



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**AFSCME COUNCIL 93, LOCAL 863/
ROCHESTER PUBLIC WORKS
DEPT. BUILDINGS AND GROUNDS**

COMPLAINANT

CASE NO. G-0024-6

v.

DECISION NO. 2009-131

**CITY OF ROCHESTER,
DEPT. OF PUBLIC WORKS AND
BUILDINGS AND GROUNDS**

RESPONDENT

APPEARANCES

Representing: AFSCME Council 93, Local 863/Rochester Public
Works Dept. Building and Grounds
Karen Clemens, Esq., Associate General Counsel, AFSCME Council 93
Boston, Massachusetts

Representing: City of Rochester, Dept. of Public Works and Building and Grounds
Thomas J. Flygare, Esq., Flygare, Schwarz & Closson, PLLC
Exeter, New Hampshire

BACKGROUND

AFSCME Council 93, Local 863/Rochester Public Works Dept. Building and Grounds
("Union") filed an unfair labor practice complaint against the City of Rochester, Dept. of Public

Works and Building and Grounds on December 29, 2008. The Union claims that the City violated RSA 273-A:5, I (c), (d), and (g) by refusing to award merit increases to employees of the Public Works Department's Buildings and Grounds Division in retaliation for their successful modification petition by which they were added to the existing Public Works bargaining unit.

The Union requests that the PELRB find that the City of Rochester Public Works Department is in violation of RSA 273-A:5, I (c), (d), and (g) and is therefore guilty of unfair labor practices; order the City to provide appropriate wage adjustments to the Buildings and Grounds employees effective July 1, 2008; order the City to publicly post the findings of the PELRB for 30 business days; and order the City to make the Union whole for any and all costs and expenses incurred to pursue the unfair labor practice charge.

On January 12, 2009 the City filed an answer denying all claims of retaliation and denying that the involved employees are entitled to merit step increases while negotiations pursuant to an Order to Negotiate, PELRB Decision No. 2008-044, are ongoing. The City requests that the PELRB dismiss the complaint with prejudice and order the Union to reimburse the City for its expenses and fees in connection with this matter.

The parties agreed to submit this matter for decision based upon stipulated facts and exhibits. Both parties filed opening briefs, and the City filed a reply brief according to the agreed upon schedule, with the last brief having been filed on May 20, 2009. The parties stipulated facts are set forth below as Findings of Fact 1-19.

FINDINGS OF FACT

1. The City is a public employer as that term is defined in RSA 273-A:1, X.

2. The Union is currently the exclusive representative for all permanent, full-time employees of the City's Public Works Department and Buildings and Grounds, excluding department heads, foremen, assistant department heads, clerical, staff, seasonal and probationary employees.

3. The City and the Union are parties to a collective bargaining agreement (CBA) for the period from July 1, 2003 to June 30, 2007 (Joint Exhibit 1). No successor agreement has been reached.

4. At the time the aforementioned collective bargaining agreement was approved, the City's buildings and grounds employees were not included in the Union's bargaining unit. Such unrepresented employees were subject to the terms of the City's Employment Policy Handbook, as last amended November 21, 2006 (Joint Exhibit 2).

5. On June 12, 2007, the Union filed a Modification Petition with the PELRB seeking to add the City's buildings and grounds employees to a pre-existing unit in the City's Public Works Department.

6. The City opposed the aforementioned Modification Petition.

7. On February 26, 2008, the PELRB Hearing Officer granted the Modification Petition. Decision No. 2008-035 (Joint Exhibit 3).

8. On March 3, 2008, the PELRB issued a modified certification and ordered the City to "negotiate collectively with the exclusive representative named herein for wages, terms and conditions of employment for the members of the bargaining unit..." Decision 2008-044 (Joint Exhibit 4).

9. On April 1, 2008, the PELRB denied the City's Motion to Review Decision No. 2008-035. Decision 2008-077 (Joint Exhibit 5).

10. The expired CBA contains an evergreen clause (Joint Exhibit 1, Page 16).

11. The employees in the bargaining unit prior to March 3, 2008 if eligible received a step increase on July 1, 2008.

12. Evaluations of buildings and grounds employees were conducted by supervisors in early 2008. All evaluations were satisfactory. The portion of the evaluation form recommended wage increases was not completed by the department head. The evaluations were signed by the department head on February 28, 2008. The evaluations were not forwarded to City Hall or signed by the City Manager.

13. On July 1, 2008, the City did not award buildings and grounds employees compensation adjustments under the City's Employment Policy Handbook (Joint Exhibit 2, Page 6).

14. On July 1, 2008, the City did not award compensation adjustments under the City's Employment Policy Handbook to three other new bargaining units in the City of Rochester Municipal Management Group, the Rochester Middle Management Group, and the Rochester Communications Union, NEPBA Local #123.

