



proceeding to election. Alternatively, the SEA argues that the hearing officer's decision and the analysis contained therein should only apply in future cases, and not to these pending proceedings.

The NEPBA election petitions were filed on July 9, 2007 and the collective bargaining agreement between the State and the SEA was executed on July 19, 2007. At the September 12, 2007 hearing, and in their hearing briefs, both parties concentrated on the status of the disputed collective bargaining agreement as of the date the NEPBA petitions were filed. In its previously filed Request for Review of Decision of Hearing Officer submitted under Pub 205.01, the SEA described the issue in this case as follows:

RSA 273-A:11 provides, in pertinent part, that the SEA has "the right to represent [these] bargaining unit[s] exclusively and without challenge during the term of the collective bargaining agreement." Thus, the single factual issue at play here is whether a collective bargaining agreement was in place on July 9, 2007. The evidence overwhelmingly shows that a binding contract existed before that date.

See November 1, 2007 SEA Request for Review of Decision of Hearing Officer at 3-4. The present motion for rehearing is the first time the SEA has claimed that the NEPBA petitions are barred by a contract executed after the filing of the petitions.

RSA 273-A:11, (b) confers upon the SEA the "right to represent the bargaining unit exclusively and without challenge during the term of the collective bargaining agreement." Pub 301.01 (a) states that:

"A petition for certification as the exclusive representative of a bargaining unit for which a collective bargaining agreement constituting a bar to election under RSA 273-A:11, I (b) presently exists shall be filed no more than 210 days and no less than 150 days prior to the budget submission date of the affected public employer in the year that agreement expires, notwithstanding any provisions in the agreement for extensions or renewal."

The SEA relies upon the recent New Hampshire Supreme Court decision in *Appeal of State Employees' Association of New Hampshire*, No. 2007-112 (December 6, 2007 slip opinion)(the court's "Fish and Game" decision) to support its argument that a subsequently executed contract bars the NEPBA election petitions. The court decision in the Fish and Game case related to the timing of an election during the time period *prior to* the expiration of an undisputed 2005-2007 collective bargaining agreement involving employees. Like the Fish and Game employees, the involved Department of Corrections' employees have never had an election under RSA 273-A.<sup>1</sup> However, the Fish and Game case did not involve the issue presented in this case, which is whether the NEPBA petitions seeking elections were barred

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<sup>1</sup> The Department of Corrections' bargaining units have their genesis in a December 7, 1976 Recognition of an Exclusive Representative issued to the SEA in Case No. S-0317 under the Laws 1975, Chapter 490:3 (which established RSA 273-A) and *State Employees Ass'n v. N.H. Pub. Employee Labor Relations Bd.*, 116 N.H. 653 (1976).

when they were filed by a collective bargaining agreement pursuant to RSA 273-A:11 (b) and Pub 301.01 (a).

In the Fish and Game case the New Hampshire Supreme Court affirmed the board's order relating to the conduct of an election involving law enforcement personnel of the Fish and Game department in the fall of 2006. The court specifically held that on the facts of the case the board properly applied an earlier New Hampshire Supreme Court decision, *State Employees' Assoc. v. Cheney*, 119 N.H. 822 (1979), when it scheduled and conducted the October 27, 2006 election. The court did not find that the board had "failed to follow the explicit rules set forth by RSA 273-A:11, (b)" as suggested by the SEA in its motion. That quotation relates to a board decision dating to 1979 which was upheld upon review by the New Hampshire Supreme Court at that time. See *State Employees' Assoc. v. Cheney*, 119 N.H. 822 (1979). The court in the Fish and Game decision stated as follows:

SEA principally argues that *Cheney* is "easily distinguishable" from the case at hand. We disagree, and find that the facts of this case parallel the legally significant facts in *Cheney*. Both cases involved timely petitions to change the composition of a bargaining unit and the certified representative of that unit. Due to "[d]ifficulties in arranging for hearings," *id.* At 825 (quotation omitted), neither set of petitions could proceed to representation elections until the deadline established by the contract bar rule had passed. Furthermore, in both cases the employees in the proposed bargaining units had never elected the union actually representing them. On such facts, we were satisfied in *Cheney* that the PELRB's scheduling of an election for just under 120 days prior to budget submission was proper; we cannot say that the PELRB's reliance upon that case here was either erroneous or unreasonable. Accordingly, we affirm the board's order.

See *Appeal of State Employees' Association of New Hampshire*, No. 2007-112 (December 6, 2007 slip opinion). The board believes the SEA's current argument concerning the significance of a subsequently executed collective bargaining agreement was available to it as of the September 12, 2007 hearing, and certainly as of November 1, 2007, the date of the SEA's Request for Review of Decision of Hearing Officer. This argument does not depend upon nor arise from the court's December 6, 2007 Fish and Game decision, as that decision has no specific application to the circumstances of this case.<sup>2</sup>

The board also concludes that the SEA's reliance upon a subsequently executed collective bargaining agreement is otherwise without merit. The more helpful authorities on this question are discussed at length in the hearing officer's decision. The board finds the hearing officer's citation to the National Labor Relations Board decision in *Appalachian Shale Products Co.* 121 N.L.R.B. 1160 (1958) to be particularly instructive:

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<sup>2</sup> The fact that the SEA is claiming for the first time in its motion for rehearing that a subsequently executed collective bargaining agreement is sufficient to bar the NEPBA election petitions is enough to justify denial of this portion of the SEA's motion for rehearing; however, the board will nevertheless consider the claim on its merits. *In re Appeal of Working on Waste*, 133 N.H. 312 (1990).

