



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Edward A. Laniyan, et al	*	
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Petitioner	*	
	*	
and	*	
	*	
AFSCME Council 93, Local 3657	*	
	*	Case No: A-0428-214
Respondent	*	
	*	Decision No. 2004-056.
and	*	
	*	
Hillsborough County Department of Corrections	*	
	*	
Interested Party	*	
	*	

DECISION AND ORDER

BACKGROUND

Edward A. Laniyan (hereinafter "the Petitioner") filed a Petition for Decertification with the Public Employee Labor Relations Board (PELRB) on January 20, 2004. The Petitioner seeks to decertify AFSCME Council 93, Local 3657 ("the Union") as the exclusive representative for certain employees employed by the Hillsborough County Department of Corrections (hereinafter "the Employer"). In his petition, the Petitioner described the current bargaining unit as consisting of all full time and regular permanent part-time employees in the following job classifications: Clerk Typist II, Secretary II, Account Clerk I, Account Clerk II, Clerk Typist I, Secretary I, Correctional Officer I, Correctional Officer II, Cook I, Cook II, Nurse I, Nurse II, Maintenance Worker I, Maintenance Worker II, Switchboard Operator/Receptionist, Food Service Supervisor, and Co/Housekeeping Supervisor. The Petitioner indicated that there are ninety-nine (99) employees in the current bargaining unit.

The Union filed an answer on February 3, 2004, wherein it indicated its interest in the matter. On February 20, 2004, the Union filed a pre-hearing worksheet with the PELRB in which it raised two issues presented by the instant petition. Specifically, the Union questioned whether the Petitioner has satisfied the requisite 30% showing of interest, based upon the Union's contention that the certified unit includes the position of deputy sheriffs. In addition, as

the Union has filed a related improper practice charge against the Employer, it claimed that such allegations should be heard by the PELRB prior to a decertification election being conducted.

A pre-hearing conference was conducted at the PELRB on February 27, 2004 at which the Petitioner, counsel for the Union and counsel for the Employer were all in attendance. During the course of the pre-hearing conference, little information was offered by the Union and the Employer to assist the PELRB in its consideration of the instant petition. In noting the various job classifications referenced within the recognition clause of the parties' current collective bargaining agreement (CBA), it was apparent that the Union and the Employer had not maintained up to date records with the PELRB as to modifications of the bargaining unit.

A Pre-Hearing Memorandum and Order was issued on March 9, 2004. Based upon the information offered and discussed at the pre-hearing conference, the hearing officer framed the issues presented in the instant decertification petition to be as follows:

- (1) What is the composition of the current certified bargaining unit in which the Petitioner is a member?
- (2) How many employees are comprised in the certified bargaining unit?
- (3) Has the Petitioner satisfied the requisite 30% showing of interest in consideration of the size of the unit and the number of signatures obtained?

The parties were otherwise directed to utilize good faith efforts in gathering any and all relevant information as to the composition and/or certification of the instant bargaining unit in order to assist the PELRB in its consideration of the instant petition, and to exchange such information between each other and the PELRB, on or before March 12, 2004. Moreover, any other preliminary or dispositive motions from the Union were to be filed with the PELRB on or before March 12, 2004 and responses, if any, from either the Petitioner or the Employer, were to be filed on or before March 26, 2004. The parties were advised that following receipt and review of the parties' submissions, the PELRB would be determine whether to request further information from the parties, schedule an evidentiary hearing, schedule a pre-election conference, or dismiss the instant petition.

The Union filed a Motion to Dismiss on March 12, 2004. The Union claimed in its motion that the Petitioner had not satisfied the required thirty percent (30%) showing of interest because he did not include those persons in the position of deputy sheriff in his calculation. The Union averred that pursuant to PELRB Case No. A-0428, the certified unit consists of Deputy Sheriffs, Correctional Officers and other employees, and that since the Petitioner admitted at the pre-hearing conference that he had not included deputy sheriffs in the bargaining unit, he therefore could not have satisfied the required thirty percent (30%) showing of interest. In response, the Petitioner filed a "Motion to Object to Motion to Dismiss Decertification Petition" on March 26, 2004. The Petitioner maintained that the PELRB has made numerous decisions confirming the Union as the exclusive representative of employees of the Hillsborough County Department of Corrections. The Petitioner also stated, among other things, that "[i]f the Board ultimately determines that [the Union] is a mix of the two departments [,] corrections and sheriff, then sufficient support can be gathered solely from one department."

