



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**MERRIMACK COUNTY DEPARTMENT OF
CORRECTION SUPERVISORS**

PETITIONERS

v.

CASE NO. S-0327-51

**MERRIMACK COUNTY DEPARTMENT OF
CORRECTIONS**

DECISION NO. 2009-201

and

**STATE EMPLOYEES' ASSOCIATION OF NH, INC.,
LOCAL 1984, SEIU**

RESPONDENTS

APPEARANCES

Representing: Merrimack County Department of Corrections Supervisors
Sgt. Jason M. Henry

Representing: State Employees' Association of NH, Inc., Local 1984, SEIU
John S. Krupski, Esq., Molan Milner & Krupski, PLLC
Concord, New Hampshire

Representing: Merrimack County Department of Corrections
Warren D. Atlas, Esq., Atlas & Atlas, P.C.
Bedford, MA

BACKGROUND

On June 24, 2009 Sergeant Jason Henry filed a petition for modification on behalf of the employees identifying themselves as "Merrimack County Department of Corrections Supervisors" seeking to remove the positions of Training Coordinator, Sergeants, Corporals, and

Medical Services Coordinator from an existing bargaining unit consisting of the following positions:

Shift Supervisor, Corrections Officers, Medical Services Coordinator, Corrections Nurse, Secretary, Maintenance Engineer, Maintenance Worker II, Training Officer

The exclusive representative of the existing bargaining unit, the State Employees' Association of NH, Inc., Local 1984, SEIU (SEA), filed its exceptions to the modification petition on July 9, 2009. The SEA claims, inter alia, that the Petitioners lack standing to modify the existing bargaining unit, that the petition is untimely, that the modification is barred by the doctrine of laches, and that the Petitioners failed to demonstrate the requisite change in circumstances. The SEA requests that the Public Employee Labor Relations Board (PELRB) dismiss or deny the petition.

The Merrimack County Department of Corrections (County) filed its exceptions to the petition on July 9, 2009. In its exceptions, which were later withdrawn, the County claimed that the positions of the Training Coordinator and the Medical Services Coordinator "should be excluded from the proposed bargaining unit due to (sic) detrimental effect their inclusion would have on the efficiency of the County DOC's operations" and because the positions are supervisory and confidential.

The undersigned hearing officer conducted a hearing on July 27, 2009 at the PELRB offices in Concord. During the hearing, Sgt. Henry moved to amend the petition to remove the positions of Training Coordinator and Medical Services Coordinator from the petition to modify. Neither the County nor the SEA objected to the motion. The motion to amend the petition was granted. The County withdrew its exceptions to the modification petition as amended. The SEA moved to dismiss the petition. The hearing officer took the SEA's motion to dismiss under

advisement and proceeded with the hearing on the merits. The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. At Sgt. Henry's and SEA's request the record was held open until August 18, 2009 to allow the filing of post-hearing briefs. Sgt. Henry filed the post-hearing brief on August 17, 2009. The SEA filed the brief on August 18, 2008. The County did not file a brief. The record is closed.

FINDINGS OF FACT

1. The Merrimack County Department of Corrections is a public employer as that term is defined in RSA 273-A:1, IX and, is, therefore, subject to the provisions of RSA 273-A.
2. The State Employees' Association of NH, Inc., Local 1984, SEIU is the certified exclusive representative of the existing bargaining unit covering certain positions within the Merrimack County Department of Corrections which the Petitioners now seek to modify.
3. The most recent Amended Certification was issued by the PELRB on April 26, 1990.
4. The existing bargaining unit contains the following positions:
 - Shift Supervisor, Corrections Officers, Medical Services Coordinator, Corrections Nurse, Secretary, Maintenance Engineer, Maintenance Worker II, and Training Officer.
5. The SEA and the County are parties to a Collective Bargaining Agreement (CBA) which expires on December 31, 2009.
6. Jason Henry is a sergeant employed by the Merrimack County Department of Corrections.
7. Prior to filing the present petition, the Petitioners contacted an employee organization other than the SEA and expressed their interest in being represented by that organization. That organization informed the SEA that the Petitioners wished to separate from the SEA.
8. Sgt. Henry has not, on his own, or with other employees, formed an employee association

or organization.

