State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

City of Laconia Complainant v. Laconia Professional Firefighters, Local 1153 I.A.F.F. Respondent	*	Case No. F-0103-18 (Unit Modification)
Laconia Professional Firefighters, Local 1153, I.A.F.F. Complainant v. City of Laconia Respondent	*	Case No. F-0103-19 (Unfair Labor Practice Decision No. 2002-087 ON REMAND

APPEARANCES

Representing City of Laconia:

Mark Broth, Esq., Counsel

Representing Laconia Firefighters, Local 1153, I.A.F.F.:

John Krupski, Esq., Counsel

BACKGROUND

The City of Laconia (City) filed a Modification Petition on January 28, 2000 seeking to remove the positions of captain and lieutenant from the bargaining unit represented by the International Association of Firefighters, Local 1153 (Union) which includes those two job titles

plus firefighters, as more particularly described at Article II, Section 1 of their collective bargaining agreement for the period July 1, 1996 to June 30, 2000 (Joint Exhibit No. 1). The Union filed its answer thereto on February 11, 2000 along with an unfair labor practice complaint of the same date alleging violations of RSA 273-A:5 I (e) resulting from the City's setting preconditions of resolving the pending modification petition before it would conclude negotiations on a successor CBA. The City filed its answer to the ULP after which both matters were consolidated for hearing and first heard by the PELRB On March 16, 2000.

At the March 16, 2000 hearing the ULP was presented first with the Union as the moving party. The Union presented a witness and rested, there being two implicit understandings, namely, that the parties reserved the right of cross examination and rebuttal and that evidence and testimony presented in the ULP proceedings would be considered in the modification petition proceedings and vice versa. After the City presented a witness in response to the ULP, the Union interposed a Motion to Dismiss. The City asked for and received approval to file a memorandum opposing this Motion to Dismiss on or before March 17, 2000 which it did in a timely manner. Simultaneously, the City filed a Motion for Summary Judgment to which the Union filed objections on April 5, 2000. The pending motions were collectively considered by the PELRB on April 6 and 13, 2000 after which the PELRB informed the parties that those motions would be taken under advisement pending completion of the case. The second and final day of hearing in the consolidated matters occurred on May 2, 2000 and concluded with closing oral arguments by both sides after which the record was closed. The PELRB issued its decision in this matter on May 10, 2000 (Decision No. 2000-038) after which the City filed for reconsideration on May 22, 2000 and the Union filed objections thereto on June 6, 2000.

This matter was then appealed to the New Hampshire Supreme Court by the City. The Court heard arguments on January 15, 2002 and issued its decision on March 12, 2002. 147 N.H. 495. In that decision, the Court remanded on three issues: (1) whether lieutenants and captains are supervisors within the meaning of RSA 273-A:8 II; (2) if the lieutenants and captains are supervisors, whether it is permissible to include them in the same bargaining unit as firefighters; and (3) whether the City is barred from challenging the composition of the bargaining unit because of laches or any other reason. Both parties filed written briefs with the PELRB on these issues on April 29, 2002.

DECISION AND ORDER

The first of three issues directed to us on remand is whether lieutenants and captains are supervisors within the meaning of RSA 273-A:8 II. That portion of the statute provides that "persons exercising supervisory authority involving the significant exercise of discretion may not belong to the same bargaining unit as the employees they supervise." Our review of the testimony as reiterated in Decision No. 2000-038, from witnesses for both labor and management (see Finding Nos. 4, 6, 7 and 8 in particular), is conclusive on the point that nothing crucial or pivotal in the job functions of captains and lieutenants has actually changed since written evaluations commenced under Article IX, Section 12 of the parties' 1996-2000 CBA. See Finding No. 3.

When we compare the impact or consequences from the evaluations conducted by the captains and lieutenants, be they written or oral, we find that those evaluations have historically been corrective or instructive in nature, as opposed to being disciplinary or precursors to awarding merit pay or promotions. This comes as no surprise as it is consistent with the language of Article IX, Section 12 of the CBA which provides that "performance evaluations shall not be deemed to be disciplinary action" and with the testimony from labor and management witnesses alike in Finding Nos. 4, 6 and 7. When contrasted to Appeal of University System of NH, 131 NH 368, 376 (1988) where captains' evaluations were given "certain weight in merit pay increases...and were considered in terminating a new employee," neither the scope, intent nor consequences of the evaluations in Laconia rises to that level.