A notice of hearing was thereafter issued in this matter on April 1, 2004, scheduling a hearing date of April 8, 2004 at 9:30 AM at PELRB offices. The stated purpose of the hearing was to hear evidence and argument on the following issues:

- (1) How many employees are comprised in the certified bargaining unit?
- (2) Has the Petitioner satisfied the requisite 30% showing of interest in consideration of the size of the unit and the number of signatures obtained?

The Petitioner, counsel for the Union and counsel for the Employer were present for the April 8, 2004 hearing. The Petitioner appeared *pro se*. Upon the commencement of the hearing, the parties agreed to waive the ten (10) day notice requirement set forth in Pub. 201.07.

At the outset of his case, the Petitioner made a motion to amend the petition in order to incorporate the certification dated December 7, 1976 in PELRB Case No. A-0428. The Petitioner acknowledged that his petition, as filed, was incorrect and that the recognition dated December 7, 1976 was the current and accurate description of the certified bargaining unit. Accordingly, the Petitioner requested leave to amend his petition at that time.

At the request of the Employer, and without objection from the Petitioner or the Union, the hearing officer took judicial notice of said certification, and the document was entered into the record as Joint Exhibit No. 1. The unit certified therein is described as "Deputy sheriffs and correctional officers of County Jail; Deputy sheriffs, secretary, clerk typists and account clerks of Sheriff's Department; Correctional officers, security guard at the House of Correction."

As to the Petitioner's motion to amend, the Union objected, arguing, among other things, the fact that since the Petitioner's current position is not referenced in the certification, he lacks appropriate standing to amend the petition in such a fashion. The Union also claimed that the showing of interest cards submitted by the Petitioner would be incorrect as they were based upon a non-existent bargaining unit. The Employer did not object to the motion to amend, and offered the point that PELRB rules generally allow for the liberal amendment of party pleadings.

The Petitioner thereafter moved for a continuance of the hearing in order to gather evidence regarding his petition, including the size of the bargaining unit. He indicated that he had no evidence to present at that time. He later added to his grounds for a continuance by describing himself as too emotionally upset to proceed. The Union objected to any continuance of the instant matter while the County expressed that it had no position on the issue. In a bench ruling, the undersigned hearings officer dismissed the petition and hereby supplements said ruling with the following written decision.

DECISION

The Petitioner's decertification petition, as it is currently presented, is defective on its face and is hereby dismissed without prejudice. The Petitioner acknowledged on the record that the petition upon which this proceeding is based was incorrect, in that the bargaining unit as he described it to be was not in fact the certified bargaining unit. Indeed, all parties present at

hearing, including the Petitioner, stipulated that the current certification for the unit is set forth in PELRB Case No. A-0428 and said certification was accepted into the record as Joint Exhibit 1.

In light of the fact that the bargaining unit as described in the Petitioner's petition is incorrect, this immediately calls into question the size of the unit referenced in the petition and the required thirty-percent (30%) showing of interest, since such information was based upon a faulty certified unit description. At hearing, the Petitioner made a motion to amend his petition and also moved that the matter be continued in order that he may be able to gather information on the size of the bargaining unit and to supplement his showing of interest. For the following reasons, I deny both of these motions made by the Petitioner.