9. Neither Sgt. Henry nor any other employee of the Merrimack County Department of Correction filed a petition to be certified as an exclusive representative in conjunction with the present modification petition.

DECISION

DECISION SUMMARY

The petition for modification is dismissed. The Petitioners lack standing to file a petition for modification of the existing bargaining unit.

JURISDICTION

The PELRB has jurisdiction of all petitions to determine and modify bargaining units pursuant to RSA 273-A:8 and Pub 302.05.

DISCUSSION

Modifications of existing bargaining units are governed by Pub 302.05, which provides in relevant part:

(d) An employee organization, other than the exclusive representative, may file a petition for modification only during time periods or under conditions when it would be entitled by statute or these rules to petition for an election to be certified as the exclusive representative. At other times, only the employer or exclusive representative may file a petition for modification of a bargaining unit.

Pub 302.05 (d).

In the present case, Sgt. Henry, on behalf of certain employees of the Merrimack County Department of Corrections, seeks to modify the existing bargaining unit by removing certain positions from the unit. The Petitioners claim that they are supervisory employees and, as such,

should be removed from the existing unit.

Pub 302.05 (d) states that only the public employer and the exclusive representative may file a petition for modification of a bargaining unit at any time, all other Pub 302.05 requirements being satisfied. The only other entity authorized, under certain circumstances, to file a modification petition under Pub 302.05 is an employee organization other than the exclusive representative. Individual employees are not identified as having a right to file a modification petition. The exception authorizing an employee organization other than exclusive representative to file a petition is limited to the modification petitions filed in conjunction with so-called “challenge” certification or modification petitions. Such petitions involve a challenge by a “rival” employee organization which seeks to become certified as the exclusive representative of an existing bargaining unit, of a part thereof, or of a new bargaining unit through either modification proceedings or an election process. Under Pub 302.05 (d), an employee organization, other than the exclusive representative, is allowed “to file a petition for modification *only* during time periods or under conditions when it would be entitled by statute or the rules to petition for an election to be certified as the exclusive representative.” (Emphasis added.) The language of Pub 302.05 (d) is clear and unambiguous and indicates that only employee organizations that seek to be certified as an exclusive representative can file petitions for modification and that they can challenge the incumbent representative only during the time periods set forth in Pub 301.01. “[A]n administrative agency must follow its own rules and regulations” *Appeal of State Employees’ Ass’n of N.H., Inc.*, 156 N.H. 426, 428 (2007), citing *Attitash Mt. Service Co. v. Schuck*, 135 N.H. 427, 429 (1992).

In the present case, the Petitioners are neither the public employer nor the incumbent exclusive representative. In addition, the Petitioners failed to establish that they are an employee

organization for the purpose of filing a modification petition under Pub 302.05. The evidence demonstrates that the Petitioners do not consider themselves an employee organization and that they do not intend to act as an exclusive representative. The Petitioners filed the present modification petition as individual employees wanting to remove themselves from the existing bargaining unit.

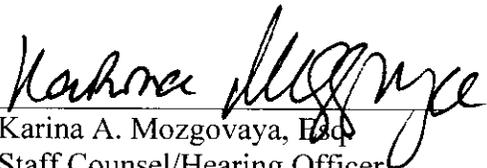
The applicable rules place limits and restrictions on the modification of existing bargaining units and one of them is that bargaining units cannot be modified at the request of individual employees. This arrangement is consistent with the purpose of RSA 273-A which “governs the relationship between public employers and their employees, including the determination and certification of exclusive bargaining representatives.” *Dillman v. Town of Hooksett*, 153 N.H. 344, 347 (2006).

Accordingly, under the Pub 302.05 (d), the Petitioners lack standing to file a modification petition.

For the foregoing reasons, the modification petition is dismissed. Since the petition is dismissed pursuant to Pub. 302.05 (d), it is unnecessary for the hearing officer to address the other objections raised by the SEA.

So ordered.

September 29, 2009


Karina A. Mozgovaya, Esq.
Staff Counsel/Hearing Officer

Distribution:
John S. Krupski, Esq.
Warren Atlas, Esq.
Sergeant Jason Henry