

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

State Employees Association of New Hampshire
Local 1984 SEIU

Petitioner

v.

State of New Hampshire

Respondent

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Case No. S-0315-2

Decision No. 2002-045

APPEARANCES

Representing SEA of NH, Local 1984 SEIU:

Dennis T. Martino, Collective Bargaining Director

Representing the State of New Hampshire:

Thomas F. Manning, Director of Personnel

Also appearing as witnesses:

Sara J. Willingham, Manager of Employee Relations
Claude Ouelette, Human Resource Director

BACKGROUND

The State Employees Association of New Hampshire, Local 1984, SEIU, (hereinafter referred to as the "Union") filed a Modification Petition on December 10, 2001 by which it sought to exclude seven positions from the existing bargaining unit which had previously been certified through a "grandfathering" process. The basis for the claimed exclusions was that the employees holding these positions performed duties that

implied the existence of a confidential relationship with their employer pursuant to RSA 273-A:I(c) or were properly designated as "human resource employees" by the State pursuant to the parties' existing collective bargaining agreement (hereinafter "CBA") in ARTICLE V, Section 8.1b.

The State of New Hampshire responded by filing its exceptions to the Union's petition on December 26, 2001 in which it denied that all Department of Safety employee positions listed by the Union were confidential or held human resource positions covered by the CBA and therefore all positions petitioned for should not be excluded from the existing unit through this modification proceeding. It did agree that three of the listed positions were confidential employees, namely the Human Resource Director, Hearing Examiner and the Human Resource Coordinator II. It also asserted in its answer that a particular State Police Captain's position should be excluded from the existing unit.

A Pre-Hearing Conference was conducted on January 18, 2001 and the evidentiary hearing was conducted on March 1, 2002 before the Hearing Officer and at which both parties were represented, presented evidence and had the opportunity to question and cross-examine witnesses.

At the outset of the hearing, the parties stipulated that the PELRB had jurisdiction to hear this matter and made representations to the Hearing Officer that they had discussed the positions proposed for exclusion. They further indicated that these discussions had resulted in mutual decisions affecting the number of positions remaining for consideration at hearing. The position of Information Technology Manager V position was withdrawn from exclusion by the Union. The position of State Police Captain, asserted by the State to be excluded from the existing unit, remained contested. The parties agreed and stipulated that the positions of Human Resource Coordinator II (EEO), Hearing Examiner/Officer and Human Resource Administrator III raised in the union's petition were hereafter to be excluded from the existing unit. Similarly, the parties agreed and stipulated that the positions of Accounting Technician, Payroll Officer II and Human Resources Assistant II raised in the State's counter petition were hereafter to be excluded from the existing unit. These agreements by the parties prior to the evidentiary hearing had the effect of removing these agreed positions from that closer scrutiny that would otherwise come into play when position inclusion is contested by the parties and determined by the PELRB after presentation of evidence by both parties.

Thereafter, the hearing proceeded for the purpose of determining whether or not the positions of Assistant Director of Motor Vehicles (Garlow), Administrator IV (VanHouten), and Executive Secretary (Baker) named by the Union and the position of State Police Captain (Babcock) named by the State should be excluded from the existing unit. Additionally, both parties waived any objection to the Hearing Officer taking official notice of the existing CBA between the parties and the Organizational Chart for the Department of Safety. Both parties presented openings at the beginning of their respective cases and both made brief closings.

At the conclusion of the hearing, the parties requested that the record remain open for the submission of legal memoranda until March 15, 2002 and for the submission of an organizational chart of the Department of Safety depicting the relative placement of the job positions at issue as requested by the Hearing Officer. A post-hearing memorandum was received from each party and the Union submitted an organizational chart for the Department of Safety. The record was then closed.

