



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Durham Professional Municipal Managers Association	*	
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Petitioner	*	
	*	
v.	*	Case No. M-0645-4
	*	
Town of Durham	*	Decision No. 2003-044
	*	
Respondent	*	
	*	

APPEARANCES

Representing Durham Professional Municipal Managers Association

John Krupski, Esquire

Representing the Town of Durham

J. Joseph McKittrick, Esquire

BACKGROUND

The Durham Professional Municipal Managers Association (DPMMA) filed a modification petition on March 5, 2003 seeking to conform the certification of the composition of the bargaining unit of record with the PELRB with the contents of the parties' collective bargaining agreement (CBA) for the period January 1, 2001 to December 31, 2003. (Jt. Ex. No. 1, Article 1, Section 2.) The Union's petition as filed sought to add the following positions to the existing bargaining unit: Assistant to Public Works Director, Assistant Fire Chief, Administrative Assistant of the Fire Department, Fire Marshal, Town Engineer, Police Lieutenant and Police Deputy Chief. It also sought to omit the position of Waste Water Lab Technician.

By way of answer filed on March 18, 2003 and denominated "Partial Objection to Modification Petition," the Town objected to the inclusion of the Assistant Fire Chief

(managerial and supervisory), Deputy Police Chief (managerial and supervisory), Town Engineer (professional and without a community of interest), Assistant to the Public Works Director (clerical without supervisory duties) and the Administrative Assistant of the Fire Department (clerical without supervisory duties). The Town's pleading did reflect consensus on the inclusion of the Fire Marshall and Police Lieutenant positions.

On April 21, 2003, the Association (DPMMA) filed a "Partial Motion for Withdrawal," stating that the petitioned-for positions of Administrative Assistant of the Fire Department, Office Manager of the Department of Public Works and the Assistant Fire Chief were already covered by and included in the already existing certification document dated December 11, 199[1] and denominated Case No. M-0465. By a document denominated "Objection to Motion for Partial Withdrawal" dated April 22, 2003 and filed with the PELRB on April 23, 2003, prior to the commencement of the hearing on this matter on that date, the Town opposed that motion, denied the applicability of the existing certification to the modifications being sought by the DPMMA and objected to the withdrawal of the three foregoing positions referenced by the Association. By way of further answer the Town continued, "That the Association, when it filed its Petition for Modification, knew that the positions in question, including the Assistant Fire Chief, Administrative Assistants to the Fire Department and to the Department of Public Works, were positions which the Town had resisted including in the Bargaining Unit and only agreed to include them in the Bargaining Unit with the understanding that no change in the existing Certified Unit would be sought by the Association during the life of the Agreement. [By filing this petition, the Association] placed all of the named positions in contest which the Town had a right to rely upon in preparing its answer as well as its defense."

Exhibits entered in these proceedings are as follows:

1. Collective agreement between the Town and the DPMMA from January 1, 2001 to December 31, 2003 Jt. Ex. 1
2. Collective agreement between the Town and the DPMMA from January 1, 1998 to December 31, 2000 Jt. Ex. 2
3. Town bargaining notes dated "12/01/01," which may be an inaccurate date in lieu of "12/01/00" Town Ex. 1
4. Town Public Works Department Organizational Chart Town Ex. 2
5. Position Description-Town Engineer Town Ex. 3
6. Durham Police Department Organizational Chart Town Ex. 4
7. Deputy Chief of Police Functions sheet Town Ex. 5
8. SOP/Fire Department Organizational Statement 1/31/91 Town Ex. 6
9. Asst. Fire Chief Job Description, Rev. Oct. 28, 1998 Town Ex. 7

10. Union bargaining notes dated 9/11/01 Union Ex. 1
11. Letter, McKittrick to Krupski, April 12, 2001 Union Ex. 2
12. Letter, McKittrick to Krupski, June 11, 2001 Union Ex. 3
13. Letter, DPMMA President Quisumbing to Town Administrator
Ilene Healy, May 2, 2000 Union Ex. 4
14. Durham Police Department Organizational Chart, March 13, 1999 Union Ex. 5

FINDINGS OF FACT

1. The Town of Durham employs personnel in various administrative and managerial capacities in the several departments of the municipality and, as such, is a "public employer" within meaning of RSA 273-A:1 X.
2. The Durham Professional Municipal Managers Association is the certified bargaining agent for the following positions: Office Manager, Superintendent of Highways, Superintendent of Water and Solid Waste, Superintendent of Buildings and Grounds, Superintendent of Waste Water, Waste Water Lab Technician, Captains in the Police Department, Assistant Fire Chief, Deputy Fire Chief, Captains in the Fire Department and Administrative Assistant.
3. The Town and the DPMMA are parties to a collective bargaining agreement for the period January 1, 2001 to December 31, 2003. Article 1, Sections 2 and 3, recognizes the Association as the exclusive representative for the following positions:

Section 2.

