The court remanded this case (and this decision) to the PELRB per January 14, 2009 Supreme Court Order in *Appeal of State Employees' Association of New Hamsphire, Inc., SEIU, Local1984*, NH Supreme Court Case No. 2008-032.

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

NEPBA Local 255/NH Supervisory Corrections Officers, IUPA, AFL-CIO Petitioner and State of New Hampshire, Department of Corrections Respondent	Case No. S-0438-1
NEPBA Local 250/New Hampshire Corrections Officers Unit, IUPA, AFL-CIO Petitioner and State of New Hampshire, Department of Corrections Respondent	Case No. S-0437-1 Decision No. 2007-153

APPEARANCES

Representing New England Police Benevolent Association, Inc. Local 250 and 255

Peter J. Perroni, Esq., Nolan Perroni Harrington LLP, Lowell, Massachusetts

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

Glenn R. Milner, Esq., Cook & Molan, Concord, New Hampshire

Representing: State of New Hampshire, Department of Corrections

Michael K. Brown, Esq., New Hampshire Dept. of Justice, Concord, New Hampshire

BACKGROUND

On July 9, 2007 NEPBA Local 255/NH Supervisory Corrections Officers, IUPA, AFL-CIO and NEPBA Local 250/New Hampshire Corrections Officers Unit, IUPA, AFL-CIO ("NEPBA") filed two petitions for modification and certification on July 9, 2007. The petitions seek to create two bargaining units composed of certain Department of Corrections employees. The NEPBA also requests that the PELRB hold elections to allow employees in the proposed bargaining units to choose their bargaining representative.

The State Employees Association, Inc., Service Employees International Union, Local 1984 ("SEA"), the incumbent representative, appeared and filed exceptions and motions to dismiss in both cases on July 24, 2007. Pursuant to the Notice of Waiver of Claims filed on September 5, 2007, the SEA has waived all its objections to the petitions except for the 30% showing of interest requirement and the issue of timeliness. The SEA opposes NEPBA's request that employees in the proposed bargaining units be provided with the opportunity to vote to choose their bargaining representative.

The undersigned hearing officer conducted a hearing on the petitions on September 12, 2007 at the PELRB offices in Concord. The State of New Hampshire, Department of Corrections, did not make any filings or appearance in this matter until the morning of September 12, 2007, when counsel for the State appeared and filed a motion to dismiss, in substance making the same arguments as those raised by the SEA. The State did not offer witnesses or exhibits at the hearing, and the State confirmed on the record that it did not object to the composition of the proposed bargaining units. As anticipated by the pre-hearing order, *see* Decision 2007-131, the NEPBA and the SEA submitted the case on stipulated facts, oral argument, and written briefs. The NEPBA also objected to the State's motion to dismiss as untimely.

The parties' stipulations are contained in Findings of Fact 1 through 24, set forth below. The parties' written stipulation with attachments is Joint Exhibit One.

FINDINGS OF FACT

1. Article 21.1 of the 2005-2007 collective bargaining agreement between the State of New Hampshire ("State") and SEA provides as follows:

> "Duration: This Agreement as executed by the Parties is effective July 1, 2005 and shall remain in full force and effect through June 30, 2007 or until such time as a new Agreement is executed."

2. The SEA and State commenced negotiations in January 2007 for a successor collective bargaining agreement.

3. On June 14, 2007, a verbal tentative agreement was reached between the SEA and State.

4. On June 14, 2007, the SEA bargaining senate and council voted to endorse the tentative agreement. (Attachment A to Joint Exhibit One)

5. On June 15, 2007, an SEA bargaining representative, Diana Lacey, emailed to the State (Sara Willingham and Thomas Manning), a written document outlining the terms of the tentative agreement. (Attachment B to Joint Exhibit One).

6. Following discussions between the SEA and State (Attachment C to Joint Exhibit One), the written tentative agreement is finalized on June 20, 2007. (Attachment D to Joint Exhibit One, hereinafter the "Tentative Agreement"). Attachment D was never signed by the parties.

7. On June 22, 2007, the State, through its bargaining representative Thomas Manning, noticed a hearing to be conducted by the Joint Committee on Employee Relations (see, RSA 273A:9) to consider and vote on the tentative agreement. (Attachment E to Joint Exhibit One).

8. On June 22, 2007, the SEA mails the Tentative Agreement to its members for ratification. (Attachment F to Joint Exhibit One).

