

**State of New Hampshire**

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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AFSCME Council 93, Local 1386	*	
Portsmouth City Employees	*	
	*	
	*	
Petitioner	*	
	*	Case No. A-0411-46
v.	*	
	*	
	*	Decision No. 2004-064
City of Portsmouth	*	
	*	
Respondent	*	

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PRE-HEARING MEMORANDUM AND ORDER

BACKGROUND

The Portsmouth City Employees, AFSCME Local 1386 (hereinafter "the Union") filed an improper practice charge on March 3, 2004 alleging that the City of Portsmouth (hereinafter "the City") committed an unfair labor practice by its creation of the positions of Assistant Chief Plant Operator for Maintenance and Assistant Chief Plant Operator for Operations. More specifically, the Union claims that City placed two employees in the new positions who had previously held bargaining unit job titles as Plant Operator II's. The job descriptions for the positions of Plant Operator II and Assistant Chief Plant Operator, according to the Union, are very similar. It is therefore the contention of the Union that the City's creation and filling of the Assistant Chief Plant Operator positions constitutes an "end run around the prior decision of the PELRB," wherein the PELRB denied the City's Modification Petition and determined that the Plant Operator II position should remain in the certified bargaining unit. As remedies, the Union requests, among other things, that the PELRB sustain the complaint and order the return of the employees in the Assistant Chief Plant Operator positions to the bargaining unit.

The City filed its answer to the Union's charge on March 17, 2004. The City denies the Union's claim that it has committed an unfair labor practice and moves to dismiss. The City asserts that the Union's complaint violates the six-month statute of limitations under RSA 273-A and that the Union has itself violated terms of the parties' grievance procedure, which provides for final and binding arbitration. As a result, the City avers that the PELRB lacks jurisdiction in this matter. Regarding the merits of the Union's charge, the City states that the persons selected for the Assistant Chief Plant Operator positions previously held Plant Operator I job titles, not

Plant Operator II. The City also states that the positions of Plant Operator II and Assistant Chief Plant Operator are fundamentally different in terms of responsibility level, technical expertise and supervisory authority. The City notes that the position of Plant Operator II remains in the bargaining unit, that two such positions are currently filled and that one more is budgeted but vacant at this time. In establishing the Assistant Chief Plant Operator positions, the City argues that it has acted well within its authority under RSA 273-A to determine its organizational structure. The City therefore requests, *inter alia*, that the PELRB (1) dismiss the Union's charge with prejudice, (2) order the Union to reimburse the City for its fees and expenses that it has incurred in responding to the charge, and grant such other relief as may be appropriate under the circumstances.

A pre-hearing conference was conducted at PELRB offices on April 5, 2004 during which both parties were represented by counsel.

#### PARTICIPATING REPRESENTATIVES

For the Union: Katherine McClure, Esquire

For the City: Thomas J. Flygare, Esquire

#### ISSUES FOR DETERMINATION BY THE BOARD

- (1) Is the Union's prohibited practice complaint time barred by the six-month statute of limitations contained in RSA 273-A:6, VII?
- (2) Does the PELRB otherwise have jurisdiction over the instant complaint?
- (3) If so, has the City committed an unfair labor practice within the meaning of RSA 273-A:5, I (a), (b), (g) (h) and/or (i) by its establishment of the positions of Assistant Chief Plant Operator – Maintenance and Assistant Chief Plant Operator – Operations?
- (4) If so, what shall be the remedy?

#### WITNESSES

For the Union:

1. Kenneth Fanjoy, Pres., AFSCME Local 1386
2. Jack Mercer, Chapter Vice-Pres., Plant Operator I

For the City:

1. Dianna Fogarty, Director of Human Resources
2. Dave Allen, City Engineer, Deputy Director of Public Works
3. Paula Anania, Chief Plant Operator

4. Geoff Howe, Asst. Chief Operator - Maintenance
5. George Neil, State of NH
6. Eric Taylor, Asst. Chief Operator - Operations
7. Dan Peterson, Operator II.

Both parties reserve the right to amend their List of Witnesses in conformity with the schedule contained in the DECISION SECTION appearing at the conclusion of this order or, upon proper showing, later with reasonable notice to the other party. It is understood that each party may rely on the representations of the other party that witnesses appearing on their respective list will be available at the hearing.

#### EXHIBITS

Joint Exhibits:

1. Current Collective Bargaining Agreement, 7/1/98 – 6/30/03
2. Board Decisions – 2000-058 and 2000-087

For the Union:

1. Job descriptions

For the City:

1. SMA CBA, 7/1/03 – 6/30/08
2. FY '04 Budget re: Plant Operator position
3. FY '05 Budget re: Plant Operator position

Both parties reserve the right to amend their List of Exhibits in conformity with the schedule contained in the DECISION SECTION appearing at the conclusion of this order or, upon proper showing, later with reasonable notice to the other party. Copies of all exhibits are to be submitted to the presiding officer in accordance with Pub 203.02. It is understood that each party may rely on the representations of the other party that the exhibits listed above will be available at the hearing.

#### LENGTH OF HEARING

The time being set aside for this hearing is one (1) day. If either party believes that additional time is required, written notice of the need for additional time shall be filed with the PELRB at least twenty (20) days prior to the date of the evidentiary hearing.

DECISION

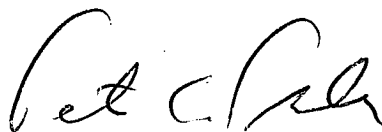
1. During the course of the pre-hearing conference, counsel for the City indicated his intent to file a Motion to Dismiss. Said motion shall be filed with the PELRB on or before **May 10, 2004**. The Union's response to the City's motion shall be filed with the PELRB on or before **May 24, 2004**.
2. The parties' representatives shall meet, or otherwise confer, no later than **May 24, 2004** in order to compose a mutual statement of agreed facts and they shall memorialize those facts upon which they can so stipulate and file said document with the PELRB at least five (5) days prior to the date of the hearing.
3. The party representatives shall forward any amendments to, or deletions from, their Witness and Exhibit lists, as detailed above, to the opposing representative or counsel, and to the PELRB, at least five (5) days prior to the scheduled hearing date. The party representatives shall meet, or otherwise arrange, to pre-mark any exhibits, for identification, prior to the time of hearing and have sufficient copies available for distribution at the hearing as required by Pub 203.02.
4. The parties shall file any additional preliminary, procedural or dispositive motions no later than twenty (20) calendar days prior to the scheduled hearing date.
5. Unless otherwise ordered as a result of the filing of any subsequent motion or for other good cause shown, an evidentiary hearing between the parties will be held on

**June 3, 2004 @ 9:30 AM**

at the offices of the Public Employee Labor Relations Board, Concord, New Hampshire.

So ordered.

Signed this 3<sup>rd</sup> day of May, 2004.



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Peter C. Phillips, Esq.  
Hearings Officer

Distribution:

Katherine McClure, Esquire  
Thomas J. Flygare, Esquire