



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

CITY OF MANCHESTER	:	
	:	
Complainant	:	
	:	CASE NO. A-0408:06
v.	:	
	:	DECISION NO. 96-099
AFSCME, LOCAL 298, (HIGHWAY	:	
DEPARTMENT EMPLOYEES)	:	
	:	
Respondent	:	
	:	

APPEARANCES

Representing City of Manchester:

David Hodgen, Chief Negotiator

Representing AFSCME, Local 298:

James C. Anderson, Staff Representative

Also appearing:

Hugh Moran, Personnel Director
Wilbur Jenkins, Arbitrator
Brian Mitchell, AFSCME
Michael D. Roche, USWA #8938
Kevin Sheppard, City of Manchester
Bob Lynch, City of Manchester

BACKGROUND

The City of Manchester (City) filed unfair labor practice (ULP) charges against AFSCME, Local 298, AFL-CIO (Union), the certified bargaining agent for organized employees of the City's Highway Department, on June 24, 1996 alleging violations of RSA 273-A:5 II (f) and (g) resulting from the Union's attempting to process and to arbitrate the grievance of a temporary, non-

bargaining unit employee. The Union filed its answer on July 2, 1996. After a continuance sought by and granted to the parties for a hearing scheduled on September 5, 1996, this matter was heard by the PELRB on September 26, 1996 and October 17, 1996.

FINDINGS OF FACT

1. The City of Manchester operates a municipal highway department and is a "public employer" of employees therein within the meaning of RSA 273-A:1 X.
2. AFSCME, Local 298, AFL-CIO, is the duly certified bargaining agent for personnel employed by the City in its highway department.
3. The Union and the City are parties to a collective bargaining agreement (CBA) for the period January 1, 1992 through June 30, 1994 and continuing thereafter under conditions of status quo. That contract contains a recognition clause, a grievance procedure and a methodology for posting promotions, vacancies and transfers. "Engineering tech I" is a position in the bargaining unit and covered by the CBA. Article 6, of the CBA covers promotions and transfers and, in pertinent part, provides:

6.8 Job posting shall include job specifications, rate of pay, job location, the shift and also if the job is permanent with a permanent rating.

6.9 The above procedures shall be followed in all promotions, vacancies and transfer, whether temporary or permanent.

Article 31 defines the grievance procedure and says that a grievance is "a claim or dispute arising out of the application or interpretation of this agreement."

4. On October 29, 1994, Tom Czaja, an Engineering Technician and member of the bargaining unit was involved in an automobile accident of such severity to keep him out of work for a prolonged and indeterminate period of time. (City Exhibit No. 2) Accordingly, Frank Thomas, Public Works Director, posted a job vacancy for a temporary Engineering Tech-1 position on November 16, 1994. (City Exhibit No. 3)

Notwithstanding the designation of "temporary" twice on the posting, the wage rates reflected thereon were for regular employees covered under Wage Schedule VII (A) of the CBA (City Exhibit No. 1) rather than for temporary rates as referenced on Union Exhibit Nos. 1 and 2. After no applicants from within the department were deemed qualified to fill the vacancy, the Deputy Director of Public Works, Kevin Sheppard, solicited an application from Tom Gillis who applied on November 18, 1994 and was hired on November 23, 1994. Gillis started work on November 29, 1994. (City Exhibit No. 2 and 10; Exhibit A to ULP.) He was employed as an Engineering Tech-1 and compensated under pay grade 20 of Salary Schedule VII (A).

5. By March 20, 1995 Czaja returned to work on a limited schedule, such as his health would permit. Between then and April 16, 1996, Czaja worked irregularly, exhausted all accrued benefits and was ultimately terminated.
6. Gillis remained employed on a full-time basis from November 29, 1994 to June 14, 1996. (City Exhibit Nos. 9 and 10.) Between those dates he had several personnel events which brought him the attention of management. On November 30 or 31, 1995, after being employed more than a year, Gillis mentioned to Thomas that he considered himself a full-time employee and that he expected he could join the Union and bid for Czaja's position when it became available as a permanent vacancy. Thomas is reported to have disagreed with that assessment on December 1, 1995. (City Exhibit No. 2, Union Exhibit No. 3.) On or about March 21, 1996, Gillis filed an authorization for payroll deduction of dues to belong to the Union. By letter of March 27, 1996, Hodgen wrote Gillis saying that as a temporary employee, the City took the position it had no obligation to deduct dues but that it would agree to do so "without prejudice, as long as you know that as a temporary employee, you are not eligible to be an AFSCME bargaining unit member and AFSCME has no authority to represent you in any employment matter with the City." (Exhibit B to ULP.) On March 25, 1996, Gillis filed a Tuition Reimbursement Request form for a "Basic Boundary Law" course. Thomas denied that request on March 29, 1996 because

"as a temporary employee, he is not covered by the master agreement." (City Exhibit No. 4.) On March 30, 1996 Gillis filed a grievance on this and because the City failed to provide him "all contractual benefits as a bargaining unit member." (Exhibit C to ULP.) Hodgen wrote Brian Mitchell, local president, on May 16, 1996 further denying the grievance. On June 3, 1996, AFSCME requested a list of arbitrators from the PELRB. (Exhibit D to ULP.) The City filed the instant ULP seeking to bar those proceedings from going forward on June 24, 1996.

7. Czaja was terminated on April 16, 1994. (City Exhibit No. 2.) His position was deemed vacant and posted as a vacancy (presumably a permanent vacancy because no restriction was set forth on it) on April 24, 1996. (City Exhibit No. 5.) Gillis applied for the vacancy. Robert Lynch, Business Service Officer, testified Gillis was not considered for the vacancy because he was a temporary employee and could not be considered over "regular" bargaining unit applicants. Likewise, Thomas wrote Gillis on May 16, 1996 saying that to consider Gillis's resume "at this time would be a violation of the collective bargaining agreement." (City Exhibit No. 6) On June 10, 1996, the City approved a permanent bargaining unit member to fill the vacancy. On the same date, Thomas wrote Gillis about the appointment and advised him his temporary status and job would terminate on June 14, 1996. (City Exhibit Nos. 7, 9 and 10).

DECISION AND ORDER

For all times pertinent to this dispute Gillis was a temporary employee. He was to become a temporary employee after he was selected for the vacancy advertised as such on November 16, 1994. (City Exhibit No. 3.) He was a temporary employee when he was hired on November 28, 1994 (City Exhibit No. 10) and when he was terminated on June 14, 1996 (City Exhibit Nos. 9 and 10). Likewise, he was a temporary employee during the course of his employment when he sought to become a union member in March of 1996 (Exhibit B to ULP) and when he sought tuition reimbursement that same month under the CBA (City Exhibit No. 4).

Article 1.3 of the CBA is the recognition clause language for the highway department. In it, the City "recognizes the

Union [as] the sole and exclusive representative of all employees of the Department...except the engineers, executives, temporary help and part-time..." (Emphasis added.)

The grievance procedure is a creature of the CBA. Without a CBA, there would be no grievance procedure. If Gillis is not an employee covered by the recognition clause of the contract, then he cannot avail himself of the grievance procedure contained in that document.

The Union's insisting on processing the instant case to arbitration is a breach of the CBA and is a ULP under RSA 273-A:5 II (f). The Union is directed to CEASE and DESIST from further processing of this grievance.

So ordered.

Signed this 10th day of December, 1996.


EDWARD J. HASELTINE
Chairman

By unanimous decision. Chairman Edward J. Haseltine presiding.
Members E. Vincent Hall and William Kidder present and voting.