



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**SALEM PUBLIC ADMINISTRATORS'
ASSOCIATION**

AND

CASE NO. G-0019-3
DECISION NO. 2009-171

TOWN OF SALEM

APPEARANCES

Representing: Salem Public Administrators' Association
Paul J. Parisi, President, Salem Public Administrators' Association
Salem, New Hampshire

Representing: Town of Salem
Debra Weiss Ford, Esq., Jackson Lewis LLP
Portsmouth, New Hampshire

BACKGROUND

On February 17, 2009, the Salem Public Administrators' Association ("SPAA") filed a modification petition to add the following six positions to the bargaining unit: Director of Engineering, Public Works Director, Police Chief, Fire Chief, Finance Director, and Community Development Director. These six positions were included in the bargaining unit when it was initially certified in 2005 with the agreement of the parties but were excluded by agreement in modification proceedings in 2007. In its petition SPAA states that that "[n]o progress has been made in nearly two (2) years to reach agreement on individual employment agreements with

these individuals as agreed to during mediation. Their status has not changed: they still maintain a community of interest with SPAA.”

The Town filed its answer on March 5, 2009 and objects to the modification petition. Among other things, the Town claims that the six positions were properly excluded in the 2007 modification proceedings and cannot be included in the bargaining unit because all of the positions qualify as supervisory within the meaning of RSA 273-A:8, II and several of the positions are confidential within the meaning of RSA 273-A:1, IX (c).

The undersigned hearing officer conducted a hearing on the modification petition on April 29, 2009 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. Both parties have filed briefs and the record is closed.

FINDINGS OF FACT

1. The Town of Salem is a public employer subject to the provisions of RSA 273-A:1 et. seq.

2. On January 10, 2005, following the submission of an agreed upon certification petition and election, the PELRB issued Decision 2005-005 certifying the Salem Public Administrators' Association (“SPAA”) as the exclusive representative of a bargaining unit comprised of Salem management level positions as follows:

UNIT: Composed of professional employees in management level positions, including as listed: Chief Assessor, Chief Building Official, Senior Engineer, Planning Director, Health Officer, Capital Projects Manager, Public Works Director, Operations Manager, Welfare Director, Information Services Manager, Utilities Manager, Police Chief, Police Lieutenant, Police Captain, Prosecutor, Assistant Prosecutor, Fire Chief, Assistant Fire Chief, Deputy Fire Chief, Battalion Chief, Recreation Director, Finance Director, Accounting and Budget Manager and Community Development Director.

3. Prior to the 2005 certification, SPAA had engaged in non-statutory collective bargaining with the Town dating back to the 1980's.

4. Following the 2005 certification SPAA and Town representatives negotiated a collective bargaining agreement (the "first contract") but voters did not approve the first contract's cost items at the 2006 annual town meeting. The parties then returned to the bargaining table, reached impasse, and participated in an eleven hour mediation in an effort to resolve the impasse on December 15, 2006. Fire Chief Kevin Breen and Public Works Director Richard Russell, among others, attended the mediation on behalf of SPAA. Michael Lyons, Chair of the Board of Selectman, and Henry LaBranche, Town Manager, attended the mediation on behalf of the Town.

5. During the mediation the parties formed the mutual impression that voters had, at least in part, rejected the cost items of the first contract because they objected to the inclusion of the Capital Projects Manager (a/k/a Director of Engineering), Public Works Director, Police Chief, Fire Chief, Finance Director, Accounting and Budget Manager and Community Development Director (the "six positions or six employees") in the bargaining unit.

6. During the mediation the parties discussed removing these six positions from the bargaining unit on an agreed upon basis in response to perceived voter concerns expressed at the 2006 annual meeting.

7. At the completion of the mediation, the parties executed a Memorandum of Agreement signed by Chief Breen and Town Manager LaBranche. See Town Exhibit 14.

8. The Mediation Memorandum of Agreement refers to the six positions or employees in paragraphs one and three, as follows:

- 1) Article 3 - Recognition – The Assn & the Town will jointly petition the PFLRB to remove the "6" persons from the bargaining unit contingent upon this agreement being

ratified & accepted at Town Meeting. The Town Manager & the "6" persons will discuss the compression in these 6 positions with the goal of resolving same by 5/1/07. They will also address the subject of annual wage increases.

and

3) Article 5 Wages

A) 3.0% 4/1/07; 3.0 % 4/1/08

B) Town will go to Board & Voters to attempt to secure an additional 2% above the 3.0% effective 4/1/07. The 2.0% will be applied at Town Managers discretion, not pro rata, to address compression with the "6."

9. The final two sentences of the mediation Memorandum of Agreement provide that:

The undersigned representatives of the parties hereby agree that they have reached agreement on all issues submitted for mediation. The parties further agree that they will fully recommend this agreement to their respective ratifying bodies for approval.

10. During the course of the mediation, Fire Chief Kevin Breen on behalf of SPAA, and Michael Lyons, Chair of the Board of Selectman, Henry LaBranche, Town Manager, and James Higgins, mediator, discussed, at least to some extent, issues relating to employment arrangements for employees holding the six positions to be excluded from the bargaining unit.

