



State of New Hampshire
Public Employee Labor Relations Board

Hudson School District

and

AFSCME Council 93, Local 1906, AFL-CIO

Case No. E-0152-4
Decision No. 2024-054

Order

The District filed a motion for review of hearing officer Decision 2024-009, which dismissed the District's request to remove the school counselor position from a Hudson School District bargaining unit (bargaining unit) established in 1993 and represented by AFSCME Council 93, Local 1906, AFL-CIO (Union). N.H. Admin. Rules, Pub 205.01, Review of a Decision of Hearing Officer, provides as follows:

(a) Any party to a hearing or intervenor 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 issuance of that decision and review shall be granted. The request shall set out a clear and concise statement of the grounds for review and shall include citation to the specific statutory provision, rule, or other authority allegedly misapplied by the hearing officer or specific findings of fact allegedly unsupported by the record.

(b) The board shall review whether the hearing officer has misapplied the applicable law or rule or made findings of material fact that are unsupported by the record and the board's review shall result in approval, denial, or modification of the decision of the hearing officer. The board's review shall be made administratively based upon the hearing officer's findings of fact and decision and the filings in the case and without a hearing or a hearing de novo unless the board finds that the party requesting review has demonstrated a substantial likelihood that the hearing officer decision is based upon erroneous findings of material fact or error of law or rule and a hearing is necessary in order for the board to determine whether it shall approve, deny, or modify the hearing officer decision or a de novo hearing is necessary because the board concludes that it

cannot adequately address the request for review with an order of approval, denial, or modification of the hearing officer decision. All findings of fact contained in hearing officer decisions shall be presumptively reasonable and lawful, and the board shall not consider requests for review based upon objections to hearing officer findings of fact unless such requests for review are supported by a complete transcript of the proceedings conducted by the hearing officer prepared by a duly certified stenographic reporter.

(c) Absent a request for review, the decision of the hearing officer shall become final in 30 days.

(d) The request for review of the hearing officer's decision shall precede, but shall not replace, a motion for rehearing of the board's decision pursuant to Pub 205.02 and RSA 541-A:5.

The rule applicable to modification proceedings provides, in relevant part, as follows:

Pub 302.05 Modification of Bargaining Units.

(a) Where the circumstances surrounding the formation of an existing bargaining unit are alleged to have changed, or where a prior unit recognized under the provisions of RSA 273-A:1 is alleged to be incorrect to the degree of warranting modification in the composition of the bargaining unit, the public employer, or the exclusive representative, or other employee organization if the provisions of section (d) are met, may complete and file Form P-4 "Petition for Modification," dated 9-15-16.

(b) A petition shall be denied if:

(1) The question is a matter amenable to settlement through the election process; or

(2) The petition attempts to modify the composition of a bargaining unit negotiated by the parties and the circumstances alleged to have changed, actually changed prior to negotiations on the collective bargaining agreement presently in force.

In this case, as the District notes in its motion for review, the District claimed the bargaining unit is "a prior unit recognized under the provisions of RSA 273-A:1...[that is] incorrect to the degree of warranting modification in the composition of the bargaining unit prior unit language." The hearing officer correctly determined that the "prior unit" language in the rule means one which is "grandfathered" because it was in existence at the time RSA 273-A became law in 1975. The law's "grandfather clause" is reviewed in *State Employees Association of New Hampshire, Inc. v. New Hampshire Public Employee Labor Relations Board*, 116 N.H. 653

(1976)(“Laws 1975, 490:3 provided that 'Nothing in this chapter shall terminate or modify a bargaining unit, certification of an exclusive representative, or collective bargaining agreement in existence on the effective date of this chapter.)¹ Because the bargaining unit in this case did not exist at the time the law became effective in 1975, it is not covered by the rule’s “ prior unit” language.

We have reviewed relevant Pub 302.05 (a) rulemaking history to confirm that our understanding is correct. The 1983 version of Pub 302.05 (a) provided, in relevant part, as follows:

Where the circumstances surrounding the formation of an existing bargaining unit are alleged to have changed, or where a prior unit recognized under the provisions of Chapter 490:3 of the laws of 1975 is alleged to be incorrect so as to sufficiently warrant modification in the composition of the bargaining unit, the public employer...(emphasis added).

During rulemaking in 1992-93, the PELRB accepted the Joint Legislative Committee on Administrative Rules (JLCAR) Objection 48: *Pub 302.05 (b) Renumber with sections (a) through (d). Change “Chapter 490:3 of the laws of 1975” to “RSA 273-A:1” in the first sentence...*² After substituting the “RSA” cite for the “Laws 1975 Chapter 490:3” cite,³ sub-section (a) of the rule adopted July 13, 1993, states:

(a) Where the circumstances surrounding the formation of an existing bargaining unit are alleged to have changed, or where a prior unit recognized under the provisions of RSA 273-A:1 is alleged to be incorrect to the degree of warranting modification in the composition of the bargaining unit...(emphasis added).

