This decision was affirmed on appeal per December 6, 2007 Supreme Court order in *Appeal of State Employee's Association of NH, SEIU Local 1984*, Supreme Court Case No. 2007-112.

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

NEPBA, Inc. Local 40 (NH Fish & Game Conservation Officers) and SEA/SEIU Local 1984	*	Case No: S-0431 Decision No. 2006-174
NEPBA, Inc. Local 45 (NH Fish & Game Supervisory Officers) and SEA/SEIU Local 1984	*	Case No: S-0432

APPEARANCES

Representing New England Police Benevolent Association, Inc. Local 50 and 55

Peter J. Perroni, Esq.

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

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BACKGROUND

The New England Police Benevolent Association, Inc. ("NEPBA") filed two petitions seeking certification and/or modification on September 12, 2006. Case No. P-0431 seeks to certify a unit composed of 24 Conservation Officers (the "Conservation Officers' Unit"). Case No. S-0432 seeks to certify a unit composed of 1 Conservation Officer Colonel, 1 Conservation Officer Major, 1 Conservation Officer Captain, 6 Conservation Officer Lieutenants, 1 Conservation Officer Administrative Lieutenant, and 5 Conservation Officer Sergeants (the "Supervisors' Unit")(containing 15 employees). Both certification petitions identify the Public Employer as the State of New Hampshire, Fish and Game Department. The employer did not agree to the proposed units and was provided with copies of the petitions pursuant to the certificate of service.

On September 27, 2006 the State Employees' Association, SEIU Local 1984 (the "SEA"), filed exceptions to the two petitions. The SEA contends that: 1) the petitions do not set forth the requisite 30% showing of interest; 2) the PELRB does not have authority or jurisdiction to conduct an election or pre-election conference in regard to the two petitions pursuant to the provisions of RSA 273-A:10; 3) the petitions fail to recognize that the involved employees are part of an existing unit represented by the SEA; 4) the PELRB should investigate the petitions and hold hearings; 5) the petitions fail to identify the exclusive representative presently representing the bargaining unit contrary to applicable rules; 6) the SEA has not been treated as a party to the two cases and has not received proper notice; 7) the petitions fail to assert reasonable efforts to reach an agreement on the proposed modification with the employer or the SEA; 8) the proposed change in circumstances (an alleged growth in numbers and rank structure) is insufficient; and 9) the proposed Supervisory Unit has less than the required 10 employees.

The undersigned hearing officer conducted a hearing on October 9, 2006 at the PELRB offices in Concord, New Hampshire.

FINDINGS OF FACT

1. The State of New Hampshire, Fish and Game Department ("Fish and Game") is a public employer within the meaning of RSA 273-A: 1,x.

2. The State Employees' Association of New Hampshire, Inc. ("SEA") is an employee organization that represents employees of Fish and Game for purposes of collective bargaining pursuant to RSA 273-A.

3. The SEA is the certified bargaining agent for Fish and Game employees in the bargaining unit pursuant to the Recognition of an Exclusive Representative in Case No. S-307 dated December 7, 1976. Petitioner Exhibit 11.

4. The December 7, 1976 Recognition states that "[a] representation proceeding having been conducted in the above matter by the Public Employee Labor Relations Board...Unit: All classified employees of Fish and Game Department, State of New Hampshire."

5. The parties stipulated that there have not been any modification or certification proceedings at the PELRB concerning the unit described in the December 7, 1976 Recognition (Petitioner Exhibit 11) since its issuance.

6. There was no evidence that the bargaining unit described in the December 7, 1976 Recognition was negotiated either before or after the adoption of RSA 273-A and Pub 302.05. This recognition issued without election, like the one discussed in State Employees' Association v. Cheney, 119 N.H. 822 (1979), as it issued under the Laws 1975, Chapter 490:3 (which established RSA 273-A), and also pursuant to State Employees Ass'n v. N.H. Pub. Employee Labor Relations Bd., 116 N.H. 653 (1976)(the November 9, 1976 decision referenced in Petitioner Exhibit 11).

