



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME Council 93, Local 863
Rochester Public Works

Petitioner

and

City of Rochester

Respondent

*
*
*
*
*
*
*
*
*
*
*

Case No. G-0024-4

Decision No. 2008-035

APPEARANCES

Representing: AFSCME Council 93, Local 863, Rochester Public Works

Michael Maccaro, Esq., AFSCME Council 93, Boston, Massachusetts

Representing: City of Rochester

Warren D. Atlas, Esq., Bedford, Massachusetts

BACKGROUND

On June 12, 2007 AFSCME Council 93, Local 863, Rochester Public Works ("AFSCME") filed a modification petition to include buildings and grounds employees in an existing bargaining unit consisting of all permanent, full-time employees of the Public Works Department, excluding department heads, foremen, assistant department heads, clerical, staff, seasonal and probationary employees.

The City of Rochester filed its answer on June 27, 2007. The City contends that AFSCME's proposed modification is materially different from the bargaining unit description contained in the recognition clause and that there is no community of interest between the buildings and grounds division employees and employees covered by the certification and/or

recognition clause. The City also claims that the modification petition is barred by Pub 302.05 (b)(1) and (b)(2), that AFSCME is required to meet the 30% interest requirement per Pub 301.01 (i), and that election procedures associated with the formation of a new bargaining unit must be followed.

On July 3, 2007 the PELRB issued a Notice of Hearing scheduling this matter for hearing on July 24, 2007. Subsequently, AFSCME requested and obtained a continuance of the July 24, 2007 hearing date and the PELRB then scheduled this matter for hearing on September 28, 2007.

The undersigned hearing officer conducted a hearing on the modification petition on September 28, 2007 at the PELRB offices in Concord. The parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. At the parties' request, the record was held open until 30 days after the parties obtained tapes of the hearing in order to allow the parties to file briefs. Thereafter, the PELRB granted the parties' joint request to extend the deadline to file briefs to November 19, 2007. Both parties have filed briefs, and the record is now closed.

FINDINGS OF FACT

1. The City of Rochester is a public employer subject to the provisions of RSA 273-A.
2. On November 28, 1983, the PELRB certified AFSCME as the exclusive representative of all permanent, full-time employees of the Public Works Department, excluding department heads, foremen, assistant department heads, clerical, staff, seasonal and probationary employees.
3. The recognition clause in the July 1, 2003 to June 30, 2007 Collective Bargaining Agreement ("2003-2007 CBA") describes the bargaining unit as "all permanent, full-time employees of the Public Works Department inclusive of the Water and Sewer Divisions excluding the Director, foremen, assistant Directors, clerical staff, seasonal and probationary employees."
4. The City does not dispute that the certification covering all permanent, full-time employees of the Public Works Department which AFSCME seeks to modify includes highway department employees, water and sewer construction crews, water plant employees, and sewer plant employees.
5. The buildings and grounds division has 14 employees, 10 of which are full time positions.
6. Historically, it appears that buildings and grounds was originally part of Code Enforcement under the direction of John Stowell, who retired in the 1998-99 time period. Thereafter, under Dick White, buildings and grounds became its own department, and when Mr. White resigned, buildings and grounds was moved into the DPW, and by 2003, if not earlier, buildings and grounds was under the overall direction of Melodie Esterberg, the DPW Commissioner.