¹ As amended by 1977, 437:4, eff. Sept. 3, 1977, “Nothing in this chapter shall terminate or modify prior to August 23, 1978, a bargaining unit, certification of an exclusive representative, or collective bargaining agreement in existence on the effective date of this chapter [Dec. 21, 1975].”

² See Appendix A to this order.

³ Laws 1975, ch. 490 established RSA ch. 273-A. *State Employees Association of New Hampshire, Inc. v. New Hampshire Public Employee Labor Relations Board*, 116 N.H. 653 (1976).

This history clearly shows that “a prior unit” means a grandfathered unit.⁴

In its motion for review, the District has also expressed concern that the hearing officer’s decision means there is no mechanism for removal of school counselors from the bargaining unit. However, the District is still free to pursue a bargaining proposal to this effect during contract negotiations, and the District can also maintain a modification petition in circumstances where there is not a “collective bargaining agreement presently in force” providing the other relevant requirements are met.

In accordance with the foregoing, we approve the hearing officer’s decision and deny the District’s motion.

So ordered.

April 10, 2024

/s/ Andrew B. Eills
Andrew B. Eills, Esq., Chair

By unanimous vote of Chair Andrew Eills, Esq., Board Member Carol M. Granfield, and Board Member Richard J. Laughton, Jr.

Distribution: Peter C. Phillips, Esq.
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⁴ There are still many examples of “prior units” in the inventory of bargaining unit certifications published on the PELRB website which state the “Certification of an Exclusive Representative” is “Under Chapter 490:3, New Hampshire Laws, 1975). See <https://www.nh.gov/pelrb/certifications/index.htm>.

STATE OF NEW HAMPSHIRE

INTER-DEPARTMENT COMMUNICATION

FROM Edward J. Haseltine, Chairman
DATE February 3, 1993
AT (OFFICE) Public Employee Labor Relations Board

SUBJECT Response of the PELRB to the Joint Legislative Committee on Rules, Final Proposal No. 92-182

TO Joint Legislative Committee on Administrative Rules
State House, Room 114, Concord 03301-4951

The Public Employee Labor Relations Board met on January 26, 1993 to consider objections raised by the Joint Legislative Committee on Administrative Rules. As the result of that meeting, the PELRB offers the following:

- 1) PUB 102.01 Agree to delete first sentence and start paragraph with the words, "The board is composed of...."
- 2) PUB 102.01 Agree to renumber sub-d and following sub-paragraphs as PUB 102.09, "Conflicts of Interest" with sub-sections (a), (b) and (c)
- 3) PUB 102.01 (d) Agree to change "must" to "shall."
- 4) PUB 102.01 (unnumbered e) Agree to change "may be pointed in one of several ways" to "may be raised as follows." Note: Alternates would not be used for such purposes because they are only in attendance in situations where their presences is required for a quorum.
- 5) PUB 102.01 (unnumbered f) Add to last sentence "...; however, if a board member shall act as such a witness, that board member shall not participate in deliberations as to the outcome of the matter being heard."
- 6) PUB 102.02, "Filings" Agree to change to become Pub 201.02 with remainder of PUB 201 renumbered to reflect this change in placement.
- 7) PUB 102.02, Agree to change "should" to "shall" as recommended.
- 8) PUB 102.02 (f) PELRB retains discretion of extending time periods by using the word "may" as proposed.
- 9) PUB 102.03 Agree to renumber to become PUB 201.04 with sections following to be renumbered accordingly.
- 10) PUB 102.04 (b) Agree to delete "grandfathering" language dating to 1973.
- 11) PUB 102.05 The PELRB has charged \$1 for copies of RSA 273-A and its rules since those rules were last adopted in 1985 in order to offset the costs of printing and copying. It does not believe changes to this section would be in the best interests of fiscal management or limiting the number of copies being requested by its clientele.
- 12) PUB 102.07 The PELRB believes further changes are unnecessary because all persons requesting transcripts or copies of tapes are affording the opportunity of doing so.

