

**State of New Hampshire**

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

CITY OF PORTSMOUTH

Petitioner

and

AFSCME Council 93, Local #1386  
Portsmouth City Employees

Respondent

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CASE NO. A-0411:34

DECISION NO. 2000-058

**APPEARANCES**

Representing the City of Portsmouth (Petitioner)

Thomas J. Flygare, Esq. – City Negotiator

Representing AFSCME, Council 93, Local 1386, Portsmouth City Employees (Respondent)

Jack McMath - New Hampshire Coordinator

Also appearing: Realine O’Neil; Sherman Pridham; Michael Jenkins; David Allen

**BACKGROUND**

The City of Portsmouth (City) filed a petition to modify the composition of the bargaining unit of municipal employees on April 13, 2000, seeking to exclude four positions. The City seeks to exclude from the Union the position of Legal Secretary based upon allegations of the existence of a confidential relationship. It seeks to exclude the position of Librarian II based upon allegations of the existence of supervisory responsibilities and the professional nature of the position. It seeks to exclude the positions of Assistant Foremen and Operator II based upon allegations of the existence of supervisory responsibilities.

The Portsmouth City Employees, AFSCME Council 93, Local #1386 (Union) objects to the exclusion of any of those positions named in the City’s petition. In its objection, the union asserts that no substantial changes in duties or job descriptions have occurred since these positions were originally included within the bargaining unit and that throughout the history of

the unit the present composition of the unit has not caused problems in labor relations or labor negotiations.

### FINDINGS OF FACT

1. The City of Portsmouth (City) employs persons to carry out the functions of municipal government and therefore is a public employer within the meaning of RSA 273-A:1 X.
2. The American Federation of State, County and Municipal Employees, Council 93, Local 1386 (Union) is the duly certified exclusive bargaining representative for a bargaining unit of full time City employees.
3. The City and the Union are parties to a collective Bargaining Agreement (CBA) effective July 1, 1998 to June 30, 2003 and signed November 9, 1999. The unit description contained in this existing CBA is entitled, "Article 3 RECOGNITION" and includes the positions of Legal Secretary, Librarian II, Assistant Foreman and Plant Operator II.
4. There has existed a long history of these positions being included in the Recognition clause of the parties' CBA's, specifically the Legal Secretary since at least 1986; the Librarian II at least since 1984; and the Assistant Foreman and Plant Operator II at least since 1984.
5. The incumbent Legal Secretary has been employed since February 1998 primarily providing legal secretarial services to the City Attorney.
6. There have been personnel and organizational changes in the Legal Department since that time that resulted in the elimination of the position of full time negotiator and elimination of an additional Assistant City Attorney from the City Attorney's office.
7. In lieu of a full time staff attorney acting as chief negotiator with the subject union, the City has hired an outside legal firm to provide legal service on a contract hour basis of approximately four (4) hours weekly.
8. The incumbent Legal Secretary testified that on occasion she would deliver, to the City Manager, co-copies of unspecified faxes received in her office from counsel and that she would fulfill requests of counsel for unspecified information.
9. The incumbent Legal Secretary testified that she has not been involved in any "dealings" with grievances involving members of the Union and that such activities are undertaken through the Human Resource Director's office. She did testify that she has performed some clerical work on grievances handled by the City Attorney for the Police Commission and Fire Commission.

10. The Human Resource Director's secretary is an excluded employee having been previously assigned that status following a previous hearing before a hearings officer of the PELRB for reasons similar to those raised now in connection with the request to exclude the Legal Secretary position. The Human Resource position is presently vacant, but the incumbent Legal Secretary testified that it is to be refilled.
11. Kenneth Fanjoy, president of the Union, provided uncontroverted testimony that Local 1386 always deals with the Human Resource Director's office or the City Manager's office and that it has had no material contact with the Legal Secretary.
12. The sole exhibit entered by the City in support of its allegation that the position of Legal Secretary performed tasks that would satisfy the standards required of excluded confidential employees was a report of the decision of the Police Commission to terminate a police employee which she had typed after it had been decided by others. (City Exhibit #1).
13. Conflicting job descriptions were submitted by the parties as City Exhibits numbered 4-7 and Union Exhibits numbered 1-4
14. The Library Director testified that he formerly conducted the employee performance evaluations of library staff and now the Librarian II conducted them. The city introduced a probationary employee evaluation that was signed by both a Librarian II and the Library Director and dated August 24, 1999.
15. The Library Director further testified that although persons employed in the position of Librarian II conduct the performance evaluation of other members of the union, they do not have authority to hire or fire an employee without the approval of himself, his subsequent recommendation to the City Manager, and the City Manager's final decision to hire or terminate the employee.
16. The Library Director, when asked to describe how the conduct of the Librarian II position had changed testified that they were "more independent" and that "more was asked of them".
17. The City introduced into evidence certain undated job descriptions that included the positions of Librarian II, Assistant Foreman and Plant Operator II and that these position descriptions were based, in large part, on a so-called "MRI Study". The City did not introduce any comparative position descriptions that may have been in place earlier.
18. Mr. Fanjoy testified that the union was unaware of the present utilization of these job descriptions by the City and no specific date was provided as to when they became implemented. He submitted other job descriptions (Union Exhibits 1-4) as evidence of descriptions he believed were in use by the City.