7. New England Police Benevolent Association, Inc. is an employee organization within the meaning of RSA 273-A.

8. Conservation Officer Colonel Gray is a 28 year employee of Fish and Game and has held the position of Colonel since October, 2002 – the position of Colonel did not exist at the time of the Recognition in 1976, it was established November 20, 2000 pursuant to the information on Petitioner Exhibit 2, and has been treated as part of the unit since that time.

9. The current collective bargaining agreement is Joint Exhibit 1, and covers the period from July 1, 2005 to June 30, 2007.

10. Lee Perry is the Executive Director of Fish and Game.

11. At hearing Executive Director Perry testified that he believed the position of Conservation Officer Colonel is a confidential position because he could be involved in labor negotiations and provided with access to confidential bargaining information.

12. The SEA states it is permissible for the Conservation Officer Colonel position to remain in the existing underlying unit (but not the proposed new supervisors' unit).

13. There was no evidence that the position of Conservation Officer Colonel had ever participated in any aspect of labor negotiations on behalf of management or otherwise ever been provided with any access to confidential management information in connection with labor relations and/or the process of collective bargaining, either with respect to the current collective bargaining agreement (Joint Exhibit 1) or with respect to any earlier collective bargaining agreement.

14. Conservation Officer Colonel Gray does not agree that he is a confidential employee and he and Executive Director Perry have never discussed the question. Nobody has ever addressed with Colonel Gray to any degree the issue of confidential employee status, although he had received a notification from the employee relations supervisor concerning the issue. This notification was somewhat ambiguous, as it advised that division chiefs were determined to be confidential employees who did not have to maintain their status as union members but also that nothing precluded them from maintaining their status as union members.

15. SEA Exhibit B states it is a preliminary draft and that it is not for distribution – there was no evidence that it ever became a final draft or that it was ever approved for distribution and there was no evidence explaining why it was prepared or the reason it was prepared.

16. Petitioner's Exhibit 1 is the organizational chart for the New Hampshire Fish and Game Department, Law Enforcement Division (the division at issue in these proceedings).

17. The employees at issue in the two NEPBA petitions are organized in the nature of a para-military organization with a very specific rank and chain of command structure.

18. The Law Enforcement Division of Fish and Game is unique and distinct in comparison to other Fish and Game employees in a number of ways – for example: a) the involved employees are sworn law enforcement officers within Fish and Game who wear distinct uniforms which are quasi military in appearance and which serves to make their status readily ascertainable to the public and which helps maintain the professional appearance to which they aspire; b) the Law Enforcement Division has a manual (Petitioner Exhibit 10) that is specific to its division; c) the conservation officers all take an oath of office; d) all sworn officers have received comprehensive training, including police academy training; e) although conservation officers work in six different districts throughout the state, they all work under the same work rules and procedures; f) all conservation officers are in Group 2 under the state retirement program while all other employees in Fish and Game are in Group 1; g) the conservation officers have a specific mission, which is to enforce all fishing, hunting, and trapping regulations, address off highway recreational vehicle use, conduct search and rescue operations in the woods and inland waters, perform some marine enforcement, engage and deal with wild life mitigation efforts, and provide public education programs; and h) conservation officers carry a side arm and also carry a 12 gauge shot gun, a rifle, and impact weapons in their vehicles – in contrast, other Fish and Game employees are not issued any weapons.

19. The SEA does not dispute that the position of Conservation Officer Lieutenant belongs in the proposed supervisory unit but does contend that Conservation Officer Sergeants do not qualify as supervisors.

20. Petitioner Exhibit 7 is a written description of the duties and responsibilities of a Conservation Officer Sergeant – pursuant to this description, a Conservation Officer Sergeant: a) supervises the work of the Conservation Officers within a geographic area and during search and rescue operations or in the absence of the Conservation Officer Lieutenant; b) supervises and coordinates training objectives and enforcement operations for an assigned geographic area; and c) reviews work methods and procedures.

