The appeal of this decision was declined per July 12, 2007 Supreme Court order in *Appeal of State Employees Association of New Hampshire, SEIU, Local 1984, AFL-CIO*, NH Supreme Court Case No. 2007-0376.

STATE OF NEW HAMPSHIRE

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

State Employees Association of New Hampshire, SEIU, Local 1984, AFL-CIO Complainant v. State of New Hampshire, Department of Safety, Division of Motor Vehicles Respondent	Case No. S-0393-1 Decision No. 2007-036

APPEARANCES

Representing the Complainant

John S. Krupski, Esq., Cook & Molan, P.A.

Representing the Respondent

Sheri Kelloway, Esq., Counsel

BACKGROUND

The SEA, SEIU Local 1984 ("SEA") filed an unfair labor practice complaint on August 3, 2006 alleging that the State of New Hampshire, Department of Safety, Division of Motor Vehicles ("State") committed a number of unfair labor practices. The SEA subsequently stated additional allegations in the body of its September 13, 2006 Objection to Motion to Dismiss.

Specifically, the SEA claims that: 1) the State in 2005, acting through Director Beecher or Department of Safety staff, met with Highway Patrol and Enforcement officers without Union representation to offer them a similar contract to the agreement reached with the State Police Association and requested that the Union not be informed of the meeting contrary to the CBA; 2) Director Beecher's signature on the New England Police Benevolent Association ("NEPBA")

petitions (Case No. P-0787 & P-0788) interfered with the SEA's existing bargaining unit certification (set forth in PELRB Decision# 2002-058) and was otherwise improper because the State of New Hampshire is the employer; 3) the State interfered with the SEA by providing aide, assistance and endorsement to NEPBA, a rival labor organization; 4) on or about June 8, 2006 the State required bargaining unit members to observe a presentation by NEPBA concerning terms and conditions of employment and thereby usurped the exclusive representative status of the SEA; 5) the State provided NEPBA the opportunity to solicit funds and membership cards from bargaining unit members during duty hours; 6) the State has provided NEPBA with access to the Department of Safety email and the internal telephone system in order to allow NEPBA to interfere with and usurp the SEA's status as exclusive representative; and 7) the State allowed members of the bargaining unit, without loss of pay or benefits, to encourage members of the current bargaining unit to reject the representation of the SEA, all in violation of RSA 273-A:5, I(a),(b),(e),(g) and (h).

The Association requests that the PELRB find that the State has committed an unfair labor practice in violation of RSA 273-A:5 I (a), (b), (e), (g) and (h), as well as RSA 273-A:11 I (a) and (b) and as a remedy, (1) order the State to withdraw its agreement to the petition for certification; and (2) order the State to reimburse the petitioner for all costs incurred, including a reasonable market value of representation and attorney's fees.

On August 18, 2006, the State filed its answer denying the Association's charges of unfair labor practice and filed a Motion to Dismiss the Association's charges. By way of further answer, the State says some of the claims are late and that nothing it did was improper.

On September 7, 2006 the PELRB ruled that the instant unfair labor practice complaint filed by SEA was not to be consolidated with two prior petitions for certification of bargaining units, previously docketed as Case No. P-0787 "Patrol Officers' Unit" and Case No. P-0788, "Supervisors' Unit." (See PELRB Decision #2006-139). On September 7, 2006 SEA filed a motion requesting an extension to respond to a previously filed dismissal motion by the State. The State assented to SEA's request for extension and the PELRB granted the extension until September 13, 2006. (See PELRB Decision # 2006-140).

A previous agreement of all parties at a preliminary conference conducted on August 24, 2006 moved the pre-hearing conference back to September 29, 2006. The originally scheduled merits hearing schedule remained unchanged for October 12, 2006. On September 18, 2006 the SEA filed a "Motion to Comply with Forty-Five Day Adjudicatory Hearing Requirement". The State filed its objection to this motion on September 19, 2006. Under the facts and circumstances expressed by the PELRB in its subsequent order, PELRB Decision #2006-155, the PELRB found that the initially scheduled date of October 12, 2006 should remain and denied the SEA's request that the matter be heard by October 2, 2006.

