State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME LOCAL 298 Complainant v. CITY OF MANCHESTER Respondent	:	CASE NO. A-0544:38 DECISION NO. 94-64
AFSCME LOCAL 298 PUBLIC BUILDING SERVICES Complainant v. CITY OF MANCHESTER Respondent	:	CASE NO. A-0435:40

APPEARANCES

Representing AFSCME Local 298:

Harriett P. Spencer, Staff Representative

Representing City of Manchester:

David Hodgen, Chief Negotiator

Also appearing:

Dennis Meve, AFSCME Local 298
James Gray, AFSCME Council #93
Brian Mitchell, AFSCME Local 298
Barbara Connor, City of Manchester
Frank Thomas, Public Works Director
Maurice H. Corriveau, Manchester Highway Department

BACKGROUND

AFSCME Local 298 filed two unfair labor practice charges against the City of Manchester on March 9, 1994 alleging violations of RSA 273-A:5 I (c), (h) and (i) for refusing to confer bargaining unit status on three unit employees who have been employed longer than one year (Case No. A-0544:38) and alleging violation of RSA 273-A:5 I (c), (g), (h) and (i) for refusing to confer permanent employee status on employees who have been employed longer than one year (Case No. A-0435:40). The City filed its answers on March 24, 1994, responding that it is under no obligation to the employees involved who were hired as temporary employees and so are not public employees within the meaning of RSA 273-A:1 IX. A hearing was set for April 26, 1994. A continuance was sought and granted and the consolidated matters were heard on May 12, 1994.

FINDINGS OF FACT

1. The City of Manchester is a "public employer" within the meaning of RSA 273-A:1 X.

2. AFSCME Council #93 Local 298 (Union) is the duly certified bargaining agent for employees of the Manchester Highway Department and the Manchester Public Building Services Department. The City and the Union are parties to collective bargaining agreements covering employees of both departments.

3. In Case No. A-0544:38, in 1991, the City instituted a pilot recycling program which continues in operation year to year as a part of the Refuse Collection Division of the Highway Department. Its funding is through the Highway Department.

4. At the hearing, it was stipulated that three of the temporary employees who were hired to operate the recycling program have been so employed for more than one year. Lucien Champagne became employed as a temporary worker at the recycling plant on April 16, 1991. David Rockholt and Robert Brown have continued to work as temporary employees since August, 1992.

5. Maurice Corriveau, business service officer for the Highway Department, testified that these three employees were told at hiring that they would be paid on an hourly basis and would receive no benefits. They are not paid at a Union rate. He stated that they were never told that they would become regular permanent employees since the City could not guarantee the length of service. The pilot program has continued for

three years but their longevity as employees depends on renewal of funding for the recycling program within the Mayor's budget.

6. Prior to the commencement of the recycling program, on March 13, 1991, a meeting was held between Brian Mitchell of AFSCME Local 298, Maurice Corriveau representing the City and others regarding the City's intention to hire temporary workers to operate the recycling project. The Union's concern at the time was that temporary employees not become permanent workers within the recycling program thus displacing long time regular employees within the Highway Department who might wish to apply for those jobs.

7. Article 1, Section 1.3 of the CBA reads: Highway Department:

> Wherever used in this agreement, the word "employee" shall refer only to a person or persons actively and regularly engaged in the Department's work and currently enrolled on the regular payroll of the Department. The Department of Highways, City of Manchester, NH hereby recognizes that the Union is the sole and exclusive representative of all employees of the Department of Highways, except the engineers, executives, temporary help and part-time help, and all managment or supervisory employees of the Department, who have authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees and the confidential secretary to the Department Head for the purpose of collective bargaining.

Article 1, Section 1.1 defines a regular employee as one "...who has completed an initial probation period and is in a budgeted permanent position."

8. In Case No. A-0435:40; the Building and Grounds Division of the Public Building Services Department had employed temporary workers as custodians for more than one year before hiring them to become permanent employees. Norman Provencher was hired as a temporary employee in November, 1992 and became a permanent employee on March 7, 1994. Michael Howe and Richard Powell were hired as temporary custodians in December 1992. On April 25, 1994, their status changed from temporary employees but, before becoming recognized as permanent regular employees, they are required to

work additional months on a probationary basis. The benefits of regular employment status are denied them in the interim.

9. Article V of the collective bargaining agreement that governs employees within the Public Building Services Department requires "new" employees to serve such a probation. At the time of the hearing, each of these three custodians was serving a six month probation period at the job each had performed for over one year.

DECISION AND ORDER

The facts of this case are not at issue. The status of the law relating to long term employment of temporary employees is at the heart of this dispute. The RSA 273-A:1 IX, in pertinent part, reads:

> IX. "Public Employee" means any person employed by a Public Employer except: ...
>
> (d) Persons in a probationary or temporary status, or employed seasonally, irregularly or on call. For the purposes of this chapter, however, no employee shall be determined to be in a probationary status who shall have been employed for more then 12 months or who has an individual contract with his employer, nor shall any employee be determined to be in a temporary status solely by reason of the source of funding of the position in which he is employed.

The Union reads sub-section (d) as providing a twelve month limit on temporary as well as probationary status. The City reads the sub-section as providing a durational limit on probationary status only.

The Board has previously rejected the durational approach to defining temporary status in a representation case involving lecturers at Keene State College, Decision No. 77-46, which was upheld by the Supreme Court in Keene State College Education Association v. State, 119 N.H. 1 (1979). The standard for distinguishing temporary from permanent status is the employee's reasonable expectation of continued employment not the length of the employment.

In the instant case, the facts support a conclusion that the three recycling plant workers had no reasonable expectation of continued employment. At hiring, they were told of the temporary nature of their work. They were aware that they had been brought

in for the life of the pilot project. Further, each received a year to year contract with terms different from other employees.

No unfair labor practice has occurred since the City was not required to extend bargaining unit status to these long term temporary employees. Therefore, this charge is DISMISSED.

In the second case, the above quoted statute supports the Union's position that, once made permanent, formerly temporary employees who have been continuously employed for twelve months can not be required to serve a probationary period before receiving the benefits of the bargaining unit status membership. The City has had the opportunity to observe the work habits of these temporary employees for more than one year. The change of status to regular permanent employee must be viewed as a ratification of an employee's abilities and work habits. RSA 273-A:1 IX (d) prevents an employer from requiring an employee to serve what is essentially a second probationary period after having worked twelve months. In this case, the term of the contract, Article I, Section 1 can be read in harmony with the statute by recognizing the six months of temporary employment immediately previous to the change of employment status from temporary to regular permanent employment as a probationary period.

The actions of the City in requiring such an extended probationary period and withholding bargaining unit status from these employees contrary to the statute constitute an unfair labor practice. The City is directed to Cease and Desist from this practice and to bestow full bargaining unit membership rights on the complaining employees retroactive to the date each ceased being a temporary employee and was hired into a permanent position.

So ordered.

Signed this 3rd day of August, 1994.

EDWARD J. HASELTINE
Chairman

By unanimous vote. Chairman Edward J. Haseltine presiding. Members Seymour Osman and E. Vincent Hall present and voting.