21. Also pursuant to Petitioner Exhibit 7, the Conservation Officer Sergeant position requires direct supervision of other employees doing related or similar work, including scheduling work, recommending leave, reviewing work for accuracy, performance appraisal, or interviewing applicants for position vacancies.

22. Also pursuant to Petitioner Exhibit 7, the Conservation Officer Sergeant's recommended work traits include knowledge of search and rescue techniques, an ability to work with and direct field activities, an ability to organize search parties and related duties, and an ability to develop and maintain cooperation among allied law enforcement branches and the general public.

23. Also pursuant to Petitioner Exhibit 7, under supplemental job specification, a Conservation Officer Sergeant: a) performs administrative, supervisory and field work in an assigned area as a Deputy District Chief; b) supervises a staff of Conservation Officers in the absence of the district Lieutenant; c) performs assigned administrative functions including, but not limited to, enforcing departmental regulations, policies, discipline, work methods and procedure; and d) exercises direct supervision over Conservation Officers and Trainees.

24. The Conservation Officer Sergeant, at a minimum, assumes all of the Conservation Officer Lieutenant's duties 8 days out of 28 (during the Lieutenant's days off) and also assumes all of the Conservation Officer Lieutenant's duties and responsibilities when the Lieutenant is otherwise absent for reasons such as training and seminars or vacation time – a description of the Lieutenant's duties, responsibilities, and related matters is set forth in Petitioner Exhibit 5.

25. The Conservation Officer Sergeant: a) assigns work; b) interviews witnesses in connection with internal affairs investigations; c) participates in annual evaluation of Conservation Officers and provides input to the Conservation Officer Lieutenant (evaluations can affect the promotional opportunities available to employees); d) meets at least once each week with the Conservation Officer Lieutenant to discuss Conservation Officers I and II; and d) issues verbal discipline and written letters of counsel (but not written warnings).

26. The definitions which appear in the Fish and Game Law Enforcement Manual (Petitioner Exhibit 10, Chapter 1, p. 5) include a definition of "Supervisor," and it is defined as Lieutenant, Sergeant, or any temporary position designated by the Chief of Law of Enforcement.

DECISION AND ORDER

Jurisdiction

The PELRB has jurisdiction over certification and modification petitions involving public employers, public employees, and employee organizations pursuant to the general provisions of RSA 273-A and the specific provisions of Pub 301.01, 301.03(c), and 302.05.

Discussion

NEPBA has filed pleadings which properly put the issues involved before the PELRB. The NEPBA filings clearly articulate the claims made, the type of proceeding involved, and the relief sought. Pub 301.03 (c) requires the filing of a "petition for certification" under Pub 301.01 when the involved employees seek to replace an incumbent representative with a new certified bargaining agent, as is the case here. NEPBA does not seek to replace the SEA as the exclusive representative of the larger bargaining unit in which the involved officers of Law Enforcement Division of Fish and Game are currently located. Instead, NEPBA seeks a modification in order to create two new bargaining units – in the event the two new units are created, an election must

be conducted in order to establish the identity, if any, of the exclusive bargaining agent for the two new units. Pub 301.01 requires a 30% interest showing among the employees in the two proposed new bargaining units.

The SEA's complaints stating it has not been treated as a party and has not received notice are belied by the SEA's extensive involvement in these matters from the outset and the information presented on the NEPBA filings. The NEPBA filings in fact identified the SEA as the incumbent representative. The SEA was notified of the NEPBA filings and subsequently submitted pleadings and participated at the informal pre-hearing conference and the hearing. The SEA sat at counsel table at the informal pre-hearing conference and at the hearing and fully participated in these proceedings.

In this case the SEA has raised Pub 302.05 as a reason to deny NEPBA's modification requests. Pub 302.05 (b)(2) states a petition shall be denied if:

> "(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."