A final informal pre-hearing conference on the instant complaint by SEA against the State was conducted at PELRB offices, in Concord, New Hampshire on September 29, 2006. A hearing on the merits of the SEA's charge that the State had acted in a manner that constitutes an unfair labor practice was held on October 12, 2006. At this hearing, both parties were present and represented by counsel. Counsel for the Respondent requested the Board take official notice of PELRB Decision 2006-169. Complainant's counsel objected and the Board indicated it would take notice of its own prior decision. The Respondent argued its motion to dismiss the complaint and the Complainant argued its objection to the same. The Board took the matter under advisement and instructed the parties to go forward with their merits. Each had the opportunity to present witnesses and other evidence and to conduct cross-examination. At the conclusion of the evidence the Board considered the request of counsel for the Complainant to submit a post hearing brief and after some discussion allowed counsel to submit briefs if they chose to do so. Counsel for the Complainant, after earlier objecting to the request of Respondent's counsel to take administrative notice of the PELRB Decision 2006-169, made a request that the Board take administrative notice of the record in PELRB Case Nos. P-0787 and P-0788. Again after some discussion the Board, without objection, indicated that it would do so reserving to itself the weight it would attribute to those other proceedings. Thereafter, the members reviewed the record in those two cases and assigned no weight to it as it did not add relevant information. It considered the evidence offered in the instant case including exhibits and witness testimony, considered the credibility of the testimony and made the following determinations:

FINDINGS OF FACT

1. The Division of Motor Vehicles within the Department of Safety of the State of New Hampshire (hereinafter "State") is a duly created state agency providing services to the public through the efforts and abilities of individuals employed within the Highway Patrol and Enforcement Bureau.

2. The State Employees' Association, SEIU Local 1984 (hereinafter "SEA") is the exclusive representative of certain individuals employed by the State of New Hampshire.

3. The New England Police Benevolent Association is a regional association in the business of providing union representation to individuals employed by public employers.

4. The New Hampshire Highway Benevolent Association is a voluntary association of individuals employed in the Highway Patrol Bureau that awards scholarships and distributes flower baskets.

5. A New Hampshire Patrol Association was organized among Highway Patrol and Enforcement employees with the thought of forming their own bargaining unit.

6. The Bureau of Highway Patrol and Enforcement is organizationally located within the authority of the Division of Motor Vehicles.

7. At all relevant times, Virginia C. Beecher was the Director of the Division of Motor Vehicles and signatory, for the employer, on two "Petitions for Certification" expressing the public employer's agreement to the proposed composition of two distinct bargaining units. (Exhibits DMV-1 and DMV-2)

8. In or about January 2006 Carleen Bowman, a Highway Patrol Officer, and at that time an SEA member, along with unnamed others, attended a meeting of SEA representatives involving so-called "sub-unit" negotiations. The purpose was to complain to officers and representatives of SEA that calls from Highway Patrol Officers were not being returned by Gary Smith, president of SEIU/SEA, by field representative Margo Stearns and subsequently by Lori Hayes, chief of field operations as well as to complain about other general dissatisfaction.

9. SEA representatives had been allowed by management to attend mandatory meetings of Highway Patrol Officers and had not been prohibited or prevented from access to the DMV building.

10. Officer Bowman, a Highway Patrol Officer, is a member of the NH Highway Benevolent Association and met with representatives of NEPBA on two occasions between January and June of 2006 and distributed so-called "interest cards" to other Highway Patrol Officers to gauge interest in those employees of forming specific bargaining units to represent individuals in the Highway Patrol Bureau. She and unnamed others had also considered meeting with the Teamsters' International as an alternative representative of a bargaining unit, but apparently dismissed that potential relationship.

11. Highway Patrol Officer Bowman distributed the "interest card forms" during lunchtime to participants attending a training session on June 8, 2006. No instructions were provided to the participants regarding the cards other than to sign and return them if they were interested in forming specific bargaining units to serve them under affiliation with NEPBA.

12. At the end of that day, June 8, 2006, Highway Patrol Officer Bowman, Major Wayne Perrault and Lt. Carlberg met with a representative of NEPBA, Peter Perroni, Esq.

