State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Manchester Water Works, United Steelworkers of America, Local 8938 Petitioner	*	CASE NO. M-0545-30
and	*	DECISION NO. 2000-076
City of Manchester Respondent	*	

APPEARANCES

Representing the Manchester Water Works, United Steelworkers of America, Local 8938 (Petitioner)

Vincent A. Wenners, Jr. Esq.

Representing City of Manchester (Respondent)

David A. Hodgen, City Negotiator
Daniel Muller, Esq.

Also appearing as Witnesses: Michael Roche, Thomas Bowen, David Hodgen

BACKGROUND

The Manchester Water Works, United Steelworkers of America, Local 8938 (Petitioner) filed a petition to modify the composition of its bargaining unit on June 13, 2000, seeking to include two recently classified positions of Utility Inspector II which it alleges the City unilaterally assigned to a non-represented unit status. The City of Manchester (Respondent) filed its Exceptions and Motion to Dismiss on June 28, 2000. Essentially, the City responds that these two positions were recently reclassified as part of a comprehensive study that is being implemented by the City. The City also

denies that it took any relevant unilateral action. In further response, the City asserts that the status of these positions was negotiated between the parties and included into a Tentative Agreement forged by the parties. The pending Tentative Agreement alleged to have been agreed to by the parties to cover the effective period from July 1, 1999 to June 30, 2002 remains unsigned by both parties at the time of this proceeding.

FINDINGS OF FACT

1. The City of Manchester (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 Manchester Water Works, United Steelworkers of America, Local 8938 (Union) is the duly certified exclusive bargaining representative for certain employees within the Manchester Water Works.

3. The City and the Union are parties to a previously expired Collective Bargaining Agreement (CBA) and undertaken negotiations for a successor CBA to that expiring on March 30, 1999.

4. The City had retained an outside business entity to undertake a comprehensive position classification study which was performed over an approximate two year period, from 1997 to 1999, and which utilized an appeal committee on which union representatives served, albeit in the minority.

5. For the most part, the reclassification study was completed and the implementation of its many changes in job positions was continuing at approximately the time these two parties were in negotiations for a successor CBA.

6. The subject CBA was negotiated over a period of months extending from at least the first recorded meeting on March 4, 1999 (City Exhibit #1 and City Exhibit #3) through the last recorded meeting on November 4, 1999 (City Exhibit #1 and City Exhibit #3). Although the parties respective negotiators reached a tentative oral agreement at that last meeting, differences of understanding apparently existed between the parties and ripened to disagreements between the verbal "okay" exchanged between the parties' respective negotiators at that last negotiation session and the written language of a later Tentative Agreement.

7. The unit description is contained in "Article 1 - RECOGNITION" and describes those positions that are included in the bargaining unit (Section 1.2 of City Exhibit #1) and those that are excluded from the bargaining unit (Section 1.3 of City Exhibit #1).

8. The position sought to be modified by this instant petition of the Union is that of "Utility Inspector II" a new position created through the reclassification study.

9. The two incumbent individuals that are now assigned as Utility Inspectors II had held the position of Engineering Technician II, a position that had not been included in the bargaining unit since its initial certification in 1982. (See PELRB Certification decision No. M-0545, dated January 5, 1982 and Amended on January 8, 1992).

10. Mr. Roche, president of the Union, and now classified under the new plan as an Engineering Technician II had been classified an Engineering Technician I and member of the union previous to the reclassification. He testified that the classification study concluded that under the old plan the positions and responsibilities of Engineering Technician I and Engineering Technician II had become essentially the same and therefore three of the four individuals who occupied these positions were to be reclassified as Engineering Technician II's. The fourth individual was reclassified as an Engineering Technician III and is not material to this matter as both parties agree that it is a supervisory position. Initially the remaining three were reclassified as Engineering Technician II.

11. In late Fall of 1998 the two incumbent Engineering Technician II's appealed their classification through the appeal board that had been created for that purpose as part of the reclassification plan and were denied their appeal to be made Engineering Technician III at the approximate time that the union and City were meeting to establish a new CBA.

12. Mr. Roche testified that the union agreed at negotiations that the new position of Utility Inspector II would be excluded from the bargaining unit because the Union's understanding of the duties of this position were that they would be more professional in nature and that the type of inspections that this position would undertake would be different than those undertaken by an Engineering Technician II as newly described in the classification study. He further testified that that understanding was proved incorrect through information discovered later on in September related to an August 17th meeting and that other Utility Inspector II's were included in the Highway Department bargaining unit.

13. Mr. Roche testified that the position of Utility Inspector II employed in another city organizational unit, namely the Highway Division, is included in a union, albeit a different union.

14. Mr. Bowen, Director of the Manchester Water Works, and David Hodgen, Chief Negotiator, testified that the position of Utility Inspector II had been

discussed on several occasions during negotiations and that no indication was made to the Union that the position of Utility Inspector II was to have supervisory responsibilities.