19. Article 39 of the existing CBA entitled, "MRI REOPENER LANGUAGE" (Joint Exhibit #1) provides,

"39.1 Parties agree that the 1994-1997 Agreement as approved by the City Council will be reopened by both parties to negotiate concerning the implementation of MRI Wage and Classification Study if any portion of it affecting AFSCME members is approved by the City Council. This re-opener does not obligate either party to agree to any wage upgrade for any specific job or any downgrade for any specific job. It is further understood that any agreement reached will be subject to ratification by the union membership, approval by the City Manager and final approval by the City Council prior to any implementation."

The Union's position is that it believed that the parties were still bound by this provision. The City's position is that the provision no longer had any effect, notwithstanding its inclusion in the present CBA which was executed on November 9, 1999.

20. A so-called "combined shop", merging previously separate water and sewer units, was established prior to the parties present CBA.
21. Michael Jenkins has risen through the ranks of employment with the City since 1982 and is the foreman of the combined shop. He testified that the practice of the Assistant Foremen reporting incidents or remedying problems that arise has been the same since he's been in the employ of the city.
22. Mr. Jenkins also testified that if there was a discipline problem on a crew, the practice has always been that the assistant foreman would provide input on suggested discipline. Further, on cross-examination, he agreed that Assistant Foremen may make recommendations as to the discipline of other employees to the Foreman, but that they cannot impose the discipline on their own.
23. Mr. Fanjoy testified that in the actual performance of responsibilities in the field that anyone with a rating supervises the crew members present.
24. David Allen is the City Engineer and has worked for the city for seven years and testified initially that persons in the position of Plant Operator II have authority to take disciplinary action. In later testimony, he qualified that assertion indicating that Plant Operator II's "provide feedback" on disciplinary matters and that, depending on the level of discipline either the City Engineer or the Director of Public Works is involved.
25. In response to a question requesting a description as to how the job of Plant Operator II had changed, Mr. Allen testified that the Plant Operator II position at the two wastewater treatment plants had been given "more responsibility".

26. Mr. Allen testified further that recommendations, presumedly related to discipline, by persons in these positions proposed for exclusion do not affect the wages or compensation of other employees.
27. Mr. Fanjoy testified that a Plant Operator I "runs the shop (Madbury) on weekends" and also, that so-called "Plus ratings" are given to Plant Operator I's to act as Plant Operator II's at the Pierce Island Plant.

### DECISION AND ORDER

The Public Employee Labor Relations Board (PELRB) is authorized under RSA 273-A:8 I to determine the composition of bargaining units of public employees. In making its determination the board should take into consideration the principle of community of interest. RSA-A:8 I. In evaluating this concept of "community of interest" we look to manifestations that can be observed and not unsubstantiated feelings which may be expressed nor unspecified acts that may be referenced by incumbents which are to be evaluated as to their appropriateness for successors to these positions continuing in a particular bargaining unit. In addition, this governing statute provides that "Persons exercising supervisory authority involving the *significant exercise of discretion* may not belong to the same bargaining unit as the employees they supervise." RSA 273-A:8 II (emphasis added). In relation to the issues for consideration here, a third provision of the governing law is relevant which indicates that a person whose duties imply a confidential relationship to the public employer is not considered a public employee for purposes of collective bargaining. RSA 273-A:IX (c).