11. Henry LaBranche retired as Town Manager and was succeeded by Jonathan Sistare in October, 2007. At the time Mr. Sistare assumed his duties as Town Manager the six employees had not obtained final written employment agreements with the Town, although at least some of them had prepared and submitted proposals to former Town Manager LaBranche. When he assumed his duties Mr. Sistare believed he had authority to review and revise any proposed employment agreements, and as of the time of hearing was continuing with his efforts to put written employment agreements in place.

12. On March 30, 2007, following the submission of an agreed upon modification petition, the PFI.RB issued Decision 2007-044 amending the certification of the SPAA

bargaining unit by excluding the six positions at issue in this case, namely the Capital Projects Manager (a/k/a Director of Engineering), Public Works Director, Police Chief, Fire Chief, Finance Director, Accounting and Budget Manager and Community Development Director.

13. There has been no change in the respective duties and responsibilities of either the disputed six positions excluded from the bargaining unit in 2007 or the positions that have remained in the bargaining unit since the 2007 proceedings.

DECISION

DECISION SUMMARY

The SPAA's modification petition is denied because there is insufficient evidence that there has been a change in circumstances since the most recent proceedings involving this bargaining unit were completed in March, 2007 or that the current composition of the bargaining unit is incorrect to a degree warranting modification. The evidence concerning the Town's failure to make progress to the SPAA's satisfaction on individual employment agreements with some or all of the employees holding the six positions excluded from the bargaining unit in 2007 is not a change in circumstance which justifies these modification proceedings.

JURISDICTION

The PELRB has jurisdiction of all petitions to determine and modify bargaining units pursuant to RSA 273-A:8 and Pub 302.05.

DISCUSSION

PELRB modification proceedings are governed in part by Pub 302.05 (a), which provides:

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, or

other employee organization if the provisions of section (d) are met, may file a petition for modification of bargaining unit.

In accordance with Pub 302.05, contested modification petitions must be supported by either a change in circumstances or by evidence demonstrating that the existing bargaining unit is incorrect to the extent that modification is required. *See Teamsters Local 633 of New Hampshire and Town of Hooksett*, PELRB Decision No. 2008-193 (modification petition dismissed because there had been no change in circumstances since the time of the prior bargaining unit proceedings). The most recent proceedings involving this bargaining unit concluded in March of 2007 with the issuance of an agreed upon amended certification. *See* PELRB Decision No. 2007-044. The 2007 changes to the bargaining unit, and in particular the exclusion of the disputed six positions, were deemed appropriate and necessary by the SPAA as well as the Town, and the parties' agreement was accepted and approved by PELRB. There is insufficient evidence that since these 2007 proceedings circumstances have changed as to either positions currently within the bargaining unit or the positions that the SPAA now seeks to add to the bargaining unit. There is also insufficient evidence that the current composition of the bargaining unit is incorrect to a degree warranting modification.

The SPAA contends that the current modification proceedings are justified because no "progress has been made in nearly two (2) years to reach agreement on individual employment agreements" for some or all of the employees holding the positions that were excluded from the bargaining unit in 2007. Although the parties dispute the nature and extent of any agreement reached at the December, 2006 mediation concerning the positions to be excluded, the written Memorandum of Agreement from that time reflects that the parties at least reached the following understanding:

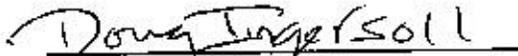
Article 3 – Recognition – The Assn & the Town will jointly petition the PELRB to remove the “6” persons from the bargaining unit contingent upon this agreement being ratified & accepted at Town Meeting. The Town Manager & the “6” persons will discuss the compression in these 6 positions with the goal of resolving same by 5/1/07. They will also address the subject of annual wage increases.

However, the current dispute about whether the Town has fulfilled its obligations to address these issues and/or other terms and conditions of employment for these six employees is not a basis for modification of the current bargaining unit. The SPAA was not required to agree to the 2007 changes to the bargaining unit but apparently did so, at least in part, to advance the interests of the remaining bargaining unit positions in the collective bargaining process. The SPAA’s agreement must also be viewed as its recognition that the exclusion of the disputed six positions was appropriate and necessary. Absent the requisite change in circumstances or evidence that the current composition of the bargaining unit is incorrect to a degree which requires modification the SPAA is foreclosed from contesting today a bargaining unit composition it agreed to in the 2007 proceedings. As a result of the 2007 modification proceedings the excluded employees are required to address the terms and conditions of their employment outside the statutory collective bargaining process. The proper forum for these employees to enforce any employment agreements reached with the Town in December, 2006 or later is a New Hampshire court of general jurisdiction, like the State District or Superior Courts.

In accordance with the foregoing the modification petition is dismissed.

So ordered.

August 18, 2009


Douglas L. Jagersoll, Esq.
Hearing Officer

Distribution:

Paul J. Parisi, President, Salem Public Administrators Association
Debra Weiss Ford, Esq.