15. Contemporaneously, Mr. Bowen was expressly arguing to the City's Sub-Committee on Human Resources and Insurance, on August 17, 2000, that two of the Engineering Technician II positions, held by the incumbent non-unionized individuals, were "supervisors in every stretch of the term and I don't want them included in the bargaining unit." (Union Exhibit #1). Therefore, he was urging that committee to override the classification study appeal panel and to assign the two incumbents to the position of Utility Inspector II which would make it easier for him to negotiate them out of the recognition clause of the pending CBA. The committee allowed the reassignment.

16. Notwithstanding his representations to that aldermatic committee on August 17, 2000 Mr. Bowen addressed a memo on August 18, 2000 to certain employees, including the two incumbents that he had obtained Utility Inspector II positions for earlier, referring to these same two incumbents as "NON AFFILIATED (NON SUPERVISORY) EMPLOYEES" (Union Exhibit #2).

17. Mr. Bowen also testified, and his negotiation session notes (City Exhibit #1) support, that the position of Utility Inspector II and its inclusion into or exclusion from the Union was the subject of negotiations between the parties on 8/27/99, 9/30/99 and 11/4/99.

18. Mr. Bowen admitted on cross-examination, that the duties performed by what is now referred to as Utility Inspector II in his department have not changed from February 1999 when they were classified as two of the three Engineering Technician II's.

19. Mr. Hodgon, Chief City Negotiator for over twelve years and participant in the negotiations which have transpired between the two parties testified that the City wanted the position of Utility Inspector II excluded from the Union.

20. Mr. Hodgon's notes (City Exhibit #3) reveal that there was great fluidity surrounding the issue of the two incumbents that had been Engineering Technicians II under the contract that was due to expire. (See 4/27/99, 5/6/99 notes). It was not until August 27, 1000 that it appears that the final position titles have been determined and are presented in definitive tabular form in negotiations. (See Sheet 9 of City Exhibit #3).

21. He further testified, and his negotiation notes support that thereafter, on 9/30/99 and 10/25/99, the parties discussed the recognition clause application to the position of Utility Inspector II. A review of his notes of what was to

prove to be the last formal negotiations meeting, being 11/4/99, do not indicate any reference to the Utility Inspector II position. His testimony at hearing was that there was a significant negotiation position achieved. The Utility Inspector II position would be excluded from the Union and that a position of Laboratory Technician II would be included within the union.

22. Mr. Hodgon testified that in the November 4, 1999 negotiation session the negotiators exchanged a verbal "Okay" regarding a Tentative Agreement and that he undertook to produce a Memorandum of Understanding to the Union for its review.

23. The Union held a meeting on November 18, 1999 and ratified a Tentative Agreement as presented by Mr. Roche. It is unclear from the record exactly what form the Memorandum of Understanding took which was considered on that date as neither party entered such a document as evidence. Mr. Roche thereafter informed the City of its ratification by memorandum dated November 23, 1999. (Union Exhibit #4) A fair reading of that memorandum also reveals that there was less than complete agreement between the parties on all items although just what "minor changes" were necessary does not appear on the face of that memorandum.

24. Mr. Hodgon testified that the proposed final CBA was not in the completed form entered into evidence (City Exhibit #2) until some time earlier in this year as it had been modified to address issues raised by the Union. Mr. Roche's testimony set this time as five or six weeks prior to the date of this hearing.

25. Under cross examination by Mr. Hodgon, as to why the proposed contract had not been signed, Mr. Roche testified that there were three reasons: (1) duration and termination language; (2) "plus rates" and a grievance; and (3) the Recognition clause "at this point".

DECISION AND ORDER

This is not the first time these same two parties have encountered difficulties in putting the matter of a tentative agreement to bed. (See PELRB Decision No. 1998-052). In that case the parties apparently had difficulty because there were loose ends that affected the vote of the Board of Mayor and Aldermen on a cost issue at the ratification stage. In the instant matter we are apparently again stumbling at the execution stage of a successor collective bargaining agreement (CBA). This time the parties' differences of opinion are the contents of their pending agreement in regard to bargaining unit composition.

The chronology of events in this matter can be summarized. Upon certification in 1982 the position of Engineering Technician I has been in the bargaining unit, that of Engineering Technician II has not. In 1997 the City of Manchester began a comprehensive job classification study which included consideration of all positions relevant to this decision. In late fall of 1998, certain job reclassifications were established affecting the Water Works employees. At that time, there were three Engineering Technician II's and one Engineering Technician I; however, testimony indicated that except for one of the Engineering Technician II's , who was elevated to an Engineering Technician III, the distinction between the remaining two Engineering Technician II's and the lone Engineering Technician I had all but evaporated and the study concluded that the remaining three incumbents should all be classified as Engineering Technician II's. During the implementation of the reclassification study, the parties began negotiations on March 4, 1999. At approximately that same time, the two remaining, original Engineering Technician II's appealed their classification and were denied. The parties continued negotiations during 1999 on April 27th, May 5th, September 30th, October 25th and finally on November 4th which included discussion of the recognition clause on some of these dates.

