



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME Local 2301, Seabrook		*	
Supervisory Employees' Association		*	
	Petitioner	*	
	v.	*	Case No. M-0592-24
	Town of Seabrook	*	Decision No. 2004-174
	Respondent	*	

APPEARANCES

Representing AFSCME Local 2301, Seabrook Supervisory Employees Association:

Katherine McClure, Assistant General Counsel

Representing the Town of Seabrook:

Douglas M. Mansfield, Esquire

BACKGROUND

AFSCME Local 2301, the Seabrook Supervisory Employees' Association (hereinafter "the Union") filed a Modification Petition with the Public Employee Labor Relations Board ("PELRB" or "Board") on February 19, 2004 seeking to add the position of Industrial Wastewater Pretreatment Manager to the existing certified bargaining unit. In its petition, the Union submits that the Town of Seabrook (hereinafter "the Town") created this new position that has the same "community of interest" as the certified bargaining unit currently represented by the Union.

The Town filed its objection to the Union's petition on February 19, 2004, raising several grounds upon which it contends that the petition should be dismissed. First of all, the Town indicates that it has already reached agreement with the Seabrook Employee Association

("SEA") to include the disputed position into its' bargaining unit.¹ It also states that the position of Industrial Wastewater Pretreatment Manager, as a non-supervisory position, is appropriately placed in the SEA bargaining unit. Since the Union's bargaining unit is composed of supervisory positions, the Town argues that it would be inappropriate for this position to be included therein on community of interest grounds. Moreover, the Town contends that the position may not legally be included in the Union's bargaining unit because it is supervised by the positions of Water and Sewer Superintendent and Wastewater Treatment Plant Chief Operator, both of which are currently in the unit. The Town otherwise avers that the position does not meet the criteria set forth in RSA 273-A:8 (a), (b), (c) and (d) as that test is applied to the bargaining unit of the Union when compared to those positions currently within said unit.

A hearing on the merits of the Union's petition was conducted on June 25, 2004 before the undersigned Hearing Officer at the offices of the Board in Concord, New Hampshire. Both parties were present at the hearing with their respective counsel, and had the opportunity to present witnesses for examination, to undertake cross-examination, and to offer exhibits into evidence. At the conclusion of the hearing, the record was closed subject to the filing of post-hearing briefs. Upon receipt of the parties' post-hearing memorandums, the case was submitted for decision as of July 19, 2004.

FINDINGS OF FACT

1. The Town of Seabrook ("the Town") employs personnel in the operation of its town government and constitutes a public employer within the meaning of RSA 273-A:1, X.
2. AFSCME Local 2301, Seabrook Supervisory Employees' Association ("the Union") is the exclusive representative for the following certified bargaining unit consisting of employees employed by the Town:

Assistant Recreation Dept. Director, Deputy Town Clerk, Lieutenant Detective, Water Department Superintendent, Operations Lieutenant, Recreation Director, Welfare Officer, Code Enforcement Officer, Deputy Fire Chief, Deputy Police Chief, Chief Operator-Wastewater Treatment Plant, Part-time Assistant Code Enforcement Officer, Finance Manager, Recreation Program Director, Animal Control Officer, Assessor, Water & Sewer Superintendent, Public Works Manager, Emergency Management Director, Assistant Code Enforcement Officer and Assistant Finance Manager. EXCLUDED: Mosquito Control Director, Civil Defense Director and Deputy Town Treasurer.

(Joint Exhibit No. 2)

¹ The SEA filed its' own objection to the Union's petition, but later, via a telephone communication with the Board on June 22, 2004 and a letter of the same date, declined to participate in the instant proceedings as an intervener or other interested party.

3. The Seabrook Employees Association, SEA, S.E.I.U. Local 1984 ("SEA"), is the exclusive representative for the following certified bargaining unit consisting of employees employed by the Town:

Clerks-Selectmen's Water Dept., Recreation Dept., and Asst. Appraiser's, Custodians-Town Office, Highway Dept., Water Dept., and Recreation Dept., Laborers & Equipment Operations-Highway Department and Water Department Laborers & Equipment Operations-Highway Department and Water Department, Police Dispatchers, Secretary to Police Chief, Secretary to the Selectmen, Working foreman, Wastewater /water operator, Janitor, Equipment operator/CDL/ laborer and clerk.

(Amended certification M-0575, dated December 21, 2000.)
(Joint Exhibit No. 1).

4. On December 11, 2003, the Town posted a job opening for the new position of Industrial Wastewater Pretreatment Manager. The position was created in order to fill a particular need of the Town with respect to enforcement of the Town's ordinance and federal regulations relating to the prevention of certain pollutants from entering the Town's \$55 million sewer system. In said posting, the minimum qualifications for the job were listed as follows:

- Undergraduate bachelor degree in an engineering or applied science such as chemistry.
- Two years of experience involving industrial wastewater treatment or wastewater treatment work involving industrial discharges.
- Possession of class III operators certification from the New Hampshire Dept. of Environmental Services is desired.
- Valid NH Driver's license.

(Joint Exhibit - E).

