

4. SEA's Objection to Orders of Election and to the Conduct of Pre Election Conference, filed with the PELRB on November 9, 2007;
5. The previous filings in this matter, including the Hearing Officer's Decision (PELRB Decision No. 2007-153), dated October 25, 2007, including all findings of fact and legal conclusions, and the subsequent Hearing Officer's Amended Decision (PELRB Decision No. 2007-157), dated November 1, 2007;
6. The Order of Election issued October 30, 2007;
7. The Order of Election (Corrected) issued November 1, 2007;
8. The Notice of Pre Election Conference issued November 1, 2007;
9. The PELRB November 9, 2007 email to Commissioner Wrenn and counsel re: employee home address information; and
10. The parties' submissions in this matter.

The SEA's Request for Review of Decision of Hearing Officer was filed under Pub 205.01, which provides as follows:

Pub 205.01 Review of a Decision of Hearing Officer.

- (a) Any party to a hearing or another person with an interest affected by the hearing officer's decision may file with the board a request for review of the decision of the hearing officer within 30 days of the filing of that decision and review shall be granted. The request shall set out a clear and concise statement of the grounds for review.
- (b) The board shall review the case record and the decision. The review of the board shall result in approval, reversal or modification of the decision.
- (c) The review shall be made administratively without a hearing de novo unless the grounds for review include mistake in material fact, in which case, a hearing shall be scheduled.
- (d) Absent a request for review, the decision of the hearing officer shall become final in 30 days.
- (e) The request for review of the hearing officer's decision shall precede, but shall not replace, the motion for rehearing of the board's decision pursuant to Pub 205.02 and RSA 541-A:5.

Under Pub 205.01, the board's review "shall be made administratively without a hearing de novo unless the grounds for review include mistake in material fact, in which case, a hearing shall be scheduled." Even though this is a request for review under Pub 205.01, the SEA asserts it is entitled to a hearing on its request for review under Pub 201.06.

Pub 201.06 relates to the review of reports by a hearing examiner, not a hearing officer decision. Under Pub 205.01 (d), hearing officer decisions become final without any action by the board in the absence of a timely request for a Pub 205.01 review. There is no corresponding rule with respect to a report from a hearing examiner. Additionally, Pub 201.06 is placed with other rules primarily concerned with unfair labor practice adjudicatory hearings, and not with Pub 205.01 and 205.02, which relate to necessary final steps before a party may appeal by petition to the supreme court pursuant to RSA 541:6. There are no express cross references between Pub 205.01 and Pub 201.06. Accordingly, the board's interpretation of its rules is that Pub 205.01 (c) controls the board's review procedures of hearing officer decisions, including whether a hearing is required in connection with such a review, and not Pub 201.06.

The SEA also claims that it is entitled to a hearing because the hearing officer decision contains a "mistake of fact." This portion of the SEA's argument relates to the agreement reached at hearing between the State as public employer and the petitioner ("NEPBA") that the position of "major" would be excluded from the supervisors' bargaining unit. However, the hearing officer's first decision did not reflect this agreement in the description of the supervisors' bargaining unit. The hearing officer subsequently corrected this oversight in his amended decision. It appears that if anyone should complain about these circumstances it is the State and the NEPBA, not the SEA, since the SEA did not litigate or contest the bargaining unit composition in these proceedings. In any event, the board views this event as ministerial in nature, and not a mistake in material fact which requires a de novo hearing. The amended decision properly rectified the situation and no further action by the board is required.

The SEA also argues that the board should conduct a hearing de novo because of the subject matter of the hearing officer's decision. The board disagrees. In this case, 24 of the 25 Findings of Fact contained in Decision No. 2007-153 and 2007-157 are the result of a stipulation between the SEA and the NEPBA. Finding of Fact 25 documents the State's participation in this proceeding and the State/NEPBA agreement as to bargaining unit composition matters. Both parties filed pleadings and briefs addressing in detail their respective positions. The record reflects that the only testimony at hearing was provided by Gary Smith, the president of the SEA. Mr. Smith was examined by NEPBA's counsel concerning ratification procedures. He was not questioned by counsel for the SEA or the State. The board understands the factual circumstances of this case and the relevant legal issues. Upon due consideration of the SEA's points and the hearing officer's decisions, the board concludes that a de novo hearing is neither necessary nor required.