The SEA did not introduce any evidence that the underlying bargaining unit was negotiated by the parties since the inception of Pub 302.05 in its current form or at a point in time subsequent to the enactment of RSA 273-A (or earlier, for that matter). The unit composition in this case is stated in Petitioner Exhibit 11 which was issued by the PELRB on December 7, 1976 following a "representation proceeding," all as discussed in Findings of Fact No. 6. Additionally, the Pub 302.05 bar applies, if at all in this case, only to the SEA and the State of New Hampshire – Department of Fish and Game. This serves the underlying purpose of the Pub 302.05 bar, which is to prevent a party to the CBA from agreeing to unit composition and then entering the CBA on that basis and thereafter subsequently appearing at the PELRB and, contrary to the prior agreement on unit composition and the CBA, asking the PELRB to alter the bargaining unit. The SEA also has not provided any evidence to support any claim that the current modification proceedings are somehow "amenable to settlement through an election process" pursuant to Pub 302.05 (b)(1).

The SEA's primary objection to the composition of the proposed units is the inclusion of Sergeants in the supervisory unit. At hearing, the SEA also requested the exclusion of the Conservation Officer Colonel position because the position is allegedly confidential. The SEA also complains that NEPBA has not demonstrated a community of interest.

In general, the PELRB "should take into consideration the principle of community of interest" when determining the appropriate bargaining unit. RSA 273-A:8, I. Some criteria relevant to the community of interest include whether employees have the same conditions of employment, have a history of workable and acceptable collective negotiations, are in the same historic craft of profession, and function in the same organizational unit. RSA 273-A:8, I (a-d). Additionally, per Pub 302.02, the PELRB is also required to consider a common geographic location of the proposed unit as well as the presence of common work rules, personnel practices, salary and fringe benefit structures, and the self-felt community of interest of employees as

further evidence of a community of interest. The NEPBA has shown the requisite community of interest in this case, as demonstrated in the Findings of Fact, in particular Findings of Fact 16-18.

RSA 273-A:8, II provides that "[p]ersons exercising supervisory authority involving the significant exercise of discretion may not belong to the same bargaining unit as the employees they supervise." The PELRB has "broad subject matter jurisdiction to determine and certify bargaining units to enforce the provisions of that chapter (RSA 273-A)." Appeal of SAU #21, 126 N.H. 95, 97 (1985). Important factors to consider include an "employee's authority to evaluate other employees, the employee's supervisory role, and the employee's disciplinary authority." Appeal of Town of Stratham, 144 N.H. 429, 432 (1999) (citing Appeal of East Derry Fire Precinct, 137 N.H. , 610 (1993). "The mere fact that they (putative supervisory positions) have such authority, regardless of whether it is presently exercised, is sufficient for us to hold that they are supervisors under the statute." Appeal of Univ. System of New Hampshire, 131 N.H. 368, 376 (1988). Supervisory employees are generally separated from rank and file employees because there is "a strong potential for a conflict of interest to arise between the two groups." Id.

With respect to the status of the Conservation Officer Sergeants, the PELRB finds that there was varied and sufficient evidence which demonstrates that Sergeants exercise supervisory authority involving the significant exercise of discretion and are supervisors within the meaning of RSA 273-A:8, II. This evidence specifically concerned Sergeant's responsibilities, duties, and activities with respect to evaluation of employees, supervision of employees, and discipline of employees, and it is specifically recounted in the Findings of Fact portion of this decision, in particular Findings of Fact 20-26. The PELRB places particular importance on the fact that Conservation Officer Sergeants fulfill all the duties and responsibilities of Conservation Officer Lieutenants at least 8 out of each 28 days, and they serve more in this capacity when the Lieutenants are absent because of vacation, training, or reasons. Additionally, Sergeants and Lieutenants are supervisors by definition under the Law Enforcement Conservation Officer Manual, Sergeants are specifically charged with and carry out supervisory and disciplinary duties and responsibilities under the Conservation Officer Sergeant job description (Petitioner Exhibit 7), Sergeants are involved in the performance appraisal and annual evaluation of Conservation Officers I and II (Sergeants also meet at least once a week with Lieutenants to discuss the performance of Conservation Officers I and II)(the evaluation process can affect the promotional opportunities available to employees), they serve as Deputy District Chief for their districts, and they interview applicants for open positions.