Setting aside the question of the Petitioner's standing, the Petitioner's proposed amendment seeks to make wholesale changes to his petition, including altering the description of the certified unit. Although Pub. 201.04 specifically provides that "the board shall permit an amendment to [a] complaint...at any time," PELRB regulations are silent as to whether or not a de-certification petition can be amended after filing. N.H. CODE ADMIN. R. PUB. 201.04 (emphasis added). Allowing the Petitioner's petition to be amended at this point in time would create a proverbial "moving target," in which the size of the unit, the effected positions and employees, and the necessary showing of interest are all placed in a state of flux. Based upon the representations of the Petitioner at hearing, he was discarding the information provided in his January 20, 2004 petition and did not yet know the total size of the bargaining unit that he was seeking to decertify under an amended petition. It consequently follows that his necessary thirty-percent (30%) showing of interest becomes speculative. These are critical pieces of information that, given the significant consequences and potential impact of the instant process, must be known, or at the very least alleged, at the outset. Further compounding matters, the Petitioner declared that he was not prepared to present evidence on any of these issues despite having stated earlier, at the commencement of the hearing, that he was prepared to proceed.

As the moving party, it is the Petitioner's burden to establish for the record the various positions and job classifications that are comprised in the bargaining unit, the number of employees in the unit, and satisfaction of the necessary thirty-percent (30%) showing of interest. The Petitioner not only failed to do so, but also indicated to this Hearing Officer that he needed more time in order to determine if he could satisfy his various burdens. Given that the issues concerning the appropriate unit certification, size of the unit, and showing of interest have all been previously raised and discussed in this matter, including in the Union's pre-hearing worksheet of February 20, 2004, during the pre-hearing conference held on February 27, 2004 and subsequent PELRB Pre-Hearing Memorandum and Order issued on March 9, 2004, and in the Union's Motion to Dismiss filed on March 12, 2004, the Petitioner had sufficient notice as to the questions presented in this case. The granting of the Petitioner's motion to amend and to allow the matter to be continued would not only serve to prolong the life of an otherwise flawed petition, but would also lead astray the fairness of the process.

Upon the presentation of a decertification petition to the PELRB, the Petitioner must "deliver the goods." In this regard, he must submit a defined bargaining unit and an adequate showing of interest derived from within that bargaining unit. Here, since the Petitioner could provide no evidence, or even assurance, that he would be able to meet these conditions

precedent, it is needless to proceed at this juncture. The Petitioner is certainly free to re-file his petition once he is able to determine the accurate size of his bargaining unit and has garnered a sufficient showing of interest based upon the size of that unit. Indeed, it is this information that is correctly acquired *before* filing the petition, *not afterwards*. Allowing the case to continue under the current circumstances would unduly burden the PELRB and the other parties to this case in a matter that frankly remains speculative.

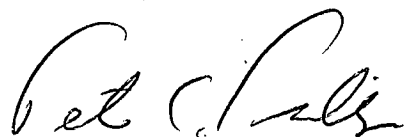
It is appropriately noted that the instant confusion and difficulties experienced by the Petitioner are the unfortunate result of the Union's and Employer's apparent lapse in updating and modifying the composition of the certified bargaining unit. At least since 1998, it is well-settled in New Hampshire that "[t]he composition of a bargaining unit is limited by law to those positions identified in the recognition clause at the time the original unit is certified by the PELRB and by any subsequent modifications approved by the PELRB." *Appeal of the Somersworth School District*, 142 N.H. 837, 840 (1998), quoting *Appeal of Londonderry School District*, 142 N.H. at 680 (1998). Therefore, even though an exclusive representative and public employer may reach an agreement on the composition of a bargaining unit within their CBA (i.e., in the so-called "recognition clause"), it is not the *certified* bargaining unit until it is approved by the PELRB. While I am sensitive to the predicament in which the Petitioner finds himself, this still does not relieve him of his legal burdens in pursuing a petition of this nature.

ORDER

Based upon all of the foregoing, the Petitioner's petition is dismissed without prejudice, and he may file a new petition in due course upon presentation of an adequate showing of interest for the appropriate bargaining unit. Moreover, nothing in this decision shall be construed as limiting the Union and Employer from addressing the bargaining unit certification issue through the submission of a modification petition to the PELRB.

So ordered.

Signed this 14th day of April, 2004.



Peter C. Phillips, Esq.
Hearings Officer

Distribution:

Edward A. Laniyan,
Katherine M. McClure, Esq.
Carolyn M. Kirby, Esq.