Affirms PELRB Decision No. 2002-087

THE SUPREME COURT OF NEW HAMPSHIRE

Public Employee Labor Relations Board

No. 2002-675

APPEAL OF CITY OF LACONIA

(New Hampshire Public Employee Labor Relations Board)

Argued: June 18, 2003

Opinion Issued: October 1, 2003

Devine, Millimet & Branch, P.A., of Manchester (Mark T. Broth and Abigail J. Sykas on the brief, and Mr. Broth orally), for the petitioner.

Cook & Molan, P.A., of Concord (John S. Krupski on the brief and orally), for the respondent.

DUGGAN, J. The petitioner, City of Laconia (City), appeals a New Hampshire Public Employee Labor Relations Board (PELRB) decision dismissing its petition to modify the fire department's collective bargaining unit to exclude lieutenants and captains. We affirm.

The respondent, Laconia Professional Firefighters, Local 1153, IAFF (Union), has been the exclusive representative of the bargaining unit of firefighters, captains and lieutenants since 1956. In 2000, the City petitioned the PELRB to modify the bargaining unit to exclude lieutenants and captains. The PELRB dismissed the petition and the city appealed to this court. In 2002, we remanded the case to the PELRB to decide: (1) whether lieutenants and captains are supervisors within the meaning of RSA 273-A:8, II (1999); (2) if the lieutenants and captains are supervisors, whether it is permissible to include them in the same bargaining unit as firefighters; and (3) whether the City is barred from challenging the composition of the bargaining unit because of laches or some other reason. Appeal of City of Laconia, 147 N.H. 495, 497 (2002).

On remand, the PELRB affirmed the previous dismissal of the City's petition because, "while lieutenants and captains may be 'supervisors' by virtue of their ranks or titles, they are not sufficiently 'supervisors' by function or vested with sufficient 'disciplinary authority' to cause their exclusion from the bargaining unit." Regarding the issue of laches, the PELRB said that it "[did] not address the issues of laches in detail, with the exception of noting that if the City were allowed to proceed, there would be

what it called 'resulting prejudice' [] because the remaining lieutenants and captains would be less than ten in number."

On appeal, the City challenges the PELRB's conclusion that lieutenants and captains are not supervisors who must be excluded from the bargaining unit. The City also challenges the PELRB's dismissal of its modification petition based upon the doctrine of laches. Finally, the City asserts that the Union's argument that it waived its right to petition for a modification is without merit. We agree with the PELRB that the doctrine of laches bars the City's modification petition; thus, we need not address the remaining issues.

"To succeed on appeal, the [City] must show that the [PELRB's] decision is unlawful or clearly unreasonable. We review for errors of law without deference to the [PELRB's] rulings. The [PELRB's] findings of fact are presumptively lawful and reasonable, but we require that the record support the [PELRB's] determinations." Appeal of Town of Stratham, 144 N.H. 429, 430 (1999) (citations and quotations omitted).

"Laches is an equitable doctrine that bars litigation when a potential plaintiff has slept on his rights." Town of Seabrook v. Vachon Management, 144 N.H. 660, 668 (2000) (quotation omitted). The doctrine of laches "is not a mere matter of time, but is principally a question of the inequity of permitting the claim to be enforced." Seabrook, 144 N.H. at 668 (quotation omitted). We consider four factors in our analysis: (1) "the knowledge of the plaintiffs"; (2) "the conduct of the defendants"; (3) "the interests to be vindicated"; and (4) "the resulting prejudice." Id. Our analysis of these factors "hinges upon the particular facts of each case." Healey v. Town of New Durham, 140 N.H. 232, 241 (1995).

The PELRB found the following facts. The City and the Union began collective bargaining in 1956. In 1976, the PELRB formally certified the Union as the exclusive representative for the bargaining unit, which consisted of captains, lieutenants and firefighters. Captains and lieutenants had been conducting oral performance evaluations of the firefighters since 1956. In December 1996, the Union and City agreed that the evaluations would be written "with the caveat that it was agreed that it was not to be used to demonstrate management functions on behalf of the lieutenants and captains such as to exclude them from the bargaining unit." The 1998 collective bargaining agreement contained the first contractual reference to written performance evaluations.