The evidence in this case, in particular the historical evidence, does not support the SEA's contention that the Conservation Officer Colonel position is confidential. Conservation Officer Colonel Gray is a 28 year Fish and Game employee who has held every position in the Law Enforcement Division. He has been a Colonel since October, 2002. The Colonel position was not established until 2000. Although it was a new position, neither the SEA nor the employer has ever filed a modification proceeding seeking to exclude the Conservation Officer Colonel position as confidential, and the position has remained in the underlying bargaining unit since its inception. Colonel Gray testified that while nobody had addressed with him to any degree the issue of confidential employee status, he had received a notification from the employee relations supervisor concerning the issue. The notification advised that division chiefs

were determined to be confidential employees who did not have to maintain their status as union members but also that nothing precluded them from maintaining their status as union members. Colonel Gray does not agree with this characterization as he did not consider himself to be a confidential employee, and there was no evidence that the SEA had agreed to this characterization at the time it was made (although the SEA does agree with it now for purposes of this proceeding). It was unclear whether this notification related in any way to SEA Exhibit B or when Colonel Gray received the notification. Colonel Gray also testified that he was a policy maker, but the SEA failed to elicit or develop any evidence as to the nature and extent of the policy or policies involved.

The Conservation Officer Colonel position existed at the time the July 1, 2005 to June 30, 2007 Collective Bargaining Agreement (Joint Exhibit 1) was negotiated. The SEA did not ask Colonel Gray any questions or otherwise elicit any testimony from Colonel Gray concerning his possible involvement in labor relations, negotiations, or his possible receipt of or access to confidential management information concerning labor relations in general, or with respect to the negotiation and formation of the current collective bargaining agreement. SEA Exhibit B does not establish that Colonel Gray is a confidential employee for the reasons stated in Finding of Fact 15. As he testified, the basis for Director Perry's belief that the Conservation Officer Colonel position should be deemed confidential was that the position could be involved in labor negotiations during the collective bargaining agreement process with access to confidential bargaining information. However, Director Perry's limited testimony on the issue is outweighed by the historical evidence demonstrating the lack of involvement of this position with duties or activities which imply a confidential relationship with a public employer pursuant to RSA 273-A:1, IX (c).

The NEPBA petitions were timely filed and these matters will now proceed to election. Pub 301.01 (a) sets the time frame for the filing of certification petitions at "no more than 210 days and no less than 150 days prior to the budget submission date of the affected public employer" (the "filing window"). As noted in other proceedings, the budget submission date for the State is February 15. It is reasonable to conclude that one of the underlying presumptions of the filing window is that proper certification petitions submitted during the filing window will ultimately result in the conduct of an election within the "election window," which is "not more than 180 nor less than 120 days prior to the budget submission date." See RSA 273-A:11, I (b). However, in this case it may be necessary to conduct the election inside the 120 day deadline (but the Order of Election can issue within the 180 to 120 day period).

There is precedent for conducting elections after the 120 time period imposed by RSA 273-A:11, I (b). See The State Employees' Association of New Hampshire Inc. v. Elizabeth W. Cheney and Public Employee Labor Relations Board, 119 N.H. 822, 825 (1979) and PELRB Decision No. 79009. In Cheney the PELRB addressed whether a decertification election could be conducted after the expiration of the election window:

> "The Board, therefore, finds that the petition having been timely filed, and the budget submission date being September 21 in the year the contract expires, namely 1979, that an election is proper. Difficulties in arranging for hearings and the extension granted to the employees earlier makes the holding of such an election within the 120 days prior to the budget submission date impossible. The Board finds, however, that, as with many of the time

periods in the statute, the administration of the law must be made to fit its purposes. When there is doubt as to the choice of employees in a bargaining unit as has been raised properly in this case by the petition for decertification, and especially when there is a unit representation for which (sic) was established prior to the effective date of RSA 273-A:3, and given the special circumstances of this case, the setting of the election date prior to the 120 days and not the actual election prior to 120 days is found by the Board to be in keeping with the spirit of the law. An election, therefore, will be scheduled by the Board for June 12, 1979."