- 13) PUB 102.08 Agree to sub-divide using letters and numerical designations as recommended.
- 14) PUB 103.01 Agree to sub-divide using letters and numerical designations as recommended. Do not agree to strike "may" in last sentence because declaratory judgment actions may involve hypothetical or prospective cases submitted for a determination in order to avoid possible future violations wherein the parties are seeking an answer and have not requested a hearing.
- 15) PUB 103.02 Agree to change "promulgate" to "adopt."
- 16) PUB 103.03 (a) Agree to divide to sub-section (b). Agree to change RSA 541-A:3 I (b) to RSA 541-A:3 (c) to conform to legislative changes. Agree to start last sentence of the paragraph with "If the board determines..."
- 17) PUB 103.03 (b) Agree to change RSA 541-A:4 II to RSA 541-B:3-g to conform to legislative changes.
- 18) PUB 201.01 Retain "may conduct" to be consistent with flexibility found in Chapter 192, Laws of 1992 relative to the manner of reviewing a hearing officer's decision. Designate as 201.01 (a). Add 201.01 (b) to provide, "Petitioning or complaining parties shall ordinarily have the burden of going forward with the case."
- 19) PUB 201.02 (a) Agree to start third sentence with "Said employer shall display...." Agree to change last sentence to read "Copies so mailed..."
- 20) PUB 201.02 (b) Agree to change second sentence to read " All other hearings...."
- 21) PUB 201.02 (c) Retain "may be continued from day to day." Flexibility is required to maintain consistency of PELRB members without the need to restart the case before another panel.
- 22) PUB 201.03 Referral to hearing examiner is a matter of prerogative under Chapter 192, Laws of 1992, to be determined on a case-by-case basis. Agree to change "insure" to "ensure."
- 23) PUB 201.04 Agree that second sentence should read "If no such motion has been made or if such a motion has been denied, the decision shall become final." Retain "may" consistent with statutory language.
- 24) PUB 202.01 Retain "may" as pre-hearings are a matter of prerogative and not of right, depending on the nature and urgency of the case. Agree the last sentence should read, "The hearing examiner may limit the number of parties...."
- 25) PUB 203.01 Change the last sentence to read "Upon request therefor or on his own motion, the hearing examiner shall compel..." Agree the last sentence should read, In all matters pertaining..."
- 26) PUB 203.01 (b) Retain as written as reflective of cases determined by PELRB and RSA 273-A:5 I (d).

- 27) PUB 203.01 (d) Retain "may" because sequestering is discretionary.
- 28) PUB 203.02 Change title to "Rights to Representation, Rules of Evidence." Add to first sentence "...but shall be bound by RSA 541-A:18." Begin second sentence with "All parties shall have the right..." Agree to change "must" to "shall."
- 29) PUB 203.03 Agree to delete "directly and significantly." Retain the remainder in the interest of cost effectiveness in the event the parties submit on brief and waive hearing. They would not be deprived of a hearing without such a waiver.
- 30) PUB 203.04 Same as response to PUB 102.07
- 31) PUB 204.01 Delete "and recommendation" to conform to Section VI, Chapter 12, Laws of 1992.
- 32) PUB 205.01 (b) Agree to delete "directly and significantly, "and recommendation" and "with the board's approval."
- 33) PUB 205.02 (b) Agree to delete "directly and significantly."
- 34) PUB 301.01 (a) is retained for historical purposes to explain why certain certification documents older than 1980 are in the form which they are found.
- 35) PUB 301.02 Agree to expand from sections (a) - (f) inclusive to (a) - (k) inclusive, as recommended.
- 36) PUB 301.02 (a) Change "must be filed no earlier than 210 days and shall be filed no later than..." to " shall be filed no more than 210 days and no less than 150 days..." Change "Any petition filed later than 150 days..." to "Any petition filed less than..." Change "must" and "may" to "shall" where indicated. Change last sentence to read, "The board shall refuse to entertain..."
- 37) PUB 301.02 (b) Change first sentence to read, "The petition under (a) above shall set out:..." End last sentence with "by the affected public employer." thus deleting reference to Section 2.1.
- 38) PUB 301.02 (c) Change "insure" to "ensure." Change "must" and "will" to "shall." Expand to read, "petition cards shall, as a minimum, disclose the purposes for which they were solicited, the name of the labor organization or employee group soliciting same, and bear the signature and typewritten or printed name..." Delete last sentence relating to retroactive application.
- 39) PUB 301.03 Delete "Section 1.2) and replace with "PUB 301.02." Agree to change "must" to "shall."
- 40) PUB 301.04 Change second sentence to read "Upon final determination by the appropriate tribunal that grounds for decertification exist, the board shall conduct a hearing in accordance with RSA 541-A:15 to determine if the certification of the employee organization which is the exclusive representative should be revoked under RSA 273-A:10 VI (b)." Agree to create new section (c) for last two sentences of paragraph.

