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**CERTIFICATION, MODIFICATION AND
DECERTIFICATION OF COLLECTIVE BARGAINING UNITS**

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I. INTRODUCTION

The New Hampshire Public Employee Labor Relations Board decides both unfair labor practice cases and representation cases. Representation cases include certification, modification and decertification of collective bargaining units. Representation cases are governed by RSA 273-A, PELRB rules PUB Parts 301-303, and caselaw.

II. CERTIFICATION OF BARGAINING UNITS

A. Pre-Election Procedures

The PELRB is responsible for determining the composition of bargaining units and administering the election of their representatives under RSA 273-A. A bargaining unit must include at least 10 employees. Probationary employees count toward the 10-employee minimum, but cannot vote in the election. Employee organizations, almost always through affiliated unions,¹ or public employers may submit petitions to the PELRB for certification of bargaining units. Petitions for certification of units that are unrepresented may be filed at any time.

Such petitions must identify the employer and the union, must describe the positions which are proposed to be included in the bargaining unit, and must be accompanied by authorization cards that were signed by at least 30% of the employees in the proposed unit within six months before the petition is filed. The identities of employees who sign authorization cards is not disclosed to the employer. The PELRB will send a copy of the petition to the employer to be posted in the workplace. The employer then must send the PELRB a list of employees who hold positions in the proposed bargaining unit so that the PELRB can verify whether at least 30% of those employees signed authorization cards. The employer or another interested party may object to the proposed composition of the bargaining unit within 15 days of the petition's filing. The PELRB then will hold a hearing and issue a decision on the unit's composition.

After the composition of the bargaining unit either is agreed upon or is decided by the PELRB following a hearing, the PELRB will issue an order for an election. That order must be posted in the workplace. The employer then will file a list of names and home addresses of employees in the proposed bargaining unit. The PELRB will hold a pre-election conference with representatives of the employer and the union to resolve details concerning the election, including its date and time (usually during the work day), location (somewhere at the workplace), and eligibility period (the specific period before the election during which one must be a non-probationary employee in order to be eligible to vote).

¹ Employee organizations are not required to affiliate with unions, but they almost always do so. Consequently, for simplicity these materials will use the terms "employee organization" and "union" interchangeably.

At the pre-election conference, the PELRB will address the use of absentee ballots. They are permitted for eligible voters who are unable to vote in person either because the employer mandates that the voters be elsewhere at the time of the election or because of circumstances beyond the employees' control.

After the pre-election conference, the PELRB will issue a sample ballot and a notice of election that sets out the information discussed in the pre-election conference. The employer must post those documents in the workplace.

During the campaign preceding the election, many school districts remain silent. Sometimes this is because districts know that employees overwhelmingly support the union and believe that campaigning will be fruitless. Sometimes it is because districts fear committing unfair labor practices. It is an unfair labor practice to threaten employees (e.g., with loss of wages or jobs) if they vote for the union or to make promises to the employees (e.g., pay or benefit increases) if they vote against the union. However, a board may explain why it believes a union is unnecessary. A board also may make factual statements to employees. For example, a board may point out that the law prohibits unionized employees' pay raises or benefit increases from being implemented unless and until a collective bargaining agreement is negotiated and voters approve the agreement's cost items.

During the election campaign, unions may post notices at employee workplaces (usually on employee bulletin boards) and may make reasonable use of the employer's mail system. Unions may meet with employees on school property during non-working hours at any location that the employer makes available for other public meetings. Unions also may access employees outside work hours and away from the workplace.

B. Election Procedures

The election is held by secret ballot. A PELRB representative oversees the election, and one employer representative who is not eligible to vote and one union representative serve as observers. The ballots will include one box for each union seeking to represent the employees and one box for "No Representative." The majority of votes actually cast (not a majority of employees in the proposed unit) determines the election's outcome. If the only options on the ballot are one union and No Representative, the union loses if the vote is a tie. If the ballot includes multiple unions and No Representative, and no option receives a majority, a subsequent run-off election will be held between the two options that received the most votes in the initial election. If two options tied for second place in the initial election, both of them and the first place option will be on the run-off election ballot.

The employer and the union must make any challenges and objections to the election promptly. The employer and union representatives at the election must inform the PELRB representative of any challenges to an employee's eligibility to vote before that employee votes. The employer and union representatives also must make any objections to conduct in the polling

area that affects the outcome of the election before the votes are counted. Objections to matters which arise outside the polling area must be made within five days after the PELRB representative files the report of election at the PELRB.