13. Director Beecher was not at the training session, and was unaware of this organizing step in distributing and collecting "interest cards."

14. Director Beecher did not attend any meetings between Highway Patrol and Enforcement employees and NEPBA representatives. Besides recommending to Officer Bowman on one occasion that she believed the Highway Patrol Officers should accept the terms of the collective bargaining agreement ("CBA") of the Troopers' Association, Ms. Beecher had no further discussions regarding wages and hours of work with Officer Bowman.

15. No one sought Director Beecher's permission to conduct any meetings nor utilize any specific area of the DMV building for purposes of these meetings.

16. Lt. William Carlberg is employed within the Highway Patrol and Enforcement Bureau of the Division of Motor Vehicles and is a member of the NH Highway Benevolent Association. He met with representatives of NEPBA on two occasions.

17. Lt. Carlberg obtained the "interest card form" so-called from the PELRB web site.

18. Lt. Carlberg testified that the first meeting with the NEPBA representatives was orchestrated by him "after hours" at the DMV building in a open conference room and that no reservation of the room was made. He did not seek permission from Director Beecher.

19. Neither Lt. Carlberg nor Officer Bowman used an employer provided cell phone to communicate with NEPBA. Lt. Carlberg did exchange e-mail with SEA's Lori Hayes, but did not otherwise e-mail NEPBA representatives utilizing any state equipment. NEPBA did not provide information directly to him but did refer him to their web site to learn about them.

20. Lt. Carlberg did reserve a room at the Division of Fish & Game "around the lunch hour" for approximately 30-40 minutes for anyone who was interested to meet with NEPBA representatives. Director Beecher was not informed of this meeting.

21. SEA was the bargaining unit for certain DMV employees since approximately 1969 and when Highway Patrol and Enforcement was formed in 1999 SEA's representation included those employees as well.

22. Over the years of her tenure as director, Ms. Beecher was aware that some of her employees were unsatisfied with SEA's representation. She based this opinion on the fact that on approximately four to six occasions employees complained to her that Gary Smith and Lori Hayes of SEA would not return calls. On these occasions, Ms. Beecher did not intervene or become involved other than to suggest that these employees go to the SEA office, itself.

23. Director Beecher did not encourage the Highway Patrol and Enforcement Bureau employees to seek alternate representation to that of the SEA.

24. Director Beecher first learned of NEPBA on the occasion of an appointment made by NEPBA's attorney, Peter Perroni, on July 18, 2006 to meet with her on July 19, 2006. She agreed to meet with him and the meeting lasted approximately 15-20 minutes. During the meeting, Attorney Perroni presented her with two documents later proven to be "Petitions for Certification" (See DMV-1 and DMV-2).

25. Director Beecher's signature on these forms indicated that the employer agreed to the proposed composition of the bargaining unit described in the document. It did not indicate an endorsement of any organization. (See also, Memo to Safety Commissioner Flynn, DMV-3).

26. Following the filing of the signed petitions with the PELRB, SEA representatives including: Gary Smith, president; Lori Hayes, Field Operations Director and Contract Administrator; Jay Ward, Political Director met with Department of Safety Commissioner Flynn and Assistant Commissioner Sweeney on August 4, 2005. The meeting lasted approximately 45-50 minutes. The Commissioner and Assistant Commissioner indicated that they would have also signed the documents. Director Beecher was present at this meeting as well.

27. Director Beecher admitted she had spoken of a health insurance issue with at least one member of the Highway Patrol and Enforcement Bureau on one occasion, concerning an historical memorandum executed by former Director of Personnel, Thomas Manning, responding with her opinion that she thought that the Highway Patrol members should accept the same health coverage as that received by state troopers.

DECISION AND ORDER

JURISDICTION

The Public Employee Labor Relations Act (RSA 273-A) provides that the PELRB has primary jurisdiction to adjudicate claims between the duly elected "exclusive representative" of a certified bargaining unit comprised of public employees, as that designation is applied in RSA 273-A:10, and a "public employer" as defined in RSA 273-A:1,I. (See RSA 273-A:6,I).