We now consider the four factors to determine whether the doctrine of laches bars the City's petition. First, we consider the City's knowledge. The City knew in 1975 that the legislature enacted RSA 273-A:8, II, which provides that "[p]ersons exercising supervisory authority involving the significant exercise of discretion may not belong to the same bargaining unit as the employees they supervise." The enactment of RSA 273-A:8, II alone may not have given the City notice to petition the PELRB to exclude captains and lieutenants from the bargaining unit. However, our subsequent case law explained the scope of the statute.

In 1988, we held that fire department captains with certain authority, "regardless of whether it is presently exercised," are supervisors under RSA 273-A:8, II. Appeal of University System of N.H., 131 N.H. 368, 376 (1988) (hereinafter Appeal of UNH). In Appeal of UNH, the captains' duties included "assigning work, ensuring that the shifts are fully staffed, and being in command of fire and other incidents when senior staff [were] not present." Id. at 376. Also, in Appeal of UNH, the PELRB had found that the "captains have some limited supervisory authority over the firefighters, including significant discretion or independent judgment." Id. at 376. Given the facts and holding in Appeal of UNH, the City should have known by 1988 that a petition for modification would be in order but failed to file one. In fact, in 1998, the City negotiated a new collective bargaining agreement with the Union that included the captains and lieutenants.

The City argues that its delay is insufficient to bar its petition. We agree that delay is only one factor; nevertheless, significant delay must be present to trigger a laches analysis. Seabrook, 144 N.H. at 668. As we noted in Miner v. A & C Tire Co., 146 N.H. 631, 634 (2001), laches did not bar suit where the plaintiff's delay did not prejudice the defendants. Thus, once there is a delay, we must consider the remaining factors. Healey, 140 N.H. at 241.

Second, we consider the conduct of the Union. Richard Molan, the Union's chief negotiator since 1979, testified that the issue of whether captains and lieutenants were considered supervisors within the meaning of RSA 273-A:8, II was never an issue during negotiations until 1996. After an October 1996 meeting, the City and Union came to an "agreement on this contract language with the caveat that it was agreed that it was not to be used to demonstrate management functions on behalf of the lieutenants and captains such as to exclude them from the bargaining unit." Nothing in the record indicates that the Union's conduct contributed to the City's delay. The City did not rely upon the Union's conduct in delaying its petition. Rather, the Union's conduct indicates its intent to limit the supervisory authority of the captains and lieutenants in an effort to preserve the bargaining unit.

Third, we consider the interests to be vindicated. In 1975, the legislature enacted RSA chapter 273-A because "it is the policy of the state to foster harmonious and cooperative relations between public employers and their employees and to protect the public by encouraging the orderly and uninterrupted operation of government." Laws 1975, 490:1. Since 1976, the bargaining unit has included captains and lieutenants. This bargaining unit has negotiated successive collective bargaining agreements to the benefit of the entire unit without exception. According to RSA 273-A:8, an appropriate bargaining unit is determined by "the principle of community of interest." Michael Drake, a lieutenant since 1989, confirmed that "the captains, lieutenants and firefighters all have the same working conditions under the contract, with the exception of pay differentials, and have a 'self-felt community of interest.'" Excluding captains and lieutenants from the bargaining unit after twenty-seven years and disrupting this "self-felt community of interest" would be inconsistent with the State's interest in fostering "harmonious and cooperative relations between public employers and their employees." Laws 1975, 490:1.

Finally, we consider the resulting prejudice. The PELRB found that "if the City were allowed to proceed, there would be . . . 'resulting prejudice' . . . because the remaining lieutenants and captains would be less than ten in number" and thus ineligible to form a bargaining unit. RSA 273-A:8, I. While the City has offered to negotiate with the captains and lieutenants, the captains and lieutenants would not be eligible to be certified as a bargaining unit and enjoy the resulting protections provided in RSA chapter 273-A.

