



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**ROCHESTER MUNICIPAL MANAGERS
GROUP**

PETITIONER

and

CASE NO. G-0068-2
DECISION NO. 2009-182

CITY OF ROCHESTER

RESPONDENT

APPEARANCES

Representing: Rochester Municipal Employees Association
John S. Krupski, Esq., Molan Milner & Krupski, PLLC
Concord, New Hampshire

Representing: City of Rochester
Thomas J. Flygare, Esq., Flygare, Schwarz & Closson, PLLC
Exeter, New Hampshire

BACKGROUND

On May 6, 2009 the Rochester Municipal Managers Group (Union) filed a petition for modification seeking to add a position of Communications Supervisor¹ to an existing bargaining unit consisting of the following positions:

¹ The parties refer to the subject position in various ways, including "Communications Supervisor," "Communication Center Supervisor," and "Communications Manager." In the interests of clarity and uniformity, the subject position will hereinafter be referred to as "Communications Supervisor."

Fire Chief, Director of Recreation, Arena and Youth Services, Public Works Commissioner, City Clerk, Director of Code Enforcement, Tax Collector, Welfare Director, Director of Planning and Development, Deputy Assessor, Economic Development Manager, Library Director, and Information Systems Supervisor

The City of Rochester (City) filed an objection to the modification petition on May 20, 2009. The City claims that the circumstances have not changed since the bargaining unit was negotiated by the parties and certified on December 4, 2008; that the position of a Communications Supervisor is a confidential position; and that the position does not share a community of interest with the remainder of the bargaining unit.

The undersigned Hearing Officer conducted a hearing on June 26, 2009 at the Public Employee Labor Relations Board (PELRB) offices in Concord at which time the parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. At the parties' request the record was held open until July 24, 2009 to allow the filing of post-hearing briefs. Both parties filed their briefs on July 24, 2009 and the record is closed.

FINDINGS OF FACT

1. The City of Rochester is a public employer as that term is defined in RSA 273-A:1, IX and, is, therefore, subject to the provisions of RSA 273-A.

2. The Rochester Municipal Managers Group is the certified exclusive representative of the existing bargaining unit covering certain positions which it now seeks to modify. PELRB Decision No. 2008-246.

3. The existing bargaining unit contains the following positions:

Fire Chief, Director of Recreation, Arena and Youth Services, Public Works Commissioner, City Clerk, Director of Code Enforcement, Tax Collector, Welfare Director, Director of Planning and Development, Deputy Assessor, Economic Development Manager, Library Director and Information Systems Supervisor.

PELRB Decision No. 2008-246.

4. As of the time of the hearing, the parties were in negotiations on their first collective bargaining agreement (CBA).

5. Rochester Municipal Managers Group filed its first petition for certification on June 6, 2008. The petition contained the following description of the proposed unit: "City of Rochester Department Heads, Deputies, and Supervisors." See *Rochester Municipal Managers Group and City of Rochester*, PELRB Case No. G-0065-1. The City objected to the composition of the bargaining unit proposed in June 2008 petition.

6. Following the City's objections and negotiations between the parties, the Union withdrew its first petition for certification on October 8, 2008. In its assented to motion to withdraw, the Union stated that the parties "have settled this matter as to composition of the bargaining unit therefore the hearing . . . will not be necessary." See *Rochester Municipal Managers Group and City of Rochester*, PELRB Case No. G-0065-1.

7. Pursuant to the parties' negotiations and agreement, the bargaining unit proposed in June 2008 petition was split up into two units: Municipal Managers Group and Middle Management Group. Both Groups filed written majority authorization (WMA) petitions for certification on October 20, 2008. See *Rochester Municipal Managers Group and City of Rochester*, PELRB Case No. G-0068-1 and *Rochester Middle Management Group and City of Rochester*, PELRB Case No. G-0067-1.

8. The City agreed with the composition of the bargaining unit proposed in the Rochester Municipal Managers Group's petition for certification. See *Rochester Municipal Managers Group and City of Rochester*, PELRB Case No. G-0068-1. The PELRB issued a

Certification of Representative and Order to Negotiate on December 4, 2008 without conducting a hearing. PELRB Decision No. 2008-246.

9. The October 2008 petition for certification filed by the Rochester Municipal Managers Group, which resulted in the formation of the existing bargaining unit, did not include the position of Communications Supervisor among the positions within the proposed bargaining unit the petitioner sought to certify.

10. The October 2008 petition for certification filed by the Rochester Middle Management Group also did not include the position of Communications Supervisor among the positions within the proposed bargaining unit the petitioner sought to certify. The Middle Management Group's petition was granted and a Certification of Representative and Order to Negotiate was issued on December 4, 2008. See PELRB Decision No. 2008-245.

11. The position of Communications Supervisor existed and was filled at the time Rochester Municipal Managers Group filed its June 2008 and October 2008 petitions for certification.

12. The composition of the bargaining unit represented by the Rochester Municipal Managers Group was negotiated by the Group and the City, and the exclusion of the position of the Communications Supervisor served as an incentive for the City to agree with the composition of the proposed Municipal Managers bargaining unit.

13. The present case is the first modification proceeding since the formation of the Rochester Municipal Managers bargaining unit.