9. On June 25, 2007, the Joint Committee on Employee Relations met and voted to recommend the Tentative Agreement to the full House and Senate. In making its recommendation to fund the contract, the State's bargaining team told the legislature that the State had reached a Tentative Agreement with SEA. (Attachment G to Joint Exhibit One).

10. On June 25, 2007, the Department of Corrections' employees (employees subjects of the instant petition) ratified changes to their subunit agreement. (Attachment H to Joint Exhibit One) This vote did not constitute ratification of SEA/State Master Agreement and the terms thereof which are applicable to these employees.

11. On June 27, 2007, the Legislature passed HB 1 & HB2 funding all cost items contained in the Tentative Agreement.

12. On June 28, 2007, the SEA sends to members a second ballot package. (Attachment I to Joint Exhibit One).

13. Voting by SEA members for ratification closed on July 5, 2007.

14. Subsequent to the filing of the instant petitions, during the evening of July 9, 2007, SEA officials count and certify the ratification vote of 1607 to 1045 ratifying the Tentative Agreement. (Attachment J to Joint Exhibit One). The SEA's policy on ratification is Exhibit L to Joint Exhibit One.

15. During the day of July 9, 2007, the petitions in this case were filed with the PELRB.

16. On July 16, 2007, State Bargaining Representative, Sara Willingham, delivered a notice regarding the Tentative Agreement and the effective dates contained therein. The notice provided as follows:

Attached please find the Tentative Agreement language for the 2007-2009 Collective Bargaining Agreement with the State Employees' Association. The $.51 pay raise and the $25 per pay period contribution to health benefit will be implemented at the start of the pay period beginning July 6, 2007 and reflected in checks dated August 3, 2007. Other provisions with specific dates, such as future pay raises or changes to the health plan design, are effective as stated in the Tentative Agreement. The remaining provisions in the CBA are effective July 1, 2007 or upon implementation. For example, certain new provisions requiring prospective implementation (including but not limited to changes in work schedules and domestic partner benefits) are effective upon implementation.

Please contact me if you have any questions.

Sara J. Willingham, Manager of Employee Relations
NH Division of Personnel
25 Capitol Street
Concord, NH 03301
(603) 271-3359 FAX (603) 271-1422
Sara.Willingham@nh.gov (Attachment K to Joint Exhibit One)

17. On July 19, 2007, Governor John Lynch and SEA President, Gary Smith, held a ceremonial signing of the 2007-2009 collective bargaining agreement and executed the contract on this date.

18. The 2007-2009 collective bargaining agreement between the SEA and State provides at Article 21.1 as follows:

"Duration: This Agreement as executed by the Parties is effective July 1, 2007 and shall remain in full force and effect through June 30, 2009 or until such time as a new Agreement is executed."

19. Neither the 2007-2009 CBA nor the 2005-2007 CBA contain any language requiring ratification by SEA members as a condition precedent to the contracts' effectiveness.

20. The 2007-2009 collective bargaining agreement requires, and the State and the SEA undertook the following:

a. Effective July 6, 2007: SEA bargaining unit members were paid salary increases as provided by the collective bargaining agreement;

b. Effective July 1, 2007: SEA bargaining unit members were paid increased amounts for travel and meal expenses pursuant to the terms of the collective bargaining agreement;

c. Effective the pay period beginning July 6, 2007: all SEA bargaining unit employees began paying $25.00 per pay period as a health insurance premium cost share pursuant to the terms of the collective bargaining unit;

d. Effective July 1, 2007: the State began a prescription drug bidding program saving the State millions of dollars per year in prescription drug costs, pursuant to the terms of the collective bargaining agreement; and

e. Effective July 1, 2007: the State's dental plan began covering dental x-rays at 100% (formerly the level was 80%).

21. As to the negotiations for the 2007-2009 CBA, Richard Molan, Esquire served as the Chief Negotiator for the SEA and Mr. Thomas Manning served as Chair of the State Negotiating Committee. Attorney Molan has served in this role during the negotiations of 11 of the 17 CBA's undertaken by the SEA and the State, beginning with the first CBA in 1976.

22. During the course of this thirty year period, Mr. Manning has been involved in each of these negotiations on behalf of the State, with the sole exceptions of years 1983 and 2003.

23. There were over thirty negotiation sessions for the 2007-2009 CBA which concluded on June 14, 2007 when the parties reached a tentative agreement. Thereafter, a tentative agreement memorandum was generated, discussed and its terms and language agreed upon on or before June 20, 2007 (the "Tentative Agreement"). This Tentative Agreement document was then submitted to the Joint Committee of Employee Relations for approval and thereafter funded by the full Legislature. The Tentative Agreement document was never signed by the parties.

