



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**NEPBA LOCAL 255/NH SUPERVISORY
CORRECTIONS OFFICERS, IUPA, AFL-CIO**

CASE NO. S-0438-1

and

**STATE OF NEW HAMPSHIRE,
DEPARTMENT OF CORRECTIONS**

**NEPBA LOCAL 250/NH CORRECTIONS
OFFICERS, IUPA, AFL-CIO**

CASE NO. S-0437-1

and

**STATE OF NEW HAMPSHIRE,
DEPARTMENT OF CORRECTIONS**

DECISION NO. 2009-102

APPEARANCES

Representing: NEPBA Local 255/NH Supervisory Corrections Officers and
NEPBA Local 250/NH Corrections Officers, IUPA, AFL-CIO
Peter J. Perroni, Esq., Nolan & Perroni PLLC, Lowell, Massachusetts

Representing: State Employees Association of NH, Inc., SEIU Local 1984
Glenn R. Milner, Esq., Molan, Milner & Krupski, PLLC,
Concord, New Hampshire

Representing: State of New Hampshire, Department of Corrections
Michael K. Brown, Esq., New Hampshire Department of Justice
Concord, New Hampshire

BACKGROUND

In PELRB Decision 2007-153 the PELRB determined that the unsigned 2007-2009 collective bargaining agreement ("CBA") between the State and the State Employees

Association of New Hampshire, Inc., SEIU, Local 1984 (“SEA”) did not bar the NEPBA Local 250 and 255 election petitions filed on July 9, 2007. The PELRB did not find that collective bargaining agreements are unenforceable unless signed.¹ The NEPBA modification petitions were subsequently granted, the board approved two new bargaining units, and in the resulting elections a majority of the voting employees selected the NEPBA to serve as their exclusive representative. The SEA appealed, claiming the NEPBA was not entitled to maintain its petitions because of the CBA, and the court reversed and remanded the case. At the conclusion of its decision the court references filing and election window time frames, and states “[t]hese are among the issues that the parties may address on remand.”

The NEPBA now argues that the results of the earlier elections should be upheld, and the NEPBA should remain as the exclusive representative of the two bargaining units, because: 1) the 2007-09 CBA was not enforceable as of July 9, 2007, the date the underlying petitions were filed, because the CBA had not been duly ratified and it did not comply with RSA 506:2; 2) the court’s decision in *Appeal of State Employees’ Association of New Hampshire*, 156 N.H. 507 (2007)(involving certain Fish and Game department employees) authorizes the board to recognize and uphold the election results, notwithstanding the court’s remand decision; 3) the SEA can’t be certified as the exclusive representative of bargaining unit employees without a valid election; and 4) a change in representation is contrary to the involved employees’ interests given ongoing contract negotiations with the State and threatened layoffs.

¹ PELRB Decision 2007-153 expressly cites with approval decisions from other jurisdictions, such as Maine, on this subject: “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.”

The SEA claims that the court only intended the board to determine whether the petitions were timely filed and elections held within the applicable periods set forth in RSA 273-A:11, I (b) and Pub 301.01. The SEA contends that these time periods have no application to this case and there are no other issues for the board to address given the court's remand order.

The board conducted a hearing in this matter on April 30, 2009 at the offices of the PELRB in Concord. The parties agree that the existing record² in this matter should serve as the basis for the board's decision, with the exception of evidence the NEPBA wished to offer concerning the negative impact a change in exclusive representative would have given the status of ongoing contract negotiations between the NEPBA and the State and contemplated employee layoffs. After receiving the NEPBA's offer of proof the board ruled such evidence was not relevant. Neither party offered any other evidence beyond the existing record, and a deadline for post-hearing briefs was established and the case was submitted.

DECISION AND ORDER

DECISION SUMMARY

The board is not persuaded by the NEPBA's arguments that it should be allowed to continue as the exclusive representation of certain Department of Corrections' employees notwithstanding the court's decision in *Appeal of State Employees Association of New Hampshire, Inc., SEIU, Local 1984*, No. 2008-032 (January 14, 2009)(slip opinion). For the reasons outlined in this decision, the underlying NEPBA petitions are dismissed, the previously issued certification orders are vacated, and the affected Department of Corrections' employees

² The record is contained within the duly certified PELRB record prepared and filed with the New Hampshire Supreme Court, Docket No. 2008-032.

shall continue as members of the Department of Corrections bargaining unit to which they belonged prior to July 9, 2007.

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. The present proceedings are being conducted to address issues in these consolidated cases following the court's remand.

DISCUSSION:

The NEPBA concedes that the Pub 301.01 and RSA 273-A:11, I (b) time periods referenced in the concluding paragraph of the court's January 14, 2009 decision do not entitle the NEPBA to maintain its petitions or have elections. These time frames are relevant in circumstances not at issue in this case. They provide that when there is an existing collective bargaining agreement election petitions may be filed and any resulting election conducted during certain specified periods prior to the budget submission date of the public employer in the year the agreement expires, notwithstanding any provisions in the agreement for extension or renewal. In the present case the NEPBA claims these restrictive periods did not apply because, for purposes of "contract bar" analysis under RSA 273-A:11, I (b) the State and the SEA did not have a collective bargaining agreement at the time the NEPBA petitions were filed. If a collective bargaining agreement was in place, the NEPBA petitions and the resulting elections were premature as they were filed in the first month of a two year agreement.