Concurrent with these negotiations, additional related meetings were being conducted by an appeals panel established to facilitate reconsideration of mis-classifications and a separate Board of Aldermen Sub-committee for the purpose of implementing the reclassification study and making adjustments to the scheme proposed. On August 17, 1999 Mr. Bowen appeared before the aldermatic sub-committee and urged that the same two incumbent Engineering Technician II's who had been denied their appeal to become Engineering Technician III's now be reclassified as Utility Inspector II's. He was successful. His admitted rationale was that they were supervisory and that he didn't want these two individuals in the Union. In subsequent negotiation sessions the City proposed that the position of Utility Inspector II be excluded from the Union. On or about September 30, 1999, the Union received knowledge that these same positions, employed in another City department, were placed within union ranks. On November 4, 1999 the parties had their last formal negotiation session at which both parties gave a verbal "okay" to a the tentative agreement was given. On November 18, 1999 the Union ratified a tentative agreement and informed the City of the ratification vote by letter dated November 23, 1999 wherein an exceptional clause appeared. The first paragraph of that letter contained that infamous clause and creator of contract quagmires "only minor changes". That was in November of 1999. The parties still remain without a signed contract eight months later as they appear here.

The PELRB is the administrative instrumentality created by the legislature "to foster harmonious and cooperative relations between public employers and their employees." RSA Chapter 273-A, New Hampshire Public Employee Labor Relations Act, Appeal of House Legislative Facilities Subcommittee, 141 N.H. 443 (1996). When

acting as the fact-finder in matters such as bargaining unit modification petitions such as the instant one, this overall purpose of the PELRB cannot be ignored. Indeed it is the fulfillment of that purpose that prompted the legislature to delegate to the PELRB the authority and broad discretion to address differences between parties related to the composition of bargaining units. RSA 273-A:8. Modifications are in order when there have been changes in circumstances since the formation of the bargaining unit that warrant additions or deletions of positions to the bargaining unit. Rule Pub 302.05 provides conditions for reviewing such requests for unit modification. It also provides language that expressly states that a petition shall be denied if it attempts to modify a unit which has been, "*negotiated by the parties* and the circumstances alleged to have changed, actually changed prior to negotiations on the collective bargaining agreement *presently in force*." (Emphasis added). See Pub 302.05 (b)(2). When the status of the inclusion of a position into a bargaining unit has been unsuccessfully bargained, a contested modification petition is not favored as a method for accomplishing the same aim. However, even less desirable is a failure at the bargaining table followed by unilateral institution of changes that would open the public employer to charges of unfair labor practice.

All three witnesses testified that these two parties negotiated over the inclusion or exclusion of the position of Utility Inspector II in their recent round of negotiation sessions. (Findings of Fact #'s 12, 17, 21). To the extent that it can be determined from the record of evidence presented, the parties came to a tentative agreement on November 4, 1999. However, as that agreement, reduced to writing at some later time, was not entered into evidence the fact-finder does not know what that complete agreement was. It appears that the position of Utility Inspector II was tentatively agreed by the parties to be excluded from the bargaining unit at least at the time of a conditional ratification vote by the Union in November 1999, although the Union's position may have changed while finalization of the CBA is pending.

Presently, the parties have pending before them a Tentative Agreement, nothing more nor less. The fact that it is not presently an existing contract, and lacks execution as the embodiment of a full meeting of the minds, prevents the fact-finder from application of the automatic dismissal, contained in Pub 302.05 (b)(2) that is requested by the City. The fact-finder is equally reticent to take the ability away from the parties to negotiate a harmonious end to these negotiations by nakedly applying the ultimate "community of interest test" at this time given the dearth of the evidence presented by the parties on that issue. Likewise, at this point the fact-finder is not inclined to consider the remedies of reformation or recission of the parties' pending agreement, common where a meeting of the minds is lacking, in light of the comprehensive reclassification effort which is integrated into the agreement and the parties' considerable negotiation effort to date. It is obvious that the parties have a pending CBA before them which they must complete and execute as evidence of the required meeting of the minds necessary for the implementation of any contract. It is the accomplishment of that task which requires the parties' attention at this juncture.

The Union's Petition for Modification is dismissed, not on the basis of Pub 302.05 (b)(2), but rather as being pre-mature as the parties do not have a final executed CBA. If the parties were of the like mind required to contract with one another on the terms of their agreement, then the pending CBA would be signed. It is not. To the extent that the pending tentative agreement is not ultimately incorporated into the parties' final CBA, either party may file appropriate documents, be they in the nature of an unfair labor practice or a modification, with the PELRB to later address this issue. In light of the position adopted by the fact-finder, i.e. that the parties do not yet have a final agreement, the City is cautioned against any unilateral action regarding unit composition. Finally, both parties should be mindful of basic negotiation completion practices given their last two visits before the PELRB and should endeavor to finalize an agreement before other "loose ends" shake free from the fabric of their Tentative Agreement.

So Ordered.
This 1st day of August, 2000.

Donald E. Mitchell, Esq., Hearings Officer