The Town hereby recognizes the Association as the exclusive representative of all regular full-time employees and bargaining agent for the purpose of collective bargaining for the employees of job classifications of: Assistant to the Public Works Director, Superintendent of Highways, Superintendent of Water and Solid Waste, Superintendent of Buildings and Grounds, Superintendent of Wastewater, Captains in the Police Department, Assistant Fire Chief, Captains in the Fire Department, Administrative Assistant of the Fire Department, Fire Marshal, Town Engineer, Police Lieutenant, Police Deputy Chief.

Section 3.

The following employees are considered "salaried:"

Superintendent of Highways, Superintendent of Water and Solid Waste, Superintendent of Buildings and Grounds, Superintendent of Wastewater, Town Engineer, Captains in the Police Department, Assistant Fire Chief, Police Deputy Chief and Police Lieutenant.

4. The parties are in agreement and it is consistent with the configuration of the existing bargaining unit to add the positions of Fire Marshal and Police Lieutenant and to delete the position of Waste Water Lab Technician.
5. The "Office Manager" referenced in the 1991 certification applies to a job in the public works department. Its functional equivalent currently is the petitioned-for Assistant to the Public Works Director.
6. The "Administrative Assistant" referenced in the 1991 certification applies to a job in the fire department and, thus, is subject to the DPMMA's April 21, 2003 motion described above.
7. The Position of "Captain" in the police department has been phased out and no longer is filled, as per a comparison of Union Ex. No. 5, page 1 in 1999 showing 2 captains and Union Ex. No. 5, page 3 in 2002 showing no captain positions. Conversely, in 1999 there were no lieutenants. In 2002, there were two lieutenants but in a totally different organizational structure, i.e., not filling what were formerly captain positions.
8. The parties' negotiating history for the 2001-2003 CBA is insightful as to the inclusion or exclusion of certain positions in the bargaining unit. On what was likely December 1, 2000 and on February 12, 2001, the Town objected to including the Deputy Police Chief and Town Engineer. There was a problem with a Fire Training Captain position, which is not under consideration here. Inclusion of the Police Lieutenant and Fire Marshal was not an issue. When the parties met on April 11, 2001, the Town proposed four exclusions: Deputy Police Chief, Assistant Fire Chief (already included), Town Engineer and DPW Superintendent of Operations (not under consideration in the pending petition). In an "open issues" list (a Town document) included in Town Ex. No. 1 and given an "April 2001" time frame, there is an annotation "will agree to include in contract, not accretion." The recognition clause was listed as an open subject in the Association's mediation request dated April 11, 2001. In contrast, the only Association notes submitted (Union Ex. No. 1) were dated 9-11-01 and read "will allow all positions [and] make DPW Asst. to Director hourly."

DECISION AND ORDER

The petitioner's (DPMMA) Partial Motion for Withdrawal warrants preliminary consideration before proceeding to substantive matters in the pleadings. Essentially, this motion seeks to remove three positions named in the original petition from further consideration in these proceedings, namely the positions of Administrative Assistant of/to the Fire Department, Assistant Fire Chief and Office Manager of the Department of Public Works (DPW). As noted in the "Background" portion of this document, the basis for this withdrawal was that the three positions were already named in the 1991 certification document, although by slightly different names in the case of the "Administrative Assistant" and "Office Manager."

After hearing the arguments of the parties, the hearing officer is persuaded that (1) the "Assistant Fire Chief" in the 1991 certification is the same position as the "Assistant Fire Chief" in the petition filed March 5, 2003, (2) that the "Administrative Assistant" in the 1991 certification is the same position as the "Administrative Assistant to the Fire Department" in the instant petition and (3) that the "Office Manager" in the 1991 certification is the same position as the "Office Manager of the Department of Public Works," and "Manager of the Department of Public Works" (both terms being used in petitioner's motion of April 21, 2003) and as the "Assistant to the Public Works Director" referenced in the instant petition.

At hearing, DPMMA counsel further relied on Rule PUB. 201.04 as authority that he may amend his petition and/or that he may withdraw it "at anytime upon written notification to the board." The Town countered, through counsel, that the bringing of this petition, "placed all of the named positions in contest," as is further explained under "Background," above.

The hearing officer is persuaded that the intention of both PUB 201.04 in particular and the administrative law process in general is to streamline and create efficiency in the administrative hearing process. If one were to accept the respondent's proposition, the flood gates of the administrative process, to the extent they exist, not only would be irrevocably opened, but also washed down stream. Respondent had ample opportunity to file its own petition or cross-petition for positions not raised by the petitioner. It elected not to do so, as per the relief sought in its Partial Objection to Modification Petition. These proceedings shall not be opened to a breadth wider than that required to address those positions properly before the hearing officer. The petitioner's Partial Motion for Withdrawal is **GRANTED** and the certification document shall be modified to reflect the current nomenclature of the three positions in question, namely, Assistant Fire Chief, Administrative Assistant to the Fire Department, and Assistant to the Public Works Director.

The parties agree, their pleadings are compatible on the issue, and Finding No. 4 indicates consensus on including the Fire Marshal and the Police Lieutenant in the bargaining unit. There is also consensus on removing the position of Waste Water Lab

Technician from the bargaining unit. The certification document shall be modified to reflect these changes.