5. On March 9, 2004, after the instant petition had been filed, the Town's December 11th job posting was amended. More specifically, under the listing of minimum qualifications for the job, the following "qualifications" were added:

- Reports to and is supervised by the Wastewater Treatment Plant Chief Operator and the Water/Sewer Superintendent.
- This position is not responsible for the supervision or management of any other employee.

(Joint Exhibit - G).

6. Philip Maltais ("Maltais"), the Wastewater Treatment Plant Chief Operator, played a significant role in the establishment of the Industrial Wastewater Pretreatment Manager position and states that it was designed to be independent in nature. He describes the position as being at a "professional level." He states that a high level of communication is required of the position and that its responsibilities include educating and regulating local industries as to the Town's sewer ordinance. Moreover, according to Maltais, the position manages its own activities, and regularly exercises independent judgment. He states that he shares a "peer relationship" with the position, "working together and sharing information," and does not assign it tasks, noting that the position reports to the Water and Sewer Superintendent, who has overall authority over the sewer department.
7. The Industrial Wastewater Pretreatment Manager position is not responsible for supervising any other employees. The position itself falls under the direction of both the Wastewater Treatment Plant Chief Operator and the Water & Sewer Superintendent (also referred to as the Water/Sewer Manager). The positions of Wastewater Treatment Plant Chief Operator and the Water and Sewer Superintendent are both included in the certified bargaining unit of the Union.
8. The Chief Operator - Wastewater Treatment Plant is responsible for the general operation of the Town's water treatment plant, including coordinating activity of the wastewater treatment plant personnel, such as the Industrial Wastewater Pretreatment Manager.
9. The Water and Sewer Superintendent is responsible for the general supervision of the entire water and sewer operations of the Town. The position has the authority to impose discipline upon employees up to level of termination.
10. The current job description for the Industrial Wastewater Pretreatment Manager position provides, in part, that the position is a "non-management employee who is responsible to the Water/Sewer Manager for the performance day to day work required for the operation of the industrial and commercial pre-treatment program of the Town," under the heading "Supervision Received" that it "...receives instruction, general supervision, and direction from the Water/Sewer Manager and the Wastewater Treatment Plant Chief Operator..." and, among its general duties and responsibilities, that it "carries out orders of the Water/Sewer Manager and the Wastewater Treatment Plant Chief Operator..." (Joint Exhibit F-4).
11. The Town does not formally evaluate the job performance of its employees and therefore neither the Wastewater Treatment Plant Chief Operator nor the Water & Sewer Superintendent is responsible for reviewing and documenting the job performance of the Industrial Wastewater Pretreatment Manager.
12. The Industrial Wastewater Pretreatment Manager is a salaried, non-hourly position. The Union's certified bargaining unit primarily consists of salaried employees, but there are four (4) positions, namely the Deputy Town Clerk, Assistant Finance

Manager, Animal Control Officer and Assistant Code Enforcement Officer that are paid on an hourly basis. The SEA bargaining unit, on the other hand, consists of all hourly employees. If placed within the SEA bargaining unit, the Industrial Wastewater Pretreatment Manager would be the only salaried position in the bargaining unit.

13. Thomas Campbell was hired by the Town as the Industrial Wastewater Pretreatment Manager and commenced worked in May 2004. Prior to being hired, he was interviewed by the Town Manager and the Water and Sewer Superintendent, and had the opportunity to review the current job description (Joint Exhibit F-4) for the position. He testified to his belief that the position belongs in the Union's bargaining unit, rather than the SEA bargaining unit, based upon the professional nature of the job.
14. Despite the Union's title of "Seabrook Supervisory Employees Association," all positions within the certified unit do not have supervisory responsibilities. Specifically, the positions of Animal Control Officer, Welfare Officer, and Deputy Town Clerk do not supervise other employees.

DECISION AND ORDER

JURISDICTION

The New Hampshire Public Employee Labor Relations Board is the administrative agency charged with determining the composition of public employee collective bargaining units. RSA 273-A:8. Inherent in that authority, and pursuant to Pub. 302.05, is the discretion necessary to consider modification petitions. The composition of each bargaining unit is evaluated on its own circumstances on a case-by-case basis. *Appeal of Town of Newport*, 140 N.H. 343, 352 (1995).

SUMMARY OF DECISION

The instant petition is denied because it seeks to add a position to a certified unit that currently includes a supervisory position within the meaning of RSA 273-A:8 II. In accordance with RSA 273-A:8 II, supervisory employees exercising significant discretion may not be included in the same bargaining unit as employees they supervise. Likewise, a subordinate employee may not be added to an existing bargaining unit that already includes such a supervisory employee.

DISCUSSION

As set forth in its modification petition, the Union seeks to modify the certified bargaining unit by adding the newly created position of Industrial Wastewater Pretreatment Manager. Modification of a bargaining unit may be carried out pursuant to the PELRB's administrative rule Pub. 302.05. Pub. 302.05(a) provides, in pertinent part, that:

Where the circumstances surrounding the formation of an existing bargaining unit are alleged to have changed, or where a prior unit recognized under the provisions of RSA 273-A:1 is alleged to be incorrect to the degree of warranting modification in the composition of the bargaining unit, the public employer, or the exclusive representative... may file a petition for modification of bargaining unit.