In its Objections to Order of Election and Conduct of Pre Election conference, the SEA complains that election activities, such as the executive director's issuance of an order of election¹ and his scheduling² of a pre election conference for November 20, 2007, cannot take place per Pub 204.01 pending the board's ruling on the SEA's Pub 205.01 request for review of decision of hearing officer. The board believes these objections are mooted by the issuance of this order.

Additionally, the board notes that elections can and do eliminate possible legal disputes. See *New Hampshire Department of Revenue Administration v. Public Employee Labor Relations Board & The State Employees Association of New Hampshire, Inc.*, 117 N.H. 976, 979 (1977). Pub 302.04 specifically provides that "[o]rders of election shall not be final orders of the board subject to appeal until after the election is conducted and the results are certified because grounds for appeal might become moot consequential to the election results." There is no language in Pub 205.01 which prohibits election activity for any period of time following a hearing officer decision.

¹ The order of election is an administrative 1 page document reiterating the hearing officer's order that elections be held. The order of election does not establish an election date.

² Agency staff notifies the parties of the date on which a pre election conference will be held.

The board notes that there is another consideration at play in considering the SEA's argument that election proceedings involving hearing officer decisions must be suspended for at least 30 days. This consideration relates to the processing of election petitions filed in the 210-150 day time period prior to the employer's budget submission date in the year the agreement expires per Pub 301.01. RSA 273-A:11, I (b) states that elections on such petitions 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." This establishes a relatively short period of time, barely more than 30 days in some cases, within which any necessary hearings can be conducted and approved elections held. At times there is an interval of 45 to 60 days between the time a petition is filed and the issuance of a hearing officer decision approving a matter for election.

The SEA's interpretation of the board's rules, which would suspend election proceedings involving hearing officer decisions for at least 30 days, would seriously impair the board's ability to conduct elections within specified time frames and in fact would likely result in no elections in a not insignificant number of cases. The board endeavors to interpret its rules in a more harmonious manner, one which takes into consideration all rules and statutory provisions relating to the election process. Further, the SEA is familiar with the board's interpretation that election proceedings are not suspended following the issuance of hearing officer decisions by virtue of the SEA's participation in contested election proceedings approximately one year ago. Those cases also involved the NEPBA, and elections were conducted *before* the SEA submitted its filings under Pub 205.01 and 205.02. See PELRB Case No.s P-0787 and P-0788 (affirmed by the Supreme Court on November 14, 2007, Case No. 2007-0114) and PELRB Case No.s S-0431 and S-0432 (pending appeal at the Supreme Court, Case No. 2007-0112 [SEA appeal issue is board conduct of election approximately 10 days after election deadline set by RSA 273-A:11, I (b)]).

Further, Pub 204.01 only requires that the board delay acting on a recommendation of a hearing officer if this is a "case where the decision of the hearing officer is required to be filed with the board." Nothing in RSA 273-A or board rules require that the hearing officer's decision in this case be formally "filed with the board" for action. The board finds that the kind of decisions which are required to be filed with the board are those rendered pursuant to the process set forth in RSA 541-A:34. Under RSA 541-A:34, such decisions are known as "*proposed*" decisions, and board "action" is required to render a final decision. This is in contrast to the hearing officer decision in this case, which does not require any board action to become final. See Pub 205.01 (d).

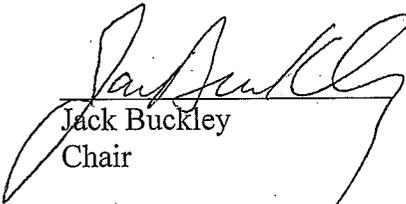
The SEA's complaints concerning the content of the Order of Election were addressed by the PELRB staff via a November 9, 2007 email to Commissioner Wrenn and all counsel, stating that:

In accordance with Pub 303.01 and the New Hampshire Supreme Court decision in Appeal of State Employees' Association of New Hampshire, Inc. dated November 9, 2007, upon receiving the order for election, the public employer is required to provide to all parties who will appear on the ballot (the NEPBA and the SEA) a complete list of the names and home addresses of the employees in the bargaining unit determined by the board.

Accordingly, upon review, the board upholds and approves the decisions of the hearing officer and denies and overrules the SEA's Objections to the Orders of Election and Conduct of Pre Election Conference.

It is so ordered.

Signed this 19TH day of November, 2007.



Jack Buckley
Chair

By unanimous decision. Chair Jack Buckley. Member E. Vincent Hall and Member James M. O'Mara Jr. present and voting.

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