For instance, the City would not be obligated to meet "at reasonable times and places" or "cooperate in mediation and fact-finding." RSA 273-A:3. Also, a breach of any agreement reached between the City and the captains and lieutenants would not constitute an unfair labor practice. RSA 273-A:5 (1999). The PELRB would not have jurisdiction to issue a cease and desist order to remedy the breach. RSA 273-A:6 (1999). Thus, the City has failed to meet its burden to show that the PELRB's conclusion that there would be a "resulting prejudice" was unlawful or clearly unreasonable.

Based upon our review of the facts in light of the City's knowledge, the Union's conduct, the interests to be vindicated and the resulting prejudice, we conclude that the PELRB properly dismissed the City's petition for modification based upon the doctrine of laches.

Affirmed.

BROCK, C.J., and BRODERICK, NADEAU and DALIANIS, JJ., concurred.

NH Supreme Court affirmed this decision on 10-1-2003, Slip Op. No. 2002-675
(NH Supreme Court Case No. 2002-675)

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

City of Laconia Complainant v. Laconia Professional Firefighters, Local 1153 I.A.F.F. Respondent	Case No. F-0103-18 (Unit Modification)
Laconia Professional Firefighters, Local 1153, I.A.F.F. Complainant v. City of Laconia Respondent	Case No. F-0103-19 (Unfair Labor Practice Decision No. 2002-087 ON REMAND

APPEARANCES

Representing City of Laconia:

Mark Broth, Esq., Counsel

Representing Laconia Firefighters, Local 1153, I.A.F.F.:

John Krupski, Esq., Counsel

BACKGROUND

The City of Laconia (City) filed a Modification Petition on January 28, 2000 seeking to remove the positions of captain and lieutenant from the bargaining unit represented by the International Association of Firefighters, Local 1153 (Union) which includes those two job titles

plus firefighters, as more particularly described at Article II, Section 1 of their collective bargaining agreement for the period July 1, 1996 to June 30, 2000 (Joint Exhibit No. 1). The Union filed its answer thereto on February 11, 2000 along with an unfair labor practice complaint of the same date alleging violations of RSA 273-A:5 I (e) resulting from the City's setting preconditions of resolving the pending modification petition before it would conclude negotiations on a successor CBA. The City filed its answer to the ULP after which both matters were consolidated for hearing and first heard by the PELRB On March 16, 2000.

At the March 16, 2000 hearing the ULP was presented first with the Union as the moving party. The Union presented a witness and rested, there being two implicit understandings, namely, that the parties reserved the right of cross examination and rebuttal and that evidence and testimony presented in the ULP proceedings would be considered in the modification petition proceedings and vice versa. After the City presented a witness in response to the ULP, the Union interposed a Motion to Dismiss. The City asked for and received approval to file a memorandum opposing this Motion to Dismiss on or before March 17, 2000 which it did in a timely manner. Simultaneously, the City filed a Motion for Summary Judgment to which the Union filed objections on April 5, 2000. The pending motions were collectively considered by the PELRB on April 6 and 13, 2000 after which the PELRB informed the parties that those motions would be taken under advisement pending completion of the case. The second and final day of hearing in the consolidated matters occurred on May 2, 2000 and concluded with closing oral arguments by both sides after which the record was closed. The PELRB issued its decision in this matter on May 10, 2000 (Decision No. 2000-038) after which the City filed for reconsideration on May 22, 2000 and the Union filed objections thereto on June 6, 2000.

This matter was then appealed to the New Hampshire Supreme Court by the City. The Court heard arguments on January 15, 2002 and issued its decision on March 12, 2002. 147 N.H. 495. In that decision, the Court remanded on three issues: (1) whether lieutenants and captains are supervisors within the meaning of RSA 273-A:8 II; (2) if the lieutenants and captains are supervisors, whether it is permissible to include them in the same bargaining unit as firefighters; and (3) whether the City is barred from challenging the composition of the bargaining unit because of laches or any other reason. Both parties filed written briefs with the PELRB on these issues on April 29, 2002.