The disposition of the foregoing positions leaves only the Town Engineer and Police Deputy Chief unresolved. In an attempt to determine the chronology of events, the hearing officer reviewed the recognition clause of the parties' 2001-2003 CBA (Finding No. 3, above) and the negotiation history, as reflected in Finding No. 8, above. Both of these positions appear in the recognition clause. The parties, however, attribute different meanings to their inclusion. The Town says the positions were included for the purpose of the CBA but not for purposes of the PELRB certification document. The DPMMA, conversely, says the language of the recognition clause is "clear and unambiguous" and should prevail, not only for the CBA but also for the PELRB certification.

Having been made aware of this contradiction, the hearing officer concludes, first, that the parties did have an agreement as to the composition of the bargaining unit for the purpose of the CBA and, second, there is insufficient evidence to show a meeting of the minds as to the composition of the bargaining unit for purposes of a PELRB certification under PUB 302.01. By way of example, the Town never responded to the DPMMA's letter of May 2, 2000 within the requested thirty days. Union Ex. No. 4. Under these circumstances, the two contested positions of Town Engineer and Police Deputy Chief shall remain in the recognition clause of the CBA and be covered by the CBA so long as it remains in effect or until negotiated or adjudicated to the contrary.

If, as of the expiration of the current 2001-2003 CBA or the conclusion of negotiations for a successor agreement, whichever first occurs, the issue of placement of the Town Engineer and the Police Deputy Chief inside of or excluded from the bargaining unit has not been resolved, the resolution shall be as follows.

Effective with the commencement of the successor CBA the position of Town Engineer shall be added to the PELRB certification. The Town Engineer is the equivalent of a non-supervisory professional special staff assistant or augmentee to the Public Works Director. Town Ex. No. 2. While he may and reportedly has "stood in" for the Director in his absence, the record lacks any evidence of actions he took in that capacity which would give him status as a *bona fide* and on-going supervisor within the meaning of RSA 273-A: 8. For example, there is no record of hiring, firing, disciplinary, evaluative or other supervisory consequences having been exercised by him. Conversely, if that were to be the case, those actions would have had no effect or consequence on this bargaining unit where his inclusion is being sought.

There is no cause to exclude the Town Engineer from this bargaining unit based on the contents of his job description. See Town Ex. No. 3. He performs the normal expected staff functions of an engineer. He is required to possess a Professional Engineers license from the State of New Hampshire. There are other functions included within the bargaining unit for which licensing requirements also apply, e.g., solid waste disposal, water purity, and waste water disposal. This unit is denominated "professional municipal managers" with the existing and on-going expectation of employees with

professional qualifications being included in it. This is not a case of adding a professional employee to an exclusively non-professional bargaining unit as contemplated by RSA 273-A:8, II as asserted by the Town. It is, rather, the issue of finding placement in an appropriate bargaining unit for a professional position where the job description was created/reviewed in January of 1999. The DPPMA has met its obligation of "self-felt community of interest" under PUB 302.02 (b). See Union Ex. No. 4, para. 1.

The position of Police Deputy Chief does not qualify for inclusion in the bargaining unit. The duties required of this position involve supervision and evaluation of Police Lieutenants who have already been deemed appropriate for the bargaining unit. RSA 273-A:8. The Town's evidence as to the Deputy's role and the consequences and/or finality of his actions or recommendations was probative. When contrasted to Hudson Police, Fire and Town Supervisors, Decision No. 2003-045, the Deputy here is not merely a conduit of information to the Chief, performs quarterly evaluations of the Lieutenant and Sergeant positions, and assists in contract negotiations. Town Ex. No. 5. The current CBA, Joint Ex. No. 1, Article 27, contains a Performance Plan, a/k/a Performance Award System, which is predicated on performance and evaluations. Unlike Hudson, the record here is that the Chief historically adheres to the Deputy's recommendations on these matters. Likewise, the Deputy, when contrasted to the Assistant Fire Chief (Town Ex. No. 7), already in the bargaining unit, has duties such as those related to negotiations, which are cause for exclusion while no such duties are enumerated for the Assistant Fire Chief. Finally, the DPMMA did not meet the self-felt community of interest standard for this position.

Based on the foregoing, the composition of the certified bargaining unit shall be updated and modified to read as follows: Assistant to the Public Works Director, Superintendent of Highways, Superintendent of Water and Solid Waste, Superintendent of Buildings and Grounds, Superintendent of Waste Water, Captains in the Police Department, Police Lieutenants, Assistant Fire Chief, Deputy Fire Chief, Captains in the Fire Department, Administrative Assistant to the Fire Department and Fire Marshal. Effective upon the expiration of the current CBA on December 31, 2003, unless sooner advised to the contrary by the parties jointly, the position of "Town Engineer" shall be added to the bargaining unit along with the further annotation of "Excluded: Police Deputy Chief."

So ordered.

Signed this 14th day of May, 2003.



Parker Denaco
Hearing Officer

Distribution: John Krupski, Esq.
J. Joseph McKittrick, Esq.