N.H. CODE ADMIN. R. PUB 302.05 (a). The Town does not dispute that the instant petition satisfies the provisions for filing under Pub. 302.05(a), but objects on other grounds, including the contention that the position of Industrial Wastewater Pretreatment Manager, as a matter of law, cannot be included in the same bargaining unit as other positions that supervise it.

RSA 273-A:8 II, specifically provides, in relevant part, that “[p]ersons exercising supervisory authority involving the significant exercise of discretion may not belong to the same bargaining unit as the employees they supervise.” N.H. REV. STAT. ANN. 273-A:8 II (1999). “In determining whether an employee exercises supervisory authority sufficient to exclude the employee from a bargaining unit, [the New Hampshire Supreme Court] consider[s] several factors, including the employee’s authority to evaluate other employees, the employee’s supervisory role, and the employee’s disciplinary authority.” *Appeal of Town of Stratham*, 144 N.H. 429, 432 (1999)(citing *Appeal of East Derry Fire Precinct*, 137 N.H. 607, 610 (1993). See also *Appeal of University System of New Hampshire*, 131 N.H. 368, 376 (1988). Although the instant case presents a “reverse” scenario, in which the issue presented involves whether or not an alleged subordinate employee may be included in a “supervisory” unit, the same standards apply. Upon consideration of same, I conclude that the position of Industrial Wastewater Pretreatment Manager may not be included in the Union’s certified bargaining unit.

The record reflects that the position in question is subordinate, in varying degrees, to the bargaining unit positions of Wastewater Treatment Plant Chief Operator and the Water and Sewer Superintendent (Findings of Fact, Nos. 7, 8, 9, and 10, above). This fact alone, however, does not prevent its inclusion in the instant unit. The critical issue remains as to what extent, if any, the supervisory authority of either position rises to a level of “significant exercise of discretion” over the Industrial Wastewater Pretreatment Manager, and thereby prohibits their inclusion within the same unit. I find that it does rise to this level for the position of Water and Sewer Superintendent.

This position exercises broad supervisory authority over the entire water and sewer department of the Town, which includes the position of Industrial Wastewater Pretreatment Manager. Mr. Maltais, the Wastewater Treatment Plant Chief Operator, testified that the Industrial Wastewater Pretreatment Manager primarily reports to the Water and Sewer Superintendent, who has overall authority of the department, and not to him. (Finding of Fact No. 6, above). The uncontroverted testimony of Town Manager Welch established that the Water and Sewer Superintendent has authority to impose discipline upon department employees up to the level of termination. (Finding of Fact No. 9, above). The fact that the Water and Sewer Superintendent participates in the hiring of employees, as occurred in the instant hiring of the Industrial Wastewater Pretreatment Manager, is further indication of this position’s significant managerial standing. (Finding of Fact No. 12, above). Even though the Industrial Wastewater

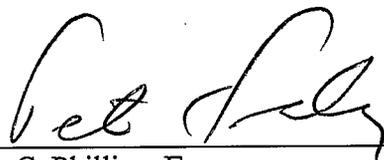
Pretreatment Manager may work independently on a day to day basis, the fact remains that the position still falls under the Water and Sewer Superintendent's direct line of supervision.

Under the circumstances, it is legally inappropriate for the positions of Water and Sewer Superintendent and Industrial Wastewater Pretreatment Manager to be included in the same bargaining unit. While the Water and Sewer Superintendent does not conduct job performance evaluations of the Industrial Wastewater Pretreatment Manager, there is sufficient evidence of other managerial responsibilities, including disciplinary authority and a general supervisory role, that is reflective of a "significant exercise of discretion" over the position. Therefore, even if I were to determine that a sufficient community of interest is shared between the Union's certified unit and the position of Industrial Wastewater Pretreatment Manager, the current composition of the bargaining unit precludes its modification in this manner.

The Union's modification petition is accordingly denied. Since the Union's petition is denied pursuant to RSA 273-A:8 II, it is unnecessary for me to address the other objections raised by the Town in its answer. Moreover, as there is no petition before me regarding modifying the SEA bargaining unit, I do not address the question of whether or not a sufficient community of interest exists for the placement of the Industrial Wastewater Pretreatment Manager position within said bargaining unit. It should be noted that "[t]he composition of a bargaining unit is limited by law to those positions identified in the recognition clause at the time the original unit is certified by the PELRB and by any subsequent modifications approved by the PELRB." *Appeal of the Somersworth School District*, 142 N.H. 837, 840 (1998), quoting *Appeal of Londonderry School District*, 142 N.H. at 680 (1998). Therefore, even though an exclusive representative and a public employer may reach an agreement on the composition of a bargaining unit within their CBA (i.e., in the so-called "recognition clause"), it is not the *certified* bargaining unit until it is approved by the PELRB.

So ordered.

Signed this 1st day of November, 2004.



Peter C. Phillips, Esq.
Hearing Officer

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