(a) The Certification Petition for the Rochester Municipal Management Group and the Rochester Middle Management Group was filed on June 6, 2008. Certifications for these units were issued on December 4, 2008. PELRB Decisions Nos. 2008-245 and 2008-246.

(b) The Certification of the Rochester Communications Union, NEPBA Local #123 was issued on June 17, 2008, PELRB Decision 2008-126.

15. On July 1, 2008 all non-union full time employees of the City of Rochester received 60% of the recommended merit increase in accordance with the Employment Policy Handbook.

16. On December 9, 2008, the Union submitted proposals to the City regarding wages and terms of employment for buildings and grounds employees (Joint Exhibit 6).

17. On December 9, 2008, the Union wrote the City requesting the implementation of wage adjustments for buildings and grounds employees (Joint Exhibit 7).

18. On December 19, 2008, the City through its counsel responded to the Union's letter of December 9, 2008, declining the Union's request of wage adjustments for buildings and grounds employees (Joint Exhibit 8).

19. On January 6, 2009, the City submitted its proposals to the Union regarding wages and terms of employment for buildings and grounds employees (Joint Exhibit 9).

DECISION AND ORDER

DECISION SUMMARY

The Union's unfair labor practice complaint is denied. There is insufficient evidence that the City declined the Union's December 9, 2008 request for the implementation of wage adjustments in order to retaliate against employees who were added to an existing Public Works Department bargaining unit as a result of contested modification proceedings completed in April, 2008 or that the City has otherwise violated the provisions of RSA 273-A:5, I (c), (d) and (g).

JURISDICTION

The PELRB has primary jurisdiction of all violations of RSA 273-A:5. *See* RSA 273-A:6, I. PELRB jurisdiction is proper in this case as the Union has alleged violations of RSA 273-A:5, I (c), (d) and (g).

DISCUSSION:

The Union claims that the City's failure to provide the demanded wage increases for the Buildings and Grounds employees who were recently added to the Public Works Department

bargaining unit constituted an illegal retaliation against these employees for their involvement in the related modification proceedings in violation of the following statutory provisions:

RSA 273-A:5, I

(c) To discriminate in the hiring or tenure, or the terms and conditions of employment of its employees for the purpose of encouraging or discouraging membership in any employee organization;

(d) To discharge or otherwise discriminate against any employee because he has filed a complaint, affidavit or petition, or given information or testimony under this chapter; and

(g) To fail to comply with this chapter or any rule adopted under this chapter.

In cases where anti-union retaliation is claimed, it is the Union's burden to prove, by a preponderance of the evidence, some "minimal degree of retaliatory motivation," and this burden cannot be met "simply by the union making a claim of retaliation and producing some evidence to support the claim." *Appeal of Professional Firefighters of East Derry, Local 2252, IAFF*, 138 N.H. 142, 145 (1993)(citations omitted).

The stipulated facts establish the occurrence of a contested modification proceeding ending in April, 2008, the Union's first bargaining proposal dated December 9, 2008; the Union's letter demanding the implementation of a wage adjustment dated December 9, 2008, the City's December 19, 2008 denial of the Union's wage adjustment request, the filing of this complaint on December 29, 2008; and the City's first bargaining proposal dated January 6, 2009. The Union has not met its burden of proof. While these facts qualify as "some" evidence to support the retaliation claim they are not enough to establish a "minimal degree of retaliatory motivation." The record reflects that the parties' most recent negotiations commenced in December 2008 with the Union's wage proposal for the entire bargaining unit, including the positions added by the 2008 modification proceedings. The City is participating in these

negotiations as evidenced by its January 6, 2009 proposal.¹ The City is entitled to bargain the terms and conditions of employment for the positions recently added to the bargaining unit and the board does not find that the City's effort to address wage issues through collective bargaining is retaliatory, or that the City's refusal to pay the demanded wage adjustment is retaliatory. As to the Union's complaint about the City's first bargaining proposal, which among other things proposes that Buildings and Grounds division employees receive wages according to the City's Employment Policy Handbook, as amended, it should be noted that good faith participation in the collective bargaining process does not require that the Union accept any particular City proposal.

In the event the parties have not yet completed negotiations they are directed to continue the bargaining process to reach agreement on, among other things, wage arrangements for employees of the Buildings and Grounds divisions and, to the extent necessary, utilize available statutory procedures to address any impasse that might result. In accordance with the foregoing the Union's complaint is denied.

So ordered.

Signed this 26 day of June, 2009.


Jack Buckley, Chair

By unanimous vote. Chair Jack Buckley presiding with Board Members Carol M. Granfield and Kevin E. Cash also voting.

Distribution:

Karen Clemens, Esq.

Thomas J. Flygare, Esq.

¹ The record does not reflect the parties' bargaining history during the period between April 1, 2008, the date the modification proceedings were completed, and December 8, 2009.