherhood of Police Officers at 10-11 (dissenting opinion). The reference to the 1983 amendment is nothing more than a reference to the statutory change - which only provided that probationary employees could be counted to meet the 10 employee minimum, as already discussed.

The SEA also claims that the "PELRB has already ruled" that probationary employees should be counted (when determining whether the 30% interest showing has been met), but may not vote. The SEA specifically developed this argument in its motion to dismiss, filed on October 9, 2006:

> "[t]he PELRB has already ruled in both New Hampshire Insurance Department and State Employees Association of NH, SEIU Local 1984, Case No. S-0415-1, and New Hampshire Public Utilities Commission and State Employees Association of NH, SEIU Local 1984, Case No. S-041901, that probationary employees are included for purposes of determining the number of employees in a bargaining unit, but are not entitled to vote in said election. RSA 273-A:8, II."

The PELRB decisions which authorized the conduct of decertification elections with respect to New Hampshire Insurance Department and Public Utilities Commission employees are contained in Decision No. 2006-156 and 2006-159, respectively. Neither of these decisions states that probationary employees are to be treated as "employees" under Pub 301.01 (f) or should be counted when assessing whether the Pub 301.01 (f) 30% interest requirement has been met.

The Lori Hayes affidavit (SEA Exhibit 2) does not alter the analysis. The PELRB Executive Director did not issue a written ruling on the question nor did he issue an oral ruling during the course of a recorded hearing. The petitioners were not present at the time of the Executive Director's statements which were made in the context of pre-election conferences involving employees from the Insurance Department and the Public Utilities Commission on two different dates. The question was not a relevant issue in the Insurance Department or Public Utilities Commission proceedings since the Executive Director's statements had no impact on whether the Insurance Department and Public Utilities Commission employees could proceed to a decertification election. Hence there was no incentive for the parties opposing the SEA at those pre-election conferences to participate in discussions about the question and in fact there is no evidence that they were even made aware of Ms. Hayes' question or Director Mitchell's response and provided with any opportunity to respond. All these circumstances alone are enough to justify giving the Hayes affidavit little or no weight.

There are also additional reasons why the Hayes affidavit will not be treated as persuasive or controlling authority on the subject. It became evident at the October 16, 2006 hearing in this case (although not reflected in the October 16, 2006 Hayes affidavit) that Executive Director Mitchell had revisited the question with Ms. Hayes and attorney Krupski (and others) on account of the SEA motion to dismiss. At hearing it was apparent that perhaps the Executive Director had modified his earlier statements to Ms. Hayes, and the record was left open because the Executive Director, absent at the time of hearing, might be able to address the question upon his return. In fact, the Executive Director has issued a letter on the subject to Lori Hayes, Esq., John S. Krupski, Esq., and Gregory Bueddeman (representative of petitioners at the October 16, 2006 hearing) with a copy to the PELRB case files dated October 17, 2006. This letter makes clear that the Executive Director believed his prior statements made at the pre-election conferences were incorrect and he had so informed Ms. Hayes and attorney Krupski by

no later than October 13, 2006. This letter is contained in the petition for decertification file in this case and shall be considered a part of the record. The record is otherwise closed.

Accordingly, probationary employees will not be counted for purposes of the 30% interest question, nor are they eligible to sign decertification cards or vote at election. The same is true with respect to unfilled positions. It is unnecessary to address any other issue raised by the SEA in this case, because the Petitioners do not satisfy the Pub 301.01 (f) 30% threshold based upon these rulings. Pub 301.01 (j) permits the filing of cards which repudiate a previously signed petition card, and two such cards were received in this matter. Additionally, it has been determined that some cards were signed by probationary employees, and consistent with this order those cards do not count. The Petitioners' failure to satisfy the 30% requirement is true regardless of whether the Petitioners' original employee list is used as submitted (subject only to the above ruling concerning unfilled positions and probationary employees) or whether Petitioners' updated list contained in Petitioners' Exhibit 1 is used as submitted and defended at hearing (again, subject only to the above ruling concerning unfilled positions and probationary employees).

The petition for decertification is dismissed.

So Ordered.

Douglas L. Ingersoll, Esq.
Hearing Officer

Date Issued: October 19, 2006

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