In a subsequent evaluations case, Appeal of East Derry Fire Precinct, 137 NH 607, 611 (1993), the Supreme Court again spoke to evaluations whose purposes had implications on hiring and termination decisions and found that fire officers had "disciplinary authority." Such is not the case here because there is no evidence that the Article IX, Section 12 evaluations were ever used for, or intended to be used for, disciplinary purposes, inclusive of hiring and terminations.

Since we issued Decision No. 2000-038 in May of 2000, Appeal of City of Manchester, Docket No. 98-684 (Slip. Op., October 29, 2001) was decided. In that case, the PELRB concluded that the alleged "increased responsibility [given to the incumbents in newly designated job titles] is not increased supervisory discretion that would warrant bargaining unit exclusion," not unlike the circumstances in the instant Laconia case. The City of Manchester appealed. While the Supreme Court acknowledged that the incumbents were authorized to schedule and assign work, not unlike captains and lieutenants in Laconia under the directions and strictures of the fire department (e.g., Union brief, p. 9), it also found that those new "supervisory" employees lacked the requisite disciplinary authority to warrant their exclusion from the bargaining unit. In Manchester, authority to hire, fire and promote rested with the department head, called a "director," not with the evaluators. Thus, while the evaluators/new supervisory employees could recommend discipline, there was no indication that employees in the new positions "actually took any disciplinary action." If we were to substitute "chief" for "director" and to equate the role of the Manchester evaluators with that of the captains and lieutenants in Laconia, the authority and the circumstances are remarkably similar. We believe the result should also be similar, i.e., that the lieutenants and captains lack sufficient disciplinary authority to warrant their exclusion from the bargaining unit.

We conclude that while lieutenants and captains may be "supervisors" by virtue of their ranks or titles, they are not sufficiently "supervisors" by function or vested with sufficient "disciplinary authority" to cause their exclusion from the bargaining unit. As the Union noted in its brief (p. 10), RSA 273-A "does not require that supervisors be excluded from a bargaining unit simply due to a title or position." This was articulated earlier in Appeal of East Derry Fire Precinct, 137 NH 607, 611 (1993) where the court recognized the Union's position "that some employees performing supervisory functions in accordance with professional norms will not be vested with the 'supervisory authority involving the significant exercise of discretion' described by RSA 273-A:8, II." Without such vested authority, there is no requirement for exclusion under the statute and, in response to the second issue of the remand, no cause to find that it is not permissible for lieutenants and captains to remain in the bargaining unit with firefighters.

This case was initially consolidated for hearing by the PELRB, by combining the City's modification petition and the Union's ULP. We addressed the ULP in Decision No. 2000-038 and do not speak to it here because of the limited purposes of the remand. The City's cause of action, the modification petition, was filed under Rule PUB 302.05 (a). In order to prevail with such a petition, the City must successfully carry the burdens of going forward and of proof that circumstances surrounding the formation of an existing bargaining unit, in this case one dating to May 24, 1956 (Finding No. 2 in Decision No. 2000-038), have changed sufficiently to warrant a modification in its structure. For the reasons stated, it has failed to do this. While our examination of the record shows the job descriptions and duties of the lieutenants and captains to have changed vis-à-vis written evaluations and the language of Article IX, Section 12 to be new with the 1996-2000 CBA, there has not been a sufficient change in the role, function or consequences of evaluations conducted by lieutenants and captains to warrant undoing almost fifty years of successful labor-management relations with the bargaining unit structured as it is today.

Based on the foregoing, we AFFIRM our previous dismissal of the City's modification petition and our finding, under the circumstances presented to us, that there is no basis to exclude captains and lieutenants from the existing bargaining unit. Having so found, we do not address the issues of laches in detail, with the exception of noting that if the City were allowed to proceed, there would be what it called "resulting prejudice" (City brief, p. 17) because the remaining lieutenants and captains would be less than ten in number.

So ordered.

Signed this 1st day of August, 2002.

JACK BUCKLEY
Chairman

By unanimous vote. Chairman Jack Buckley presiding. Members Seymour Osman and E. Vincent Hall present and voting.