PELRB Decision No. 79009 at 3. On appeal the New Hampshire Supreme Court affirmed the PELRB's decision, stating:

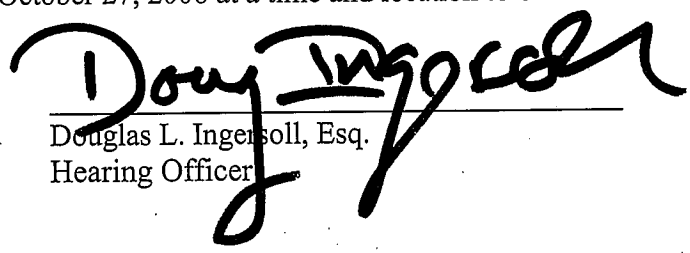
> "There is 'no doubt that this court is the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole.' We have, however, consistently recognized that the legislature has vested the PELRB with authority to define the terms of RSA ch. 273-A and to fill in the 'interstices.' Although the board's determinations are not controlling, they are nevertheless persuasive, and are considered to be *prima facie* lawful and reasonable, and will be upheld unless they constitute a clear abuse of discretion. The PELRB rulings at issue find adequate support in the record and are in keeping with the spirit of the law. Under the circumstances presented, wherein the public employees had no voice in choosing the SEA as their bargaining representative under RSA ch. 273-A, the PELRB's application of the statute was proper and reasonable. We cannot say that its rulings were erroneous or constituted a clear abuse of discretion."(citations omitted)(emphasis in original)

As was true in the Cheney case, there has never been an election for the underlying bargaining unit in this case. In the present case, any delay in the conduct of the actual election is not attributable to NEPBA, as NEPBA filed its petitions within the prescribed time period. The delay in the actual conduct of election proceedings in this case, if any, is attributable to the fact that there have been multiple petitions filed within a short time frame, all concerning bargaining units currently represented by the SEA, and which seek either a decertification election, or modification and a certification election. Counsel for the SEA is familiar with these other pending matters by virtue of the representation he has provided to the SEA in those cases. The SEA has responded to these filings by submitting multiple objections and exceptions and by requesting the conduct of informal pre-hearing conferences and adjudicatory hearings on its exceptions and objections, all of which the SEA is entitled to do, but all of which slows the processing of pending matters. During this time period the PELRB has also received related unfair labor practice complaints as well as unrelated filings, all of which have to be processed as well. The reasoning of Cheney is as applicable to the present certification proceedings as it is to decertification proceedings – both types of proceedings are subject to the same filing and election window. The circumstances of this case justify these matters proceeding to election, even if the election takes place beyond the election window, for the reasons discussed.

Accordingly, NEPBA's consolidated petitions for modification and certification are granted. The Conservation Officers' Unit shall consist of 24 Conservation Officers (Case No. S-0431). The Supervisors' Unit shall consist of 1 Conservation Officer Colonel, 1 Conservation Officer Major, 1 Conservation Officer Captain, 6 Conservation Officer Lieutenants, 1 Conservation Officer Administrative Lieutenant, and 5 Conservation Officer Sergeants (Case No. S-0432). These matters shall proceed to a pre-election conference on October 18, 2006 at 9:00 a.m. at the PELRB in

Concord, New Hampshire and election on October 27, 2006 at a time and location to be established.

So Ordered.



Douglas L. Ingersoll, Esq.
Hearing Officer

Date Issued: October 12, 2006

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