24. The SEA and State did not enter into formal ground rules for the conduct of the 2007 negotiations nor is it the parties' common practice to do so. The parties have not made it a practice to initial or sign tentative agreements prior to the formal execution of the contract.

25. The State of New Hampshire, Department of Corrections ("State"), is the public employer in this matter and appeared in this case on the date of the September 12, 2007 hearing. The State did not file any exceptions or objections to the composition of the proposed bargaining units, and counsel for the State confirmed at the hearing that the State does not have any such objections or exceptions.

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

A review of the confidential interest cards filed in support of the petitions and the employee list submitted by the State demonstrates that the NEPBA petitions are supported by the requisite 30% showing of interest as required by RSA 273-A:10, I (a) in the two new proposed bargaining units. The remaining general issue for consideration is whether the NEPBA petitions are untimely for the reasons raised by the SEA and also cited by the State in its filings. Although the State's appearance and motion to dismiss were filed late, there is no unfair prejudice to the NEPBA by allowing those objections into the record as the State's motion to dismiss only reiterates objections already raised by the SEA. The SEA relies upon RSA 273-A:11 (b), pursuant to which the SEA/SEIU Local 1984, as an exclusive representative of a bargaining unit certified under RSA 273-A:8, has:

> The right to represent the bargaining unit exclusively and without challenge during the term of the collective bargaining agreement. Notwithstanding the foregoing, an election 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.

The SEA argues that at the time the NEPBA petitions were filed on July 9, 2007 it had a collective bargaining agreement with the State which bars the NEPBA petitions under RSA 273-A:11 (b). This defense is commonly known as "contract bar." The term contract bar is unique and specific to collective bargaining law. It specifically arises in the context of the certification or representation election proceedings that are a fundamental component of both public and private sector collective bargaining. The contract bar defense is typically raised by an incumbent union or representative in an effort to prevent an election wherein employees will have the chance to determine their bargaining representative, if any, through the election process.

In this case, the SEA relies primarily on the July 1, 2007 to June 30, 2009 contract executed on July 19, 2007 to prove its contract bar defense. However, in its July 24, 2007 motion to dismiss the SEA also relies to some extent on the immediately previous July 1, 2005 to June 30, 2007 contract to prove contract bar.[1] In its July 24, 2007 motion to dismiss the SEA

[1] The SEA also suggests, in its brief, that the petitions in this case could only be filed during the "filing window" set forth in Pub 301.01 (a), regardless of whether the July 1, 2005 to June 30, 2007 had expired or been replaced by a successor contract. As support, the SEA cites *Rockingham County Corrections Officers' Association v. SEA of NH, Inc., Local 1984 SEIU*, PELRB Decision No. 2006-160. However, in the *Rockingham County* case the petition was filed on June 29, 2006, *before* the July 1, 2003 to June 30, 2006 contract expired. *Rockingham County* did not involve a representation or certification petition filed after the June 30, 2006 expiration date. Accordingly, the SEA's argument reliance upon *Rockingham Couny* is misplaced. *Rockingham County* does not state that

appears to contend that by virtue of the extension clause the earlier contract serves as a bar even as to certification or representation election petitions filed *after* the June 30, 2007 expiration date. However, in its September 12, 2007 brief the SEA clarifies that it does not rely on the extension clause to prove a contract bar. In any event, to the extent the SEA is making an argument based upon the extension clause the argument fails for the reasons set forth in *Maintenance and Custodial Employees of Concord School District v. American Federation of State, County and Municipal Employees, Local 1580*, PELRB Decision No. 84-82 (ruling that an extension clause cannot be used to defeat an election request contained in an otherwise properly filed petition for decertification).

That leaves the question of whether the SEA has proven a contract bar by virtue of the July 1, 2007 to June 30, 2009 contract. The parties disagree as to the evidence required to prove that the July 1, 2007 to June 30, 2009 contract is a bar to election proceedings in this matter. The SEA contends that contract bar does not require an executed agreement, that in fact the SEA and the State had an agreement sufficient to prove contract bar as of the time the NEPBA petitions were filed on July 9, 2007, that union ratification of the July 1, 2007 to June 30, 2009 collective bargaining agreement is not required, and that if union ratification is required the ratification process should be deemed complete as of July 5, 2007, the date voting by mail ballot closed, and not the evening of July 9, 2007, the time when the votes were counted and the certification of the election results prepared. The NEPBA contends that there is no contract bar since it filed its petitions after the expiration of the July 1, 2005 to June 30, 2007 contract and before the July 19, 2007 execution of the successor contract. The NEPBA alternatively argues that the SEA has not otherwise proven a contract, since the contract ultimately executed on July 19, 2007 was consistently referenced by both the SEA and the State as a "tentative" and "proposed" agreement during the relevant time periods and additionally the contract had not been ratified at the time the NEPBA petitions were filed.