FINDINGS OF FACT

1. The State of New Hampshire, through its Department of Safety, employs personnel in various job positions and is therefore determined to be a "public employer" within the meaning of RSA 273-A:1 X.
2. The State Employees' Association of New Hampshire, SEIU Local 1984, is the duly certified exclusive representative for certain classified employees within the Department of Safety that include the positions of Assistant Director of Motor Vehicles, Administrator IV, State Police Captain and Administrative Secretary.
3. Both parties to this modification of unit composition action are also parties to an existing collective bargaining agreement (CBA) for the period July 1, 2002 to June 30, 2003.
4. The parties stipulated to the jurisdiction of the Public Employee Labor Relations Board (PELRB) to decide the initial Modification Petition filed by the Union and to treat the State's response as a cross-petition in order to determine the appropriate composition for the bargaining unit at issue.
5. Sara Willingham has held the position of Manager of Employee Labor Relations for the State of New Hampshire for two years. Prior to assuming that position, she was the head of the Human Resources Administrative Bureau. From her experience in both positions she has become familiar with employee position classifications and the review of job classifications.
6. There are two types of job descriptions. One is the "generic job classification" that is applicable to a whole class of employees and is formulated to establish compensation for that whole class of employees. The second is a "supplemental job description" that describes the specific responsibilities and tasks assigned to a job held by a particular employee within a certain classification.
7. Arthur Garlow holds the position of Assistant Director of the Division of Motor Vehicles. His supplemental job description was entered into evidence as Union Exhibit #1. Among the many duties and responsibilities appearing within that document are the following: "Involved with personnel issues and

disciplinary process including making recommendations to the Director on hiring and firings, composing disciplinary letters and memos of counsel"; and "interacts with department legal counsel, human resources... State Employees Association". He also is "Involved with resolving personnel issues, .. employee assignments... determining training needs"; and "develop.. supplemental job descriptions, including development of new position specifications within the Division".

8. Sherry Baker holds the position of Administrative Secretary in the Division of Motor Vehicles. Her supplemental job description was entered into evidence as Union Exhibit #2. Among the many duties and responsibilities appearing within that document are the following: "Prepares correspondence (and) ...notifications to employees"; "forwards telephone calls and mail to appropriate section."; "schedules appointments for the Director and takes minutes as (sic) meetings as assigned.". She also "Prepares and distributes job postings within the Department"; and "maintains files of approved supplemental job descriptions". There was contradictory testimony by Mr. Claude Oulette that indicated that this employee no longer "Prepares HB 1506 requests". However, at the time the Modification Petition was filed it was an accurate characterization of one of her responsibilities. No further documentary or testimonial evidence was offered by either party as to the relevance of that task assignment and the reference "HB 1506 requests" is not within the common knowledge of the Hearing Officer. Further, there was no request made by either party that administrative notice of the same be taken.
9. Robert Van Houten holds the position of Administrator III in the Division of Motor Vehicles. His supplemental job description was entered into evidence as Union Exhibit #3. Among the many duties and responsibilities appearing within that document was the following: "Directs the preparation of the budget for all components of the department" and "Directs payroll, refunding and other accounting activities of the department".
10. Ms. Willingham testified that it was difficult to determine whether certain duties or responsibilities contained within the supplemental job descriptions for the Assistant Director and Administrative Secretary were in the nature of human resources without knowing how much time is spent on them. She did respond to questions by Mr. Manning that the words "interacts" and "involved" as contained within these supplemental job descriptions were not "strong action verbs".
11. Claude Ouelette is the Human Resource Director for the Division of Motor Vehicles and has held that position for ten years. He testified that he assigned work to be performed by the Administrative Secretary, although he maintained that she was not part of "my staff" and that she also performed work assigned by Mr. Van Houten and Timothy Mason, the Director of Administration for the Department of Safety