14. Jason Cole is the City's only Communications Supervisor. He started working in his present position on February 20, 2008. He was a probationary employee for one year and completed his probation on February 20, 2009.

15. The duties and responsibilities of Communications Supervisor have not changed since the formation of the bargaining unit represented by Rochester Municipal Managers Group. The Communications Supervisor's duties are outlined in Union Exhibit 1.

16. Norman Sanborn is a Rochester Fire Chief and a president of the Rochester Municipal Managers Group and Rochester Middle Management Group. Mr. Sanborn participated in filing of June 2008 petition and October 2008 petitions.

17. Chief Sanborn testified that the Communications Supervisor position was not included in June 2008 and October 2008 petitions for certification due to an oversight.

DECISION

DECISION SUMMARY

The Union's petition for modification is dismissed. The evidence is insufficient to establish that a material change in circumstances warranting modification of the bargaining unit has occurred since the formation of the bargaining unit or that the current composition of the unit is incorrect to a degree warranting its modification.

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

Modifications of existing bargaining units are governed by Pub 302.05, which provides in relevant part:

- (a) 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.

(b) 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.

Pub 302.05.

“[A]n administrative agency must follow its own rules and regulations” *Appeal of State Employees’ Ass’n of N.H., Inc.*, 156 N.H. 426, 428 (2007), citing *Attitash Mt. Service Co. v. Schuck*, 135 N.H. 427, 429 (1992). The language of Pub 302.05 leaves the PELRB discretion in deciding whether or not to grant petitions to modify. See *Appeal of the Bow School District*, 134 N.H. 64, 73 (1991). In the present case, the Union seeks to modify the existing bargaining unit by adding a position of Communications Supervisor. The threshold consideration is whether the Union has satisfied its burden, as a moving party, to demonstrate either that a change in circumstances has occurred since the existing bargaining unit was formed or that the existing bargaining unit is incorrect to a degree warranting its modification. See Pub 302.05. See also *Salem Public Administrators’ Association and Town of Salem*, PELRB Decision No. 2009-171; *Teamsters Local 633 of New Hampshire and Town of Hooksett*, PELRB Decision No. 2008-193.

The Union argues that the circumstances have changed to warrant the inclusion of the Communications Supervisor position in the existing bargaining unit because, since the formation of the unit, the Communications Supervisor’s employment status has changed from probationary to permanent. The Union’s argument is without merit.

Jason Cole was hired for the position of Communications Supervisor on February 20, 2008. The petition for certification, which resulted in the formation of the Municipal Managers bargaining unit, was filed on October 20, 2008 and granted on December 4, 2008. The position of Communications Supervisor existed and was filled at the time the petition for certification was filed. The president of Rochester Municipal Managers Group, Fire Chief Norman Sanborn, testified that, since the formation of the Municipal Managers unit, the only change concerning the position of Communications Supervisor was that the employee hired for this position completed his probation. Chief Sanborn also testified that the position of Communications Supervisor was not included in the petitions for certification due to an oversight.

The change in employment status from probationary to permanent is not a material change in circumstances warranting a modification of the existing bargaining unit. The PELRB determines the composition of, and certifies, bargaining units consisting of positions or classifications and not of individual employees. The fact that, under RSA 273-A, a probationary employee is not a public employee and can neither sign a WMA card nor vote in representation election does not prohibit a union from including a position for which the probationary employee was hired in a proposed bargaining unit assuming other applicable criteria are satisfied. For example, a proposed bargaining unit may include 50 employees in only 12 positions. In that case, the PELRB would issue a Certification of Representative covering 12 positions without reference to how many employees are actually filling these positions. A position in such a unit will be covered by the certification even when it is temporarily unfilled. Hence, a particular employee's probationary status is irrelevant to a union's ability to include a position or classification, for which that employee was hired, in a proposed bargaining unit. Furthermore, RSA 273-A:8, I

provides in relevant part that, for the purposes of determining bargaining unit, "probationary employees shall be counted to satisfy the employee minimum number requirement."

Similarly, correction of an oversight or of a mistake is not a sufficient ground for filing a petition to modify an existing bargaining unit.

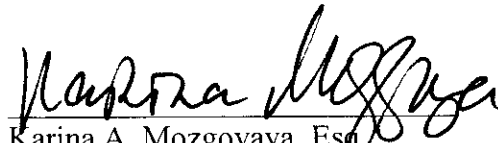
In the present case, the position of Communications Supervisor existed and was filled at the time the Union filed the petitions for certification. The Union offered no evidence that the duties and responsibilities of the Communications Supervisor have changed since the bargaining unit was formed to a degree warranting the inclusion of the subject position in the unit.

Lastly, the evidence is insufficient to establish that the existing bargaining unit is incorrect to a degree warranting its modification.

Accordingly, the Union's petition for modification is dismissed. This dismissal, however, should not be construed as a prohibition on further discussions between the parties or on any agreement between them that would result in the subsequent inclusion of the position within the unit. Since the Union's petition is denied pursuant to Pub. 302.05, it is unnecessary for the Hearings Officer to address the other objections raised by the City.

So ordered.

September 3, 2009


Karina A. Mozgovaya, Esq.
Staff Counsel/Hearing Officer

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