The evidence required to prove a contract bar has been the subject of public sector collective bargaining litigation in Maine, Vermont, and Massachusetts. It has also been addressed by the National Labor Relations Board with respect to private sector collective bargaining. These authorities all agree that the moving party must show that the contract which is the purported bar was executed before the certification or representation petition seeking an election was filed. This circumstance is absent in this case, since the successor contract was not executed until July 19, 2007, 10 days after the NEPBA petitions were filed.

The justification for the executed contract requirement was reviewed in some detail by the National Labor Relations Board in 1958:

> 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...

---

certification or representation petitions like the one filed in this case can only be submitted during the filing window described in Pub 301.01 (a).

> 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). In *Appalachian Shale* the Board also ruled that ratification is only a "condition precedent to contractual validity" if ratification is required by "express contractual provisions." *Id.* at 1162-63.

Factually, *Appalachian Shale* is similar to the circumstances presented in this case. This is especially so as to the gist of the SEA's argument, which is the assertion that the SEA and the State in effect "considered the agreement properly concluded and put into effect some of its important provisions" before July 9, 2007. The logic of the *Appalachian Shale* contract bar rule has stood the test of time. It was reviewed with approval in *Terrace Gardens Plaza, Inc. v. National Labor Relations Board*, 91 F.3d 222 (1996)(noting the bright line test was adopted to simplify and clarify the contract bar rule and "avoid protracted litigation, which had frustrated the Board's policy of expediting representation proceedings")(citations omitted). In particular, the *Terrace Gardens* court stated that:

> [T]he contract bar rule was devised by the Board in order to accommodate two potentially conflicting objectives: (1) stabilizing the collective bargaining relationship; and (2) effectuating the employee's choice with regard to representation. It is not irrational for the Board, in pursuit of these two goals, to provide that a contract that has not been signed, for whatever reason, is no bar to its holding a representation election. A signed agreement more strongly suggests a stable bargaining relationship that, as the Board says in its brief, "warrants insulation from election proceedings." While any such bright line rule may be either over- or under-inclusive or both, *the Board's experience is that a more discriminating approach invites employers and unions to engage in prolonged litigation over nice questions about the binding character of their CBA, which could both destabilize the bargaining relationship and postpone the realization of the employee's preference.*

Terrace Gardens at 227-28 (emphasis added). The virtues of requiring a contract executed prior to the filing of a certification or representation election petition are evident, as it allows for a more orderly and less litigious processing of election petitions.

In 1979, the Maine Labor Relations Board employed the *Appalachain Shale* contract bar rule to decertification/certification proceedings pursuant to which the Teamsters, Local 48 sought an election to replace the Jay Police Benevolent Association.

> We believe that the rule that unsigned or oral agreements are not valid collective bargaining agreements for purposes of barring decertification petitions is well considered, and we hereby adopt it. *The rule, which has proved satisfactory to the N.L.R.B. for a number of years, reduces the opportunity for fraud on the part of unscrupulous parties who wish to abridge the right of employees to select their bargaining representative, and also has the salutary effect of relieving the Board of the task of attempting to determine whether there has been a meeting of minds, an exercise in which the Board has no special expertise. In addition, the rule should be easily understood and applied by public employers, public employees, and public employee organizations.*

Town of Jay and Teamsters Local Union No. 48, State County, Municipal and University Workers, MLRB No. 78-A-11 (1979)(emphasis added). Accordingly, the Board upheld the election proceedings at issue. The Maine Labor Relations Board also made a point of emphasizing that it is not stating that "an unsigned or oral agreement could not be a valid collective bargaining agreement for some purpose other than barring the filing of a decertification petition." *Id.*