12. Mr. Ouelette considers the Human Resources Coordinator II, Patricia Gagne, to be a confidential employee as she provides more direct assistance to him than the Administrative Secretary, Ms. Baker. Ms Baker prepares some correspondence and maintains filing for Mr. Ouelette. With respect to his correspondence, she "types it up", that is, she produces what he develops. Examples given of such correspondence include letters of warning and letters of reprimand to employees. There was no evidence that she produced correspondence revealing collective bargaining strategies or labor relations policy or that she was privy to such information..
13. Ms. Willingham has been involved and participated in collective bargaining related to the Department of Safety. Claude Ouelette is her main contact in the Department of Safety. She testified that in her role as Manager of Employee Relations, she does not deal directly with the Assistant Director, the Administrator III (for finance, Van Houten), or the Administrative Secretary.
14. Ms. Willingham deals with State Police Captain Kevin Babcock only when the State is collectively bargaining with the New Hampshire Troopers' Association. In those negotiations the State has requested that Capt. Babcock sit on the state's management sub-unit negotiating team and he has. She testified that there is some informational "overlap" in negotiating with all State Police personnel, but did not provide any specifics as to the role Capt. Babcock plays or the kind of information that "overlaps."
15. Mr. Ouelette testified that he does not formulate or discuss personnel policy or employment matters with the employees in any of the three positions raised by the Union for exclusion, *i.e.* Assistant Director of Motor Vehicles, Administrator III and Administrative Secretary. Mr. Ouelette did not provide any testimony that related to Captain Babcock having any confidential relationship related to collective bargaining with his own bargaining unit.
16. A departmental chart depicting the organizational structure of the various personnel within the Department of Safety was submitted after the hearing ended and was added to the record as Joint Exhibit #1.

DECISION AND ORDER

The Public Employee Labor Relations Board (PELRB) is the administrative agency charged with the determination of the composition of public employee collective bargaining units. RSA-A:8. This authority includes deciding questions of the modification of existing bargaining units. The PELRB has developed rules providing guidance to parties seeking to modify bargaining units and for the PELRB's review of such modification petitions. Admin Rule Pub. 302.05.

The composition of each bargaining unit is evaluated on its own circumstances on a case by case basis. Appeal of Town of Newport, 140 N. H. 343, 352 (1995). Specific to the matter at issue here is the application of a provision of RSA 273-A:1, IX(c) which provides that a person whose duties imply a confidential relationship to the public employer is not considered a public employee for purposes of collective bargaining and therefore may not be included in a bargaining unit..

In the instant matter, both parties have implied in their filings that the existing unit has become incorrect to the degree warranting modification by virtue of their respective requests for changes in composition. (See Pub 302.05(a). For its part, the Union seeks to have the Assistant Director of Motor Vehicles (Position # 10366), an Administrator IV (Position # 10438) and an Executive Secretary (Position #10615) excluded from the bargaining unit. (N.B. The Union introduced its Exhibit #2 at hearing that described this position as an Administrative Secretary, but the parties agreed that, despite the dual reference, it was the same position). The State contests these three exclusions and, for its part, seeks to have a single State Police Captain excluded from the bargaining unit. (The parties have previously stipulated to the exclusion of the Human Resources Assistant II, the Payroll Officer II and the Accounting Technician).

The bargaining unit involved in these proceedings was first certified on March 6, 1970 and "grandfathered" as a bargaining unit when the present Public Employee Labor Relations Act (RSA 273-A) became law. The unit composition first recognized by the Commission established by Chapter 290, Section III, 1969 Session Laws and later by order of the PELRB on December 7, 1976 was described as "All classified employees of the Department of Safety, State of New Hampshire". There is no evidence at hearing that the composition of the unit was ever negotiated under the newer statute and therefore the mandatory denial of modification of the unit contemplated by Pub 302.05(b)(2) does not apply. Since 1976, there has been only one previous modification of the unit composition of record with the PELRB (See Case No. S-0315:1, Decision No. 79004) until the present Union petition and the State's cross petition. It should be noted at this juncture, that after thirty years, some divergence between the stated composition and the actual composition within this department, and possibly other departments may have evolved over such a long period of time. Consideration of this possibility and the need to examine present circumstances may have been made more timely by the Supreme Court's recent decisions in Appeal of the State of New Hampshire, No.99-425, decided 7/10/2001 citing Appeal of Londonderry School District, 142 N. H. 67, 680 (1999).