After the election the PELRB representative files a report of election with the PELRB copies it to the employer and the union. That report includes voting results. It also states the bases for any challenges or objections.

After the PELRB rules on any challenges and objections, and the timeline for the employer and the union to request rehearing of that ruling has passed, the PELRB will certify the election results. If a union won the election, the PELRB will certify it as the exclusive representative of the employees in the bargaining unit and will order the employer and the union to bargain. If the majority of employees' votes were for "No Representative," an election bar will go into effect for 12 months after the election. The election bar will prohibit a new election to certify any employee organization from representing the same employees, regardless of whether or not that employee organization was on the election ballot.

C. Bargaining Unit Composition

The issues most commonly disputed by school districts and unions concerning certification of bargaining units involve the composition of the units.

1. Employee Classifications Included or Excluded

Only public employees may be included in a bargaining unit. Public employees for these purposes exclude:

- Persons elected by popular vote.
- Persons appointed by the chief executive or the legislative body. The chief executive for these purposes always has been interpreted narrowly as the Governor. Persons appointed by the legislative body will include such persons as moderators, clerks and treasurers in some districts.
- Persons whose duties imply a confidential relationship to the employer. The caselaw limits this classification to persons who have information about collective bargaining with the union, such as the superintendent, human resources director, finance director and their secretaries.
- Probationary employees. However, an employee may not be excluded as probationary if he or she has been employed for more than 12 months.
- Temporary employees. This does not extend to every employee with a one year contract, but does apply to day-to-day substitutes.

- Seasonal employees.
- Irregular employees. Caselaw has defined irregular employees to be those who lack continuity or regularity of occurrence, activity or function.
- On-call employees. Caselaw has defined on-call employees as those who are ready to respond when summoned or commanded.

Employees may not be excluded from a bargaining unit simply on grounds that they work part-time.

Employees in the bargaining unit need to be public employees of their employer. Thus, if a union petitions for certification of all teachers or paraeducators in an SAU, the SAU should object because those positions are employed by a school district in the SAU, not by the SAU itself.

Supervisors may not be in the same bargaining unit with employees who they supervise. This is to prevent conflicts of interest or divided loyalties on the part of the supervisor. A supervisory relationship for these purposes exists when the supervisor is genuinely vested with significant supervisory authority that may be exerted or withheld depending on his or her discretion. When determining whether an employee exercises such supervisory authority, the most important factors to consider include the employee's authority to evaluate other employees, the employee's supervisory role, and the employee's disciplinary authority. Evidence of such supervision includes the authority to discipline employees in the bargaining unit (as by issuing reprimands), to recommend more severe discipline to higher level administrators, to schedule assignments, to place employees on improvement plans, to approve an employee's request to leave early, to make recommendations which carry significant weight concerning hiring and firing, and to send an employee home if necessary. The existence of disciplinary authority, even if it has not actually been exercised, supports a determination of supervisor status.

One also may not be included in a bargaining unit if he or she supervises employees in a different bargaining unit and both bargaining units affiliate with the same union. Again, such circumstances create a conflict of interest or division of loyalty on the part of the supervisor.

Professional employees may not be included in the same bargaining unit with non-professional employees unless a majority of both groups vote separately to combine in the same bargaining unit. A professional employee is defined for these purposes as one who engages in work that is predominantly intellectual and varied in character, involves the consistent exercise of discretion and judgment, and requires knowledge in a discipline customarily acquired in a formal program of advanced study (a four-year degree).

2. Community of Interests

When a position is not in a classification that is required by law to be excluded from a bargaining unit, the PELRB will include it in a bargaining unit with other employees if they share a community of interests. The PELRB principally considers the following factors in determining whether a community of interests exists:

- Whether employees have the same conditions of employment.
- Whether employees have a history of workable and acceptable collective negotiations.
- Whether the employees are in the same historic craft or profession.
- Whether the employees function within the same organizational unit.
- Whether the employees share a common geographic location.
- Whether the employees have common work rules and personnel practices.
- Whether the employees have common salary and fringe benefits structures.
- Whether the employees share a self-felt community of interests amongst themselves.

3. Other Factors

The PELRB also considers two other factors. It considers whether the formation of a particular bargaining unit will adversely affect the efficiency of government operations. It also considers whether the proposed bargaining unit will create the potential for employees in the unit to experience a division of loyalties between the employer and the union.