Because the court's decision does not restrict the remand proceedings to a consideration of the foregoing issues, the board will also address the NEPBA's arguments that the election

results should be still be upheld. The board begins with the NEPBA's argument that the CBA is not enforceable because the petitions were filed before ratification was complete and at a point in time when the CBA was unsigned, and therefore unenforceable under RSA 506:2. The record reflects that ratification ballots were returned to the SEA by July 5, 2007 and were subsequently tallied and the results certified during the evening of July 9, 2007. The NEPBA filed its petitions during the day on July 9, 2007, prior to the tally and certification of the ratification vote, but after the SEA received the completed ratification ballots. In the prior proceedings the board never decided the NEPBA ratification issues, as the board's decision rested upon a separate and independent basis. However, the board concludes that it need not resolve whether ratification of the CBA was required or the date when any necessary ratification was complete given the court's treatment of the subject:

The record shows that when NEPBA filed its petitions, not only was the CBA reduced to a writing, as required by RSA 273-A: 4, but its cost items had been approved by the legislature, *see* RSA 273-A: 3, II (b), and union members had completed voting on whether to ratify it. Under these circumstances, we hold that NEPBA's petitions were filed "during the term" of the 2007-2009 CBA, and, thus, that the 2007-2009 CBA could bar them despite the fact that it was unsigned.

See Appeal of State Employees' Association, Inc., SEIU, Local 1984 No. 2008-032 (January 14, 2009)(slip opinion). The board interprets this portion of the court's decision to foreclose the NEPBA's current arguments based upon ratification, as the court specifically found that the NEPBA petitions were filed during the term of the CBA, a holding only possible upon a finding that the ratification process had either been completed or was unnecessary.

NEPBA's reliance upon RSA 506:2 to support its argument that the CBA was unenforceable at the time the NEPBA petitions were filed is also without merit. In general, under RSA 506:2, a contract that cannot be performed within one year must be signed by the party to be charged in order to be enforceable. Although the NEPBA could have maintained this

statutory argument at the time of the initial proceedings it did not do so, and the point is raised with the PELRB for the first time in these remand proceedings. Accordingly, the board will not consider the statute of frauds argument on that basis. Additionally, the board notes that under RSA 506:2 the statute of frauds argument is in the nature of an affirmative defense more properly raised by a party to be charged in an action maintained by another party to enforce the alleged contract. The board questions its application in representation proceedings like the kind currently under the board's consideration.

The NEPBA also argues that the board cannot recognize the SEA as the exclusive representative of the two bargaining units in the absence of a valid election and that the election results should not be disturbed consistent with the court's decision in *Appeal of State Employees' Association of New Hampshire*, 156 N.H. 507 (2007)(involving the creation of two new bargaining units comprised of certain employees of the New Hampshire Fish and Game Department). In the Fish and Game case, the NEPBA modification and election petitions were timely filed, and in reliance upon *State Employees' Assoc. v. Cheney*, 119 N.H. 822 (1979), the PELRB conducted the resulting elections nine days beyond the 120 day period referenced in RSA 273-A:11, I (b). In its decision, the court expressly allowed the election results to survive, even though the court overruled the portion of the *Cheney* decision upon which the PELRB relied. In this case, in accordance with the court's decision, the NEPBA modification and election petitions were not timely filed and the court did not expressly provide that the election results could stand. The board concludes that the procedural and legal distinctions between the Fish and Game matter and the present proceedings, together with the absence of any express language in the court's decision allowing the election results to stand, mean that the election results must be set aside in this case in conjunction with the remand proceedings. However, the

board agrees that the SEA cannot be certified as the exclusive representative of the two new bargaining units in the absence of a valid election, and this decision does not certify the SEA as the exclusive representative of the two new bargaining units on that basis.

The NEPBA's remaining argument is that any change in the exclusive representative from the NEPBA to the SEA should be delayed or postponed on account of pending contract negotiations and threats of employee layoffs. The board has already ruled that this evidence is not relevant. The board concludes that NEPBA's arguments on this point lack sufficient legal support either in the provisions of RSA 273-A: 1 *et. seq.* and/or the board's rules. Additionally, the board anticipates that there will be an orderly transition managed in a way that best ensures the interests of affected Department of Corrections' employees, consistent with the SEA's obligations and duties as their exclusive representative.

In accordance with the foregoing, the January 2008 election results are set aside, the certification orders contained in PELRB Decision No.s 2008-013 and 014 are vacated, and the NEPBA modification and election petitions are dismissed. The affected Department of Corrections employees shall revert to the bargaining unit status and representation in place prior to the filing of the dismissed NEPBA petition subject to the disposition of any future modification or election petitions that might be filed.

So ordered.

Signed this 27th day of May, 2009.


Jack Buckley, Chair

By unanimous vote. Chair Jack Buckley presiding with Board Members Kevin E. Cash and Carol M. Granfield also voting.

Distribution:

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