7. Employees in the buildings and grounds division report to Bruce Young, who in turn reports to Melodie Esterberg, the DPW commissioner. Both Ms. Esterberg's and Mr. Young's city telephone numbers appear in the DPW section of the city's telephone list. Union Exhibit 11.
8. Highway department employees, water and sewer construction crews, water plant employees, and the sewer plant have their own supervisors, but these supervisors, like Bruce Young, report to and work under the direction of Ms. Esterberg. As evidenced by the job descriptions submitted into evidence, the employees of the highway department, water and sewer, water plant, and sewer have different job duties and responsibilities and work in different locations. Joint Exhibits 3-20.
9. A buildings and grounds employee who wishes to take time off completes a form titled "Rochester DPW Time Off Request Form." Below this header the states "Water-Highway-Buildings and Grounds-Sewer." Union Exhibit 1.
10. A City notice relating to the summer of 2007 time period expressly provides that the DPW is accepting applications for Maintenance Technicians to "perform responsible, skilled buildings and grounds maintenance duties." Union Exhibit 5.
11. A June 2007 City payroll status change form authorized by DPW Commissioner Melodie Esterberg, verified by the City Human Resource Coordinator, and approved by the City Manager references the DPW as the department for Larry Downes, the involved buildings and grounds employee. Union Exhibit 6.
12. City purchase orders relating to material ordered by buildings and grounds employees are placed under the department of the DPW and are shipped to the DPW at 45 Old Dover Road. Union Exhibit 7.
13. DPW workplace rules, Union Exhibit 14, are posted in the buildings and grounds office located at the community center on Wakefield street.
14. The City has provided shirts to employees of the building and grounds division which reflect that buildings and grounds is considered part of the DPW. Union Exhibits 2 and 4.
15. Union Exhibit 2 was distributed at an annual spring party attended by public works employees and held at the highway garage. The back of the shirt contains a DPW logo, which includes images representing the different divisions, including buildings and grounds.
16. Union Exhibit 4 is one of the uniform shirts worn by employees of the different divisions in the DPW, and it is a shirt worn by employees of the buildings and grounds division.

17. The City also distributes to buildings and grounds employee and DPW employees a pin as a form of commendation for the quality of work performed. Union Exhibit 3. The pin features the same DPW logo that appears on Union Exhibit 2 (t-shirt).

DECISION AND ORDER

JURISDICTION

The PELRB has jurisdiction over the determination of bargaining units, including modifications of existing bargaining units, pursuant to the provisions of RSA 273-A:8.

DISCUSSION

The City argues that under Pub 302.05 (b) dismissal is required as this matter should be settled through the election process and because AFSCME has failed to show a sufficient change in circumstances. Pub 302.05 (b) provides that:

A petition shall be denied if:

- (1) The question is a matter amenable to settlement through the election process; or
- (2) The petition attempts to modify the composition of a bargaining unit negotiated by the parties and the circumstances alleged to have changed, actually changed prior to negotiations on the collective bargaining agreement presently in force.

The crux of the City's argument is that because there are a sufficient number of buildings and grounds employees to form an independent bargaining unit, they should be required to proceed to form an independent bargaining unit under the procedures set forth in Pub 301.01. However, the City overlooks the fact that there may be advantages to buildings and grounds employees in collective bargaining if they join with a larger existing bargaining unit with nearly 25 years experience of collective bargaining with the city. Also, Pub 302.05 (b)(1) does not require the denial of AFSCME's petition just because buildings and grounds employees meet the criteria necessary to establish an independent bargaining unit. The City complains that the buildings and grounds employees are not being given the opportunity to express their preference, either at the ballot box or through the submission of showing of interest (signature) cards. This argument might carry more weight had there been evidence that a meaningful number of buildings and grounds employees oppose the modification request, but there is insufficient, if any, evidence to this effect. Further, the rules do not require a showing of interest through signature cards or at the ballot box in order to modify an existing bargaining unit.

The City has not cited any authority for its argument that an election is required given the facts of this case beyond the language of Pub 302.05 (b)(1). While such authority is not required, it would lend support to the City's position since in general elections are not conducted in modification proceedings. The City has not identified any circumstances or facts unique to this

case which, to use the language of the rule, demonstrate that "the question is a matter amendable to settlement through the election process."