In the instant matter, the City first asks that the position of Legal Secretary be removed from the bargaining unit because the position has a confidential relationship to the public employer and therefore qualifies as an excluded position under the terms of RSA 273-A:1, IX(c). The position of Legal Secretary has been included in the bargaining unit at least since 1986. Over the course of these fourteen years, this position has shared the same conditions of employment as other members of the unit through a series of negotiated collective bargaining agreements over that span of time. RSA 273-A:8 I(a). There was no evidence presented that the collective negotiations during these years and involving this position were unacceptable nor unworkable. RSA 273-A:8 I(b). Nor was any evidence presented to demonstrate that this position was no longer within the same historic craft, per RSA 273-A:8 I(c); nor functioning within the same organizational unit, per 273-A:8 I(d). The board takes administrative notice of a previous modification petition filed by the City that was decided in 1998 that excluded the position of secretary to the Human Resources Director. PELRB Decision # 98-001. There the job responsibilities met the requirements for exclusion by reason of the existence of a confidential relationship.

Over the period of at least fourteen years, the structure and composition of the office of City Attorney has been modified several times through attrition, the elimination of a full time City Negotiator and various tenures of Assistant City Attorneys. Throughout these several permutations, the Legal Secretary position has remained within the bargaining unit. The only material testimony provided at this time by the Legal Secretary is that she delivered faxes

received from the City's presently retained outside labor negotiator, and that she typed several grievance decisions involving members of other bargaining units. Further testimony revealed that she had had no "dealings" with grievances or negotiations with her own bargaining unit, and that she did not take part in negotiations. No job description was entered into evidence indicating her role in labor relations.

In short, little evidence was put before the hearings officer that indicated that the responsibilities of this position had changed in any substantial manner, nor that the person in this position held any of the responsibilities commensurate with those of the secretary to the Human Resources Director which caused this board to exclude that latter position in Decision No. 1998-001. Further, it was not proven that her assigned job tasks go to the heart of the City's ability to prepare for and conduct labor relations and labor negotiations, nor that the position is imbued with that level of confidentiality sufficient to deprive it from the rights afforded to it under our controlling law and contemplated by this board in interpreting the provisions of this statute.

The evidence presented does not depict her role as that presented in the Appeal of the City of Laconia, 135 NH 421 (1992). The City has not met its burden to prove that the City cannot perform its personnel and labor relations functions without hindrance because of a lack of executive or stenographic support personnel without this position being excluded from the bargaining unit in which it has been included for some fourteen years. There is no evidence that the Legal Secretary reports to the City's chief negotiator. There is no evidence that she is in policy discussions of strategies relating to the labor relations process. The mere fact that she types a grievance decision does not create the cloth of confidentiality required to take away rights which have been afforded the position under the statute and for such a long time. Therefore, this position is not excluded from the bargaining unit.

The City next asks that the position of Librarian II be excluded from the Union to another bargaining unit on the basis of the fact that the position requires a Masters Degree and that those persons holding this position carry out supervisory authority involving the significant exercise of discretion over other library employees. The unit to which the City would have the positions transferred include the positions of Library Director and Deputy Library Director according to the most recent contract on file with the PELRB. It should be further noted, that the unit to which the City wants this position transferred was not made a party to these proceedings, nor did it participate in them.

Lesser degrees of supervisory authority do not disqualify one position or the other from membership in a bargaining unit. Appeal of East Derry Fire Precinct, 137 NH 607,611 (1993). When the PELRB is asked to examine exclusions based upon a supervisory relationship, it looks for guidance to a standard established by the court in that same case which provides that "A supervisory relationship exists when the supervisor is genuinely vested with significant supervisory authority that may be exerted or withheld depending on his or her discretion. *Id.*, at 610, 611. From the evidence presented, the Library Director described that these positions had changed in a manner which he characterized in testimony as "more was expected of them" and that they were "more independent". The Library Director also testified that evaluations were conducted by Librarian II's and this constituted a change. However, an examination of the City's Exhibit #3, while it displays the signature of a Librarian II, also calls for his continuing

participation in reviewing, at least the evaluation, before effective significance is accorded it. Such factual evidence is not sufficient to meet the test of qualifying as the "significant exercise of discretion".

In addition, this same evaluation document offered to indicate significant changes in practice carries the date of August 24, 1999, three months before these parties executed the present collective bargaining agreement. Lacking additional evidence as to the exact date of implementation of certain changes in practices within the library, it may also be argued that the City's petition should be denied by the PELRB because it attempts to modify the composition of this unit based upon changes that actually occurred prior to the CBA presently in force. See Pub 302.05.