The Board has been reexamining its contract bar rules with a view toward simplifying and clarifying their application wherever feasible in the interest of more expeditious disposition of representation cases and of achieving a finer balance between the statutory policies of stability in labor relations and the exercise of free choice in the selection or change or bargaining representatives...

It is well established that oral agreements cannot serve as a bar. *It is equally well established that contracts not signed before the filing of a petition cannot serve as a bar.* These rules are simple, easily understood, and require no change. In the application of the second of these rules, however, a problem has arisen that merits reconsideration. Thus, although a contract is signed by the parties after the filing of a petition, it has been held to be a bar where the parties considered the agreement properly concluded and put into effect some of its important provisions. The Board has reexamined its prior decisions in this respect and has concluded that the effectiveness of its contract bar policies can best be served by eliminating this exception to the rule that a contract not signed before the filing of a petition cannot serve as a bar...to constitute a bar a contract must be signed by all the parties before a petition is filed and that unless a contract signed by all the parties precedes a petition, it will not bar a petition even though the parties consider it properly concluded and put into effect some or all of its provisions.

*Appalachian Shale Products Co.*, 121 N.L.R.B. 1160, 1162-63 (1958)(citations omitted)(emphasis added). It is important to note that the manner in which contract bar has been applied by the National Labor Relations Board in the private sector is neither unique nor an aberration in collective bargaining law. Maine, Vermont, and Massachusetts all apply contract bar in the same manner in the context of public sector collective bargaining. See Hearing Officer Decision, PELRB No. 2007-153 at 9.

The board concludes that the hearing officer has applied contract bar in accordance with the provisions of RSA 273-A:11 (b) and Pub 301.01 (a). In effect the hearing officer determined that the NEPBA challenges were not filed during the term of a presently existing collective bargaining agreement. Accordingly, the restrictions imposed by RSA 273-A:11 (b) and reflected in Pub 301.01 (a) do not apply in this case. The board also observes that the consequences of allowing subsequently executed contracts to bar election petitions would lead to undesirable disruption and uncertainty in labor relations. Participants to election proceedings in cases such as this typically include this agency, public employees and employers, as well as employee organizations. A considerable amount of time, effort, and resources are involved in processing election petitions and conducting election proceedings. The parties to election proceedings in cases like this would be compelled to proceed knowing the entire process could be upset and set aside at any moment in the event an incumbent and public employer executed a successor collective bargaining agreement. The SEA's argument would allow for the disruption and cessation of such election proceedings at any time, presumably up to and possibly during the balloting and tallying process. This would result in an obvious waste of time and resources. It could also have a chilling effect on the willingness of employees to exercise their right to seek an election to determine their representative, if any. Neither of these are desirable circumstances, nor does it appear that they are conditions imposed, albeit as an unintended consequence, by the applicable law.

The SEA's other argument in its motion for rehearing is that the hearing officer's analysis and application of contract bar under RSA 273-A:11 (b) should not apply in this case. As support, the SEA suggests that to do so would upset 30 years of established practice in the formation of binding collective bargaining agreements. However, the analysis employed in the hearing officer's decision does not represent a departure from any established board or court decisions concerning the application of contract bar in cases such as this. Further, it is consistent with how contract bar has been interpreted, understood, and applied in the private sector for nearly 50 years by the National Labor Relations Board and in the public sector for up to 20 years and longer in the public sector in Vermont, Maine, and Massachusetts. The board finds the hearing officer properly determined whether the involved Department of Corrections officers are entitled to an election in the present cases, and the board cannot identify any legitimate reason why those elections should not proceed.<sup>3</sup>

Finally, in its request for relief, the SEA asks that "the Board not conduct any elections in this case until this case is considered by the New Hampshire Supreme Court." However, the New Hampshire Supreme Court has previously made clear that any such appeal is premature until after the completion of the election. 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). The board's rules are to the same effect, as 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."

The pre-election conference, conducted over a 2 day period on November 20 and December 7, 2007, is complete. Accordingly, the elections now scheduled for January 15 and 17, 2008 shall proceed. The SEA's Motion for Rehearing is denied.

It is so ordered.

Signed this 14th day of December, 2007.

/s/ Jack Buckley

Jack Buckley  
Chairman

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

<sup>3</sup> Even if the board were to agree with the SEA and find that the hearing officer's decision should not apply to these cases, such a ruling would not necessarily mean that there will be no elections. The SEA's assertions in its November 1, 2007 Request for Review of Decision of Hearing Officer that in effect the hearing officer made a determination that the SEA otherwise proved that the NEPBA election petitions had been filed during the term of a presently existing collective bargaining agreement are not supported by the hearing officer's decision. The hearing officer's decision also reflects that the NEPBA did not concede the issue. Therefore, the hearing officer would still have to determine this issue on the basis of the evidence submitted at the September 12, 2007 hearing.

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