The City's remaining argument for dismissal under Pub 302.05 (b)(2) concerns the change in circumstances requirement. This argument fails because the City has not introduced sufficient evidence to satisfy all the requirements of Pub 302.05 (b)(2). There was no evidence at hearing that the composition of the existing bargaining unit was ever negotiated by the parties and likewise insufficient or no evidence as to when negotiations on the July 1, 2003 to June 30, 2007 Collective Bargaining Agreement ("2003-2007 CBA") took place. See NEPBA Inc. Local 40 and 45 and SEA/SEIU Local 1984, PELRB Decision No. 2006-174 and State Employees Association of New Hampshire Local 1984 SEIU v. State of New Hampshire, PELRB Decision No. 2002-045. Evidence on these points, as well as on adequacy of the claimed change in circumstances, are requirements for dismissal under Pub 302.05 (b)(2). Further, there has been a change in circumstances, consisting of a number of organizational changes referenced in the Findings of Fact that have occurred with respect to the relationship of buildings and grounds employees to the DPW and DPW employees since 1999.

The City also contends that AFSCME has not satisfied the community of interest requirement, mainly because buildings and grounds employees have different job responsibilities and work in different locations as compared to the DPW employees currently covered by the existing bargaining unit. However, the City overlooks the fact that there is already a noticeable diversity in terms of job responsibilities and work locations among existing bargaining unit employees. This existing diversity undermines the City's argument that buildings and grounds employees cannot have a community of interest with other bargaining unit members on account of their specific job responsibilities and work locations. The distinctions and differences between buildings and grounds employees and existing bargaining unit employees are no more significant than the distinctions and differences that exist as between the current bargaining unit members.

The current bargaining unit is populated by employees who work for the highway department, the sewer plant, the water plant, and or are on the water and sewer construction crews. Their relatively diverse job responsibilities and places of work are illustrated by the job descriptions submitted into evidence. Despite these differences, this group of employees has functioned as a bargaining unit under RSA 273-A since 1983, and the City does not contend today that it is an inappropriate unit. With regard to the employees at issue in this case, a community of interest showing does not require the level of uniformity in job duties, places of work and other areas urged by the City. Additionally, there are a number of documents which either on their own or in conjunction with witness testimony show that that as of 2007, at least on an operational basis, the City considers the buildings and grounds division to be a division of the DPW, and they are subject to common rules and procedures. For example, see Union Exhibits 1, 2, 3, 4, 5, 6,7, 11, and 14.

The involved employees all work under the overall direction of the DPW commissioner and are all considered to be DPW employees. They also have common uniforms and are subject to similar workplace rules. A common theme among existing bargaining unit members is their status as DPW employees. It is evident that buildings and grounds employees are also in fact

considered and treated as DPW employees, an arrangement that has developed since 1999. The City has also taken steps to promote the common purpose and unity of existing bargaining unit employees and buildings and grounds employees, as evidenced by the various logos, the "moral" buttons, and group gatherings.

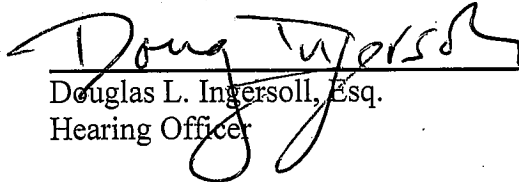
The various DPW logos submitted into evidence reflect the understanding that buildings and grounds is considered to be part of the DPW, and certainly suggests that this must be the prevalent belief and understanding among employees. The evidence indicates that the buildings and grounds employees are treated as part of this larger group, and are involved in some common activities which reflect a self-felt community of interest. AFSCME has introduced evidence to satisfy the community of interest requirement in accordance with the applicable criteria set forth in RSA 273-A:8, I and Pub 302.02.

Accordingly, the modification petition is granted. The existing bargaining unit is amended as follows:

UNIT: All permanent, full-time employees of the Public Works Department and buildings and grounds. Excluding: department heads, foremen, assistant department heads, clerical, staff, seasonal and probationary employees.

So ordered.

February 26, 2008


Douglas L. Ingersoll, Esq.
Hearing Officer

Distribution:

Michael Maccaro, Esq.
Warren D. Atlas, Esq.