In this case, the Union has complained that the State's actions related to a petition for certification violated prohibitions contained within RSA 273-A:5,I. The PELRB has sole original jurisdiction to adjudicate claims of unfair labor practices committed by a public employer or an exclusive bargaining representative certified under RSA 273-A:8 through the application of RSA 273-A:6. By reason of the alleged violations of the statute, we therefore accept jurisdiction of the Union's complaint.

DISCUSSION

This case is not complex despite the voluminous issues raised by the complainant as it proceeded to hearing, the commingling of new claims within objections to motions and, eventually, through a hearing before this Board. However, each of the issues raised required our attention, review and finally our ultimate decision. We have reviewed the record of two other cases based upon the representation of complainant's counsel that official notice of the entire record was necessary of Case No. P-0787 and No. P-0788. We find nothing in those cases that support the claims brought by the complainant's counsel in this instant matter. We will demand more justification in the future from this counsel, or any counsel, for taking official notice of such a broad expanse of any entire record.

Having expressed that belief, we first address the complainant's request for subpoena duces tecum on the day of hearing. The basis for this request allegedly was the Respondent's failure to produce certain documents, e-mails and telephone records as required by virtue of a preliminary order of the PELRB issued on September 29, 2006. (PELRB Decision 2006-163) which provided that "the State will file, *if necessary*, any objections whether based on inability to produce or otherwise to the [Complainant]'s subpoena requests no later than October 4, 2006" [emphasis added]. Both counsel addressed the Board recounting their respective actions between that time and the time of the hearing on the merits at which the Complainant requested the granting of the subpoenas again, much to the surprise of Respondent's counsel. We choose to accept Respondent counsel's rendition of the actions taken to search for communications between specified individuals, *.i.e.* telephone records, e-mail exchanges and documents. An e-mail was provided to the Complainant's counsel, a search of telephone records by Larry Brighton, a state auditor within the Division of Motor Vehicles produced no calls on lines used by the specified individuals other than a call from Attorney Peter Perroni to Ms. Beecher to arrange a meeting to obtain Ms. Beecher's signature on two documents. Other than documents entered into evidence or described in sufficient detail in testimony we are satisfied that nothing else that was requested exists. Counsel for the Respondent, having discussed the status of the Complainant's request with Complainant's counsel prior to the hearing on the merits, was reasonable in her belief that the Respondent had appropriately responded to the Complainant's request. This Board agrees that Complainant had gained sufficient knowledge through counsel discussions, the State's representation of the non-existence of other suspected documents and, that based upon representations of Respondent's counsel, had been reasonably provided with information requested. Therefore, no additional objection by Respondent's counsel was necessary as called for in the preliminary order. Therefore, we deny Complainant's request for subpoenas to issue.

Next we consider the Respondent's initial Motion to Dismiss the Union's original complaint. The Respondent filed its initial motion to dismiss the Union's complaint on August 18, 2006. Counsel for the Union filed an Objection to the State's motion on September 13, 2006. Although not normal practice before adjudicative bodies, within the body of the objection counsel for the Union raised additional charges against the State that actually constitute an amendment of the initial complaint. We allowed the Union to amend its complaint at the hearing to incorporate the contents included in its objection to the State's initial Motion to Dismiss. We have now heard the parties' respective arguments for and against dismissal of the complaint, as amended. At hearing, we took the State's motion under advisement and allowed the Union to go forward with its case.

In this instant matter, the Union bears the burden of proof to establish by a preponderance of the evidence that the State's actions amount to an improper practice. Specifically, the Union made several charges against the employer to the Board within its complaint, as amended. We have considered all of the evidence and weighed the credibility of the witnesses relating to the alleged violations of the several provisions of RSA 273-A:5,I and 273-A:11 that have been raised by the Union. We find the evidence produced at the instant hearing and, indeed, even with reference taken of the entire record of the proceedings in PELRB Cases P-0787 and 0788, to be

meager and legally insufficient to fulfill the Union's burden of proof.

We therefore deny the Union's complaint, as amended and in doing so find the Respondent's Motions to Dismiss moot.

So ordered.

Signed this 21st day of March, 2007

Jack Buckley, Chairman

By unanimous decision. Jack Buckley presiding. Members Carol M. Granfield and E. Vincent Hall present and voting.

Distribution:
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