Even if the job description for Librarian II, submitted over the objection of the Union, is given any weight, it also is deficient in its content to meet that same test. In fact, if it is demonstrative of any relationship that exists between that position and subordinate positions, it shows that this is a "hands on" position. One can easily envision incumbents in this position working alongside subordinates in those activities that describe the nature of their work as is evident from many of the examples of "ESSENTIAL JOB FUNCTIONS" contained in the job description (City Exhibit #2). This situation again calls into play our primary reliance on the community of interest shared within a bargaining unit. No evidence was offered by the City that the position descriptions and duties of the Library Director and Deputy Library Director might show a closer community of interest with the Librarian II's than exists with the Librarian II's and the other library employees.

The testimony that the Librarian II position requires a Master's Degree is similarly deficient in establishing that this position should be removed from the bargaining unit within which it has existed without adverse impact on labor negotiations for some sixteen years. This requirement, again alone, does not isolate this position from the community of interest that has existed with other librarians and library employees for sixteen years. Surely it does not give cause to disrupt the heretofore established community of interest that has shown that it is reasonable for them to continue to negotiate together. See Appeal of the University System of New Hampshire, 120 NH 853, 855 (1980).

There is insufficient evidence to conclude that the *status quo* should be disrupted and that the Librarian II positions should be excluded from continued membership in this bargaining unit on either the basis of significant supervisory authority or on the basis that the level of professionalism on the library staff is determined solely on possession of a masters degree. Therefore, these Librarian II positions are not to be excluded from the bargaining unit.

Lastly, consideration is given to two public works positions, that of Assistant Foreman and Operator II, the latter determined by testimony to actually carry the position title of "Plant Operator II". The City asks that these positions be excluded from this Union on the basis of their supervisory authority. As in the earlier analysis above relating to the position of Librarian II, this determination regarding exclusion is driven principally by the concepts of "community of interest" and "significant supervisory authority".

Over the years, these positions or similar positions assigned differing job titles have been members of this union. The City presented testimony of Michael Jenkins, the Foreman of the so-called "combined shop" of water and sewer functions. He has been employed by the City since 1982, having risen through the ranks to his present position. His forthright and candid testimony was that there had been no change in the way Assistant Foremen had reported incidents or remedied problems that arose in the course of their job performance. He also testified that those in the position of Assistant Foreman had always provided input on disciplinary matters, but that they have not in the past and do not presently impose discipline on their own.

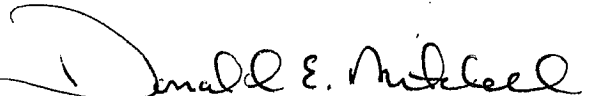
In essence, the City Engineer, indicated that the Plant Operator II's have input on disciplinary matters, but that the City Engineer or the Director of Public Works impose the discipline. Further, the City Engineer testified that recommendations of the persons in these positions sought to be excluded did not affect the wages or compensation of other employees. For its part, the Union testified that there have been no significant changes other than different titles and assignments to different physical facilities and that these positions or their predecessors have been members of the union since 1982. Further testimony by both of the City witnesses and the Union witness indicated that such organizational change as may have occurred in the department came as a result of the formation of the "combined shop", i.e. combining water and sewer functions. In any case, it appears that crews are supervised in the field by whoever has the higher job rating and that this does not mean that Assistant Foremen were always performing that supervisory function. Mr. Fanjoy testified that another rated position was that of Operator I or Truck Driver I and that these positions exercised supervision as well in the absence of the Assistant Foreman. When asked to describe how the job of Plant Operator II had changed, the City Engineer responded that they had been given "more responsibility".

Mr. Fanjoy testified that there is little difference between the position of Plant Operator I and Plant Operator II as the Operator I's perform the same responsibilities depending on whether it may be a weekend or depending on which plant location is involved. Without more evidence that supports the issue of whether or not significant supervisory authority is exercised, the PELRB cannot conclude that the positions of Assistant Foreman and Plant Operator II should be excluded from this bargaining unit. Therefore, they are not to be excluded.

The City's Petition for Modification is denied.

So ordered.

Signed this 5<sup>th</sup> day of July, 2000.

  
Donald E. Mitchell, Esq.  
Hearings Officer