



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME Local 1386, Portsmouth City Employees	*	
	*	
Complainant	*	Case No: A-0411-61
v.	*	
	*	
City of Portsmouth	*	Decision No. 2006-012
Respondent	*	
	*	

APPEARANCES

For the Petitioner: Erin L. Goodwin, Associate General Counsel, AFSCME Council 93
Steven Lyons, Staff Representative, AFSCME

For the Respondent: Thomas J. Flygare, Esq., Flygare, Schwarz & Closson, PLLC

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 changing the classification of a position without specific notice to the Union and without bargaining the upgrade. The Union's charge indicates that the City's negotiator and counsel responded to an October 20, 2004 Union e-mail stating 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 continued to upgrade similar positions from Grade 4 to a Grade 7. The Union alleges 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.

The City filed its answer to the Union's complaint on May 11, 2005. While the City generally admits to the 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.

A pre-hearing conference was conducted on June 27, 2005 at PELRB offices, Concord, New Hampshire. Subsequently, two continuances were granted by the PELRB upon the respective request of each party. A final hearing was conducted on January 24, 2006. At that time, the Board entertained the City's Motion to Dismiss the Union complaint for failure to file the complaint in a timely manner. Each party's representative was allowed to present their respective case on the timeliness of the filing on offers of proof. The Union made reference to a document prepared by the City that was slated as an exhibit to be offered in the anticipated hearing on the merits of the charges within the Union's complaint. It was a document that had been prepared by the City and purported to represent a number of reclassifications that had occurred over the last eight years by the City and which involved the same bargaining unit membership and upgraded a position from one grade within the unit to another higher grade within the same unit.

The Board was confused by the reference made by the Union in its offer of proof regarding what became labeled City Exhibit #4 and requested that the City explain the document further at this point in the proceedings. The City called Dianna Fogarty, Human Resource Director, for the limited purpose of explaining what the document depicted. Following that testimony and cross-examination by the Union, the Board recessed to consider the City's Motion to Dismiss. The Board reconvened to request that the Union further explain the reference to a later, January 27, 2005 event wherein it alleged that the City undertook action on that date that also constituted an unfair labor practice. After listening to the Union's explanation the Board again recessed to make a decision on the City's motion to dismiss and to determine, sua sponte, whether this latter reference created a separate cause of action upon which it could hear evidence.

It found as follows:

1. The Union is the exclusive representative of certain Portsmouth City Employees comprising the bargaining unit known as AFSCME Local 1386, Council 93.
2. The City of Portsmouth employees individuals in the performance of certain governmental functions and is a public employer.
3. The Union filed an improper labor practice complaint against the City on April 26, 2005.
4. The City of Portsmouth posted a reclassification of a support staff position in the Planning Department from Grade 4 to Grade 7.
5. The Union learned of this action by the City on or before October 20, 2004.

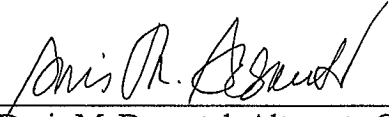
6. The Union initiated an exchange of two e-mails with the City wherein it questioned the City's action and then demanded that the parties bargain over the position upgrade. The City responded by stating that it was under no obligation to do so and refused to bargain. Such communication did not constitute substantive bargaining and did not extend, for purposes of timeliness, the date of the "triggering event" starting the statute of limitations.
7. The Union was unable to provide sufficient proof, by offer or otherwise, that a subsequent act on or about January 27, 2005 gave rise to a separate cause of action.

It ordered as follows:

1. The City's Motion to Dismiss the Union's complaint for failure to timely file the complaint alleging the commission of improper labor practices occurring on or about September 9, 2004 or October 20, 2004 is GRANTED.
2. The Union's complaint to the extent that it relies on actions of the City occurring on or about January 27, 2005 is dismissed for failure to sufficiently state a claim upon which relief may be sought.
3. The City is to post a copy of this order for a period of thirty (30) days in a location calculated to bring its contents to the notice of the members of the bargaining unit.
4. Neither party is awarded its fees or costs to be paid by the other party.

It is so ordered.

Signed this 30th day of January, 2006.



Doris M. Desautel, Alternate Chair

By unanimous vote. Alternate Chair Doris M. Desautel presiding with Board Members Carol Granfield and Richard E. Molan, Esq. also voting.

Distribution:
Erin Goodwin, Esq.
Thomas J. Flygare, Esq.