III. MODIFICATION OF BARGAINING UNITS

A. Procedure

The employer, the current union or a different union² may submit a petition to the PELRB for modification of the existing bargaining unit. Authorization cards are not required to be submitted with a petition for modification. The PELRB issues documents concerning the petition, including the deadline to file objections, which the employer must post at the workplace. If a timely objection to the modification petition is filed, the PELRB will hold a hearing and issue a decision on that objection. If no objection is filed, the PELRB virtually always grants the modification petition without a hearing.

² A different union may file a modification petition in conjunction with a “challenge” petition. See Section IV of these materials.

B. Standards for Modification

The threshold requirement for a modification petition is that either the circumstances surrounding formation of the existing bargaining unit have changed, or the previously recognized bargaining unit now is incorrect to the degree warranting modification. Usually modification petitions are filed because a new position is created, the duties of an existing position change (e.g., a non-supervisory position becomes supervisory, or vice versa), or the employer and union agree to add or remove a position from the existing unit. A change in an employee's desire to be in a bargaining unit is not a sufficient change in circumstances for modification of the unit if the modification would conflict with the recognition clause in the collective bargaining agreement.

Even if circumstances surrounding formation of a bargaining unit have changed or a previously recognized unit now is incorrect, a modification petition must be denied by the PELRB if either of two circumstances apply. First, the petition must be denied if the question is amenable to settlement through the election process. Second, the petition must be denied if it seeks to modify the composition of a bargaining unit that was negotiated by the parties and the alleged change in circumstances occurred prior to negotiation of the collective bargaining agreement that currently is in force.

All of the same issues that are considered in determining the initial composition of a bargaining unit (e.g., whether the position is in a classification that is legally required to be excluded, whether the position has a community of interests with other positions in the unit, etc.) may be considered on a modification petition.

IV. DECERTIFICATION OF BARGAINING UNITS

A union's certification remains valid until the union dissolves, it voluntarily surrenders its certification, it loses a valid election, or it is decertified. Decertification positions may arise in several ways.

If a majority of employees in a bargaining unit no longer wish to be represented by the current union, the employees may file a decertification petition on the PELRB's form. An election then will be held with the same procedures as for initial certification of a union, including submission to the PELRB of authorization cards signed by at least 30% of the employees in the unit.

If a majority of employees in the bargaining unit no longer wish to be represented by the current union, but also wish to replace it with a different union, a petition for certification of the new union must be filed on the PELRB's form. This so-called "challenge" petition must be submitted with authorization cards signed by at least 30% of the employees in the bargaining unit. If the new union seeks to take over representation of a unit with a different composition than the current unit (e.g., to take over only a portion of the existing unit), it may file a modification petition in conjunction with the "challenge" petition. The current union and the

proposed new union both will be parties to the proceedings. The election will follow the same procedures as for initial certification elections that involve multiple unions. If the new union wins the election, it must administer the collective bargaining agreement that existed under the former union, and must replace the former union in any ongoing negotiations for a successor collective bargaining agreement.

RSA 273-A:11(b) establishes a contract bar. This generally prevents a certified union's representation of a bargaining unit from being challenged during the term of a collective bargaining agreement, except that the election may be held 120-180 days before the budget submission date in the year that the collective bargaining agreement will expire.³ However, after a union is decertified, the bar does not apply and a petition for certification may be filed at any time.

Under RSA 273-A:10, VI(b), the PELRB is required to decertify any union (1) that is found in a judicial proceeding to discriminate against members of the bargaining unit based on age, sex, race, color, creed, marital status or national origin; or (2) that has systematically failed to allow bargaining unit membership equal participation in the affairs of the organization. The PELRB must hold a hearing to determine whether to decertify such a union. If the PELRB decertifies a union for violations under RSA 273-A:10, VI(b), the union cannot seek a certification election again until it satisfies the PELRB that it has purged itself of the violations.

An employer may petition to end union representation on grounds that the bargaining unit is not comprised of at least 10 employees. The New Hampshire Supreme Court has ruled that an employer may do so either by filing a petition to decertify the union, or by raising failure to comply with the 10-employee minimum in objection to a union's petition to modify the composition of the bargaining unit.

³ The budget submission date in most SB2 districts is the second Tuesday in January. The budget submission date in most non-SB2 districts that are not in cities is February 1.