Procedurally, the party requesting a change in composition, otherwise referred to as the moving party, carries the burden of producing sufficient evidence at hearing to establish that the position sought to be excluded, in fact, meets the legal criteria for exclusion. In this case, that means establishing the existence of a confidential relationship, within the meaning of RSA-A:1, IX (c). In this matter, the Union bears that burden regarding the positions of Assistant Director of Motor Vehicles, Administrator IV (Van Houten), and Executive Secretary (Baker). The State bears the same burden regarding the exclusion of the State Police Captain (Babcock).

Each party's case rests on the exclusion of certain employees based on that provision in RSA 273-A:1, IX(c) which excepts "Persons whose duties imply a confidential relationship to the public employer." Each party has made reference to a separate category of positions entitled "human resource" employees. This is not a statutory category of individuals exempted from the definition of "public employees" for purposes of the Public Employee Labor Relations Act and is not considered in the rendering of this decision. The parties have not raised the issue of whether any employee is a supervisory employee over others in the existing unit and, under the circumstances of this case, the PELRB will not do so, *sua sponte*, that is, of its own volition, without such a request from either party. This is not to imply that in another case there might not be circumstances that would compel it to do so. For their own reasons, the parties have not made supervision an issue and the PELRB does not find sufficient cause in this case to go beyond the single exclusionary basis of "confidential" employee that has been raised.

The issue of whether or not a confidential relationship exists sufficient to exclude a public employee from the rights extended to them through the Public Employee Labor Relations Act involves a close examination of the evidence regarding the responsibilities assigned to that position, the manner in which these responsibilities are carried out and the role that the individual plays in labor relations generally and, more importantly, in labor negotiations in particular. The legislature intended to vest the PELRB with primary authority to define "confidential" as it is used in the statute. Department of Revenue Admin. v. Public Employee Labor Relations Bd. 117 N. H. 976 (1977). Over the years of its existence, the PELRB has approached cases involving "confidential" employees and made its determinations based upon a long standing guideline that generally limits the application of "confidential" employee to,

"... persons who formulate, determine and effectuate management policies in the field of labor and/or personnel relations... one... whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process, would make his membership in the [employee organization] incompatible with his official duties." Keene State College PAT Staff Assoc. v. Univ. of New Hampshire, PELRB Decision No. 78007 (February 28, 1978).

The court recognized that "this definition is consistent with the one commonly used by the National Labor Relations Board and in other public employee statutes." Univ. System v. State, 117 N.H. at 101, 369 A.2d at 1141 (1977). The application of this definition is heavily fact based. A representative collection of court findings has focused on such criteria as the function of a position, the "finality of decision input" in collective bargaining, and the nature of the information to which an individual was privy. See In Re Nashua Ass'n of School Principals, 119 N.H. 90 (1979). In addition, the court has found a confidential relationship to exist where an administrative secretary was privy to a personnel director's personal thoughts about the collective bargaining process and where the administrative secretary would be present at discussions of collective bargaining strategies. See Appeal of City of Laconia, 135 N.H. 421 (1992). A third example of the court's finding involved a director of public works, who testified that he considered the

department secretary to be his "administrative assistant", that the departmental secretary kept the personnel records, was privy to any disciplinary actions taken, and attended staff meetings at which confidential matters were discussed. See Appeal of Town of Newport, 140 N. H. 343; 352 (1995). It is then with similar focus that a determination of the four positions at issue in this matter must be examined as to the type and significance of the "confidential relationship" each has with the public employer.

The first position to be determined by this decision is that of the Assistant Director of Motor Vehicles (Position #10366). This individual's supplemental job description is replete with duties and responsibilities that, taken in their totality, imply a confidential relationship with the public employer, e.g. Union Exhibit #1, Paragraphs 5,7,12 and 13. RSA 273-A:8. There was no testimony that these provisions were not current or that they were not being performed. Therefore, this position is excluded from the present bargaining unit.