- 41) PUB 301.04 (c) Agree to renumber (d). Agree to create new last sentence to read, "The public employer shall immediately...."
- 42) PUB 301.05 (a) (1), (2) and (3) Delete "the board is satisfied that" from these sections.
- 43) PUB 301.05 (b) delete "and (b) above" as recommended.
- 44) PUB 301.05 (c) Replace with "In the event an employee organization is dissolved, voluntarily surrenders its certification, loses a certification election, or is decertified, its representation as exclusive representative shall be withdrawn by the board as contemplated by RSA 273-A:10 VI (a).
- 45) PUB 302.01 Change "must" to "shall." Agree to start new sentence with "If the employee organization succeeds in reaching agreement..." Agree to start new sentence with "Agreement between a public employer and...."
- 46) PUB 302.02 Agree to renumber with (a) and (b) and (1) through (4), as recommended. Add to end of last sentence, "...within the meaning of RSA 273-A:1 XI."
- 47) PUB 302.03 Agree to renumber with sections (a) through (d). Change "Pub 301.01" to "Pub 301.02 (k)" in second sentence. Change "Pub 301.01" in fourth sentence to "Pub 301.02." Delete from new section (d) "directly and significantly" so that it reads, "...whose interest may be affected."
- 48) PUB 302.05 Agree to renumber with sections (a) through (d). Change "Chapter 490:3 of the laws of 1975" to "RSA 273-A:1" in the first sentence. Change third sentence to read "...under PUB 301.02 except no showing of interest shall be required..."
- 49) PUB 302.05 (b) Change "shall be entitled to" to "may" and "shall be allowed to" to "may."
- 50) PUB 303.01 (a) Change "Pub 301.01" to "Pub 301.02" in first sentence.
- 51) PUB 303.02 Retain "reasonable" and "unreasonable distance" standards to permit board to consider on a case-by-case basis.
- 52) PUB 303.02 (a) Change "should" to "shall" in second sentence. Delete "make every effort to" in third sentence.
- 53) PUB 303.03 (b) Same comment as # 51 above. Renumber into additional sections (c) and (d) as recommended.
- 54) PUB 303.04 Renumber into sections (a) through (c) and devote parts (1) through (6) to separate lines, as recommended.
- 55) PUB 303.06 The board believes this rule complies with RSA 541-A:2 I (b) because it does describe the contents of the ballot.
- 56) PUB 303.07 (b) Insert "of" after "supervisors" in the second sentence. Add sentence to end of paragraph, "If any or both parties should fail to certify the accuracy of the election results, the board's representative shall enter "Refused to Sign" in the appropriate signature block(s).
- 57) PUB 303.08 (a) Last sentence, change "one" to "1." Retain "make every effort to" because confidentiality cannot be maintained in those circumstances

where there is an appeal of an election based on eligibility and testimony relating to the challenged, and thus identified, voter is to be heard by the board.

- 58) PUB 303.09 (b) Change "must" to "shall." Begin new sentence with "However, any abuse...." as recommended. Delete quotation marks before "only" and after "unit." Change "must" to "shall be required to" and "may" to "shall" in the last sentence.
- 59) PUB 303.09 Renumber as (c) and (d), as recommended. Change "two" to "2." Delete "agreed to by the parties or, failing agreement, determined by the board" in the fourth sentence.
- 60) PUB 303.11 Change "it may order" to "it has directed" in last sentence.
- 61) PUB 304.01 (a) Start second sentence, "Complaints may be filed at any time..." as recommended. Renumber with sections (a) and (b) using items (1) through (8) inclusive, in (b), starting each item with a new line. Renumber sections (c), (d) and (e) as recommended.
- 62) PUB 304.03 Retain "may" as matter of discretion. Begin second sentence, "At the conclusion...." as recommended.
- 63) PUB 304.04 Renumber using (a) and (b) as recommended. Begin third sentence with "The public employer..." The last sentence of new section (a) to begin with "The copies so mailed..."
- 64) PUB 304.05 Retain "in the public interest" since this is statutory prerogative found at RSA 273-A:6 III.
- 65) PUB 305.01 Begin second sentence, "Unless the request..." as recommended.
- 66) PUB 305.02 Begin second sentence, "The parties may...." as recommended.
- 67) PUB 305.03 (a) Change "being" to "begin" as recommended.
- 68) PUB 305.03 (b) Begin last sentence with, "The parties shall notify..." as recommended.
- 69) PUB 305.04 Renumber as (a) and (b). Change first sentence from "by the chairman of both bargaining teams" to "by the chief negotiator of the requesting party(ies)." Devote separate lines to items (1) through (3), inclusive, as recommended. Change "should" to "shall" in last sentence.
- 70) Recommended changes in punctuation are accepted by the PELRB.

This concludes the PELRB's review of the recommended changes. Changes not concurred in by PELRB are intended to remain as set forth in Final Proposal 92-182 dated December 30, 1992.