In Vermont, it is also necessary to show that the "contract was fully executed, signed and dated prior to the filing of the decertification petition" in order to prove a contract bar. *Town of Castleton and AFSCME, AFL-CIO*, 13 VLRB 127, 137 (1990). In Massachusetts, the Labor Relations Commission addressed whether "the contract bar doctrine should preclude a representation petition where no contract has been executed although the principal substantitive terms of an agreement have been implemented at the time the petition is filed." *Town of Burlington*, 14 MLC 1632 (1988). The Commission ruled that in such circumstances contract bar does not apply. The Commission cited *Appalachain Shale*, stating that the "'relatively simple' requirement of a signed writing in order for a contract to constitute a bar to processing a representation petition...best facilitates expeditious handling of representation cases, while at the same time protecting the stability of continuing bargaining relationships." *Id.*

It is evident that the SEA argues for an application of the contract bar rule that is contrary to the weight of a number of well reasoned and persuasive authorities. The SEA relies on New Hampshire Supreme Court cases stating the general proposition that principles of common law contract construction and interpretation apply to collective bargaining agreements. Therefore, the SEA argues that the executed contract requirement should not control the analysis of the SEA's contract bar defense, because under New Hampshire law, contracts do not have to be signed to be binding and enforceable. However, whether accepted principles of contract construction and interpretation apply in general to collective bargaining agreements is not the

issue and in fact is not in dispute in this case. The question is what evidence is required to prove contract bar in the context of a certification or representation election proceeding. None of the authorities cited by the SEA address this specific question.

It has been true for many years that in public and private administrative agency proceedings involving contested election matters like the present case, the executed contract requirement in contract bar cases represents the most efficacious interpretation and application of the contract bar doctrine. The previously discussed reasons and justifications for following the executed contract requirement are as applicable to public sector labor law in New Hampshire as they are elsewhere. There is nothing about New Hampshire public sector labor relations law which requires a different analysis. Accordingly, I find that because the NEPBA petitions were filed on July 9, 2007, ten days before the July 1, 2007 to June 30, 2009 contract was executed, the contract does not act as a bar to the requested elections. This is true even if some of the important contract provisions had effective dates earlier than July 9, 2007 or if some of the contract provisions were implemented prior to July 9, 2007. The authorities are in accord that such facts do not constitute an exception to the executed contract requirement.

Nothing in this decision is meant to say that the common law contract standards cited by the SEA do not generally apply to public sector collective bargaining agreements, and the previously discussed authorities do not stand for this proposition. Other jurisdictions have recognized as much. For example, the Maine Labor Relations Board has enforced the executed contract requirement in contract bar cases but has also said that an unsigned or oral agreement may constitute a valid collective bargaining agreement in another context. Likewise, the Vermont Labor Relations Board, when dealing with non-contract bar matters, applies "the general rules of contract construction developed by the Vermont Supreme Court." 25 VLRB 185 (2002). In other words, there is no inherent conflict or inconsistency between the application of the executed contract requirement in contract bar cases and the use of general rules of contract construction and interpretation in other areas of public sector labor law.

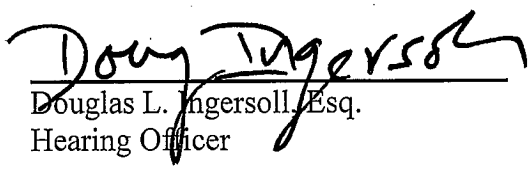
In accordance with the foregoing, the motions to dismiss are denied. The provisions of RSA 273-A:11 (b) do not bar the requested elections in this case. NEPBA's petitions to certify and modify two bargaining units are granted. These matters shall proceed to election. The bargaining units are as follows:

> Corrections Officers, Case No. S-0437-1: All Corrections Officers (457) and Corrections Officer Corporals (107), employed by the State of New Hampshire, Department of Corrections, but excluding the positions of Corrections Officer Major; Corrections Officer Captain; Corrections Officer Lieutenant and Corrections Officer Sergeant.
>
> Supervisory Corrections Officers, Case No. S-0438-1: All Corrections Officer Majors (4); Corrections Officer Captains (5); Corrections Officer Lieutenants (30); and Corrections Officer Sergeants (74) employed by the State of New Hampshire, Department of Corrections.

Pursuant to Pub 301.03 (f)(1), whoever prevails at election shall administer the July 1, 2007 to June 30, 2009 collective bargaining agreement executed on July 19, 2007 through its date of termination.

So ordered.

October 25, 2007



Douglas L. Ingersoll, Esq.
Hearing Officer

Distribution:

Peter J. Perroni, Esq.
Glenn R. Milner, Esq.
Commissioner William L. Wrenn
Michael K. Brown, Esq.