The next candidate proposed for exclusion by the Union is the position characterized by the Union as an Executive Secretary in its filings with the PELRB, but which is described in Union Exhibit #2 as "Administrative Secretary". The state made no objection to the submission of this exhibit and, with the exception of Paragraph #7 of that exhibit, regarding HB 1506 requests, provided no testimony that would indicate that the Supplemental Job Description, as submitted, was inaccurate. The testimony regarding this position did not establish that this position rises to the level of confidentiality akin to the role played by the individuals as indicated in the *Laconia* and *Newport* cases cited above. Indeed, Mr. Ouelette testified that he did not formulate or discuss personnel policy or employment matters with this individual. He did not indicate that the correspondence she produced and the filing she maintained related to labor relations generally or, more specifically, labor contract negotiations other than that she prepared disciplinary letters at his instruction. The Hearing Officer finds that the position of Administrative Secretary (Position #10615) is not a confidential employee and therefore is to remain in the existing bargaining unit.

The last of the candidates proposed for exclusion by the Union is the Administrator IV (Position #10438) whose responsibilities are described in the supplemental job description entered into evidence as Union Exhibit #3. These responsibilities include the "preparation of the budget for all components of the department." See Accountability #1, Union Exhibit #3. Neither that document or any testimony offered by the Union provided a sufficient basis upon which to imply that a confidential relationship exists between this individual and the public employer that relates to labor relations generally or to labor negotiations. While the express "accountability" to prepare a departmental budget no doubt carries significant responsibility, without more, that responsibility alone does not create a confidential relationship with the public employer and does not allow a fair inference to be drawn that this individual is privy to the public employer's labor relations policy or negotiating strategies. Mr. Ouelette's uncontroverted testimony was that he does not formulate or discuss personnel policy or employment matters with this individual. Ms. Willingham's uncontroverted testimony was that she has not dealt directly with this individual in her

role as Manager of Employee Relations or in connection with her participation in collective bargaining related to the Department of Safety. Lacking the presentation of other evidence that a confidential relationship exists between this individual and the public employer, none is found and therefore this position shall remain in the bargaining unit.

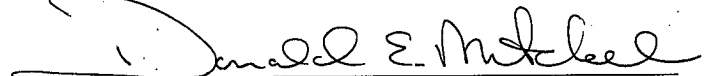
The remaining position to be considered for exclusion is the position of State Police Captain requested by the State. For identification purposes, its present incumbent is Kevin Babcock. Unlike the three positions discussed above, the State bears the burden of establishing that this position should now be excluded from the unit. Again the analysis of the position involves whether this individual should be excluded from the unit solely upon that provision in RSA 273-A:1, IX(c) which excepts "Persons whose duties imply a confidential relationship to the public employer" as that is the only basis asserted by the State.

There was no written job description entered into evidence regarding this position. Ms. Willingham testified that she deals with this individual only when the State is negotiating with a subordinate bargaining unit, the New Hampshire Troopers' Association. In that instance, Captain Babcock sits on the management sub-unit negotiating team. Mr. Ouelette, the Human Resources Director of the Department, did not provide testimony that established the existence of any confidential relationship existing between Captain Babcock and the public employer related to his own bargaining unit. There was no credible additional evidence that established that this individual participates in the formulation of labor relations policy or negotiation strategies relating to collective bargaining with his own bargaining unit. Nor was it established that he was responsible to gather confidential information for the public employer in connection with collective bargaining with this unit. There was no evidence that Ms. Willingham or Mr. Ouelette relied on Captain Babcock in preparation for or during negotiations with his own bargaining unit. There was no evidence that this individual shared the combination of duties accorded weight by the court in either the *Laconia* or *Newport* cases. There is no reason to exclude State Police Captain Babcock from the existing bargaining unit.

Hereafter, the bargaining unit shall be comprised of all classified employees of the Department of Safety, State of New Hampshire except the Assistant Director of the Division of Motor Vehicles.

So ordered.

Signed this 5th day of April, 2002



Donald E. Mitchell, Esq.
Hearing Officer