



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME Local 1386, Portsmouth City Employees *

Complainant *

v. *

City of Portsmouth *

Respondent *

Case No: A-0411-61

Decision No. 2005-085

PRE-HEARING MEMORANDUM AND ORDER

BACKGROUND

AFSCME Local 1386, Portsmouth City Employees (hereinafter "the Union") filed an unfair labor practice complaint on April 26, 2005 alleging that the City of Portsmouth (hereinafter "the City") committed an unfair labor practice in violation of RSA 273-A:5 I (a), (b), (e), (g), (h) and (i) by unilaterally upgrading the pay grades for certain positions. More specifically, the Union claims that on October 20, 2004, Union Vice-President John Mercer learned that the City had unilaterally "changed" a position in the planning department without notice to the Union. As further alleged by the Union, AFSCME Staff Representative Steven Lyons then contacted the City's Chief Negotiator Thomas Flygare via e-mail, stating among other things, that a "grade 4 position... was upgraded to a grade 7 without notice, or the ability to bargain. This was a unilateral change." The Union's charge indicates that Flygare disagreed with Lyons, writing in response "[u]nder the circumstances, the City was under no obligation to bargain the posting with the Union." The Union alleges that on January 27, 2005 it subsequently became aware that the City had continued to upgrade secretary positions to a grade 7. Accordingly, the Union asserts that the City has knowingly and willfully committed an unfair labor practice by bargaining in bad faith and otherwise failing to provide it with notice and an opportunity to bargain prior to implementation of these changes.

As remedies, the Union requests that the PELRB (1) find that the City has failed in its obligation to bargain in good faith, (2) order the City to forthwith bargain in good faith, (3) order the City to publicly post the PELRB's decision for thirty (30) days, (4) order the City to make the Union whole for any and all costs and expenses incurred as a result of its pursuit of the instant prohibited practice charge; and (5) order any and all other relief as it deems necessary and appropriate.

The City filed its answer to the Union's complaint on May 11, 2005. While the City generally admits to the factually chronology as alleged by the Union, it specifically denies that it has committed a violation of the law. By way of additional response, the City avers that the Union's charge was not filed in accordance with the six (6) month statute of limitations set forth in RSA 273-A:6, VII. In this regard, it filed a Motion to Dismiss on June 20, 2005. The City requests that the PELRB (1) dismiss the Union's unfair labor practice charge with prejudice; (2) order the Union to reimburse the City for it's fees, expenses and lost time in responding to the counterclaim; and (3) grant such other relief that may be appropriate under the circumstances.

A pre-hearing conference was conducted before the undersigned hearing officer on June 27, 2005 at PELRB offices, Concord, New Hampshire.

PARTICIPATING REPRESENTATIVES

For the Union: Erin L. Goodwin, Esq. for Daniel A. Cocuzzo, Esq.

For the City: Thomas J. Flygare, Esq.

ISSUES PRESENTED FOR BOARD REVIEW

- (1) Should the Union's complaint be dismissed as violating the six-month statute of limitations set forth in RSA 273-A:6 VII?
- (2) If not, did the City commit an unfair labor practice in violation of RSA 273-A:5 I (a), (b), (e), (g), (h) and/or (i) by unilaterally upgrading secretarial positions from pay grade 4 to grade 7 without notice to the Union or providing an opportunity to bargain?
- (3) If so, what shall be the remedy?

WITNESSES

For the Union:

1. Kenneth Fanjoy, Local President
2. John Mercer, Local Vice-President
3. Steven Lyons, Staff Representative, AFSCME

For the City:

1. Cindy Hayden
2. Dianna Fogarty, Human Resource Director, City of Portsmouth

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. Collective Bargaining Agreement
2. PELRB Unit Certification dated October 29, 1976
3. October 25, 2004 e-mail correspondence between S. Lyons and T. Flygare
4. October 26, 2004 e-mail correspondence between S. Lyons and T. Flygare
5. January 27, 2005 e-mail from J. Mercer to S. Lyons
6. Job Posting for Secretary position, September 8, 2004
7. Job Posting for Administrative Clerk position, September 22, 2004

For the Union:

1. Job Posting for Administrative Clerk position, January 7, 2005.

For the City:

None other than those marked as joint.

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 set aside for this hearing will be one-half (½) 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. The parties' representatives shall meet, or otherwise confer, on or before **July 6, 2005** in order to compose a mutual statement of agreed facts. The parties' representatives shall memorialize those facts upon which they can so stipulate and file that document with the PELRB forthwith. If, after completing stipulations, agreement is reached to submit the case by written submission, the parties shall

forthwith notify the PELRB and file a joint statement indicating such agreement, including a proposed schedule for the parties' filings.

2. In the event that this matter proceeds to hearing as scheduled, or the PELRB determines, upon review of parties' written submissions, that a hearing is necessary, the parties' counsel 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.

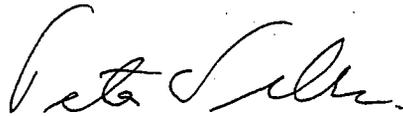
3. Unless otherwise ordered as a result of the filing of any subsequent motion or for other good cause shown, including the parties' agreement to present the case through written submissions, an evidentiary hearing between the parties is presently scheduled for:

July 12, 2005 @ 9:30 AM

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

So ordered.

Signed this 29th day of June, 2005.



Peter C. Phillips, Esq.
Hearing Officer

Distribution:

Daniel A. Cocuzzo, Esq.

Thomas J. Flygare, Esq.