DECISION AND ORDER

The first of three issues directed to us on remand is whether lieutenants and captains are supervisors within the meaning of RSA 273-A:8 II. That portion of the statute provides that "persons exercising supervisory authority involving the significant exercise of discretion may not belong to the same bargaining unit as the employees they supervise." Our review of the testimony as reiterated in Decision No. 2000-038, from witnesses for both labor and management (see Finding Nos. 4, 6, 7 and 8 in particular), is conclusive on the point that nothing crucial or pivotal in the job functions of captains and lieutenants has actually changed since written evaluations commenced under Article IX, Section 12 of the parties' 1996-2000 CBA. See Finding No. 3.

When we compare the impact or consequences from the evaluations conducted by the captains and lieutenants, be they written or oral, we find that those evaluations have historically been corrective or instructive in nature, as opposed to being disciplinary or precursors to awarding merit pay or promotions. This comes as no surprise as it is consistent with the language of Article IX, Section 12 of the CBA which provides that "performance evaluations shall not be deemed to be disciplinary action" and with the testimony from labor and management witnesses alike in Finding Nos. 4, 6 and 7. When contrasted to Appeal of University System of NH, 131 NH 368, 376 (1988) where captains' evaluations were given "certain weight in merit pay increases...and were considered in terminating a new employee," neither the scope, intent nor consequences of the evaluations in Laconia rises to that level.

In a subsequent evaluations case, Appeal of East Derry Fire Precinct, 137 NH 607, 611 (1993), the Supreme Court again spoke to evaluations whose purposes had implications on hiring and termination decisions and found that fire officers had "disciplinary authority." Such is not the case here because there is no evidence that the Article IX, Section 12 evaluations were ever used for, or intended to be used for, disciplinary purposes, inclusive of hiring and terminations.

Since we issued Decision No. 2000-038 in May of 2000, Appeal of City of Manchester, Docket No. 98-684 (Slip. Op., October 29, 2001) was decided. In that case, the PELRB concluded that the alleged "increased responsibility [given to the incumbents in newly designated job titles] is not increased supervisory discretion that would warrant bargaining unit exclusion," not unlike the circumstances in the instant Laconia case. The City of Manchester appealed. While the Supreme Court acknowledged that the incumbents were authorized to schedule and assign work, not unlike captains and lieutenants in Laconia under the directions and strictures of the fire department (e.g., Union brief, p. 9), it also found that those new "supervisory" employees lacked the requisite disciplinary authority to warrant their exclusion from the bargaining unit. In Manchester, authority to hire, fire and promote rested with the department head, called a "director," not with the evaluators. Thus, while the evaluators/new supervisory employees could recommend discipline, there was no indication that employees in the new positions "actually took any disciplinary action." If we were to substitute "chief" for "director" and to equate the role of the Manchester evaluators with that of the captains and lieutenants in Laconia, the authority and the circumstances are remarkably similar. We believe the result should also be similar, i.e., that the lieutenants and captains lack sufficient disciplinary authority to warrant their exclusion from the bargaining unit.

We conclude that while lieutenants and captains may be "supervisors" by virtue of their ranks or titles, they are not sufficiently "supervisors" by function or vested with sufficient "disciplinary authority" to cause their exclusion from the bargaining unit. As the Union noted in its brief (p. 10), RSA 273-A "does not require that supervisors be excluded from a bargaining unit simply due to a title or position." This was articulated earlier in Appeal of East Derry Fire Precinct, 137 NH 607, 611 (1993) where the court recognized the Union's position "that some employees performing supervisory functions in accordance with professional norms will not be vested with the 'supervisory authority involving the significant exercise of discretion' described by RSA 273-A:8, II." Without such vested authority, there is no requirement for exclusion under the statute and, in response to the second issue of the remand, no cause to find that it is not permissible for lieutenants and captains to remain in the bargaining unit with firefighters.

This case was initially consolidated for hearing by the PELRB, by combining the City's modification petition and the Union's ULP. We addressed the ULP in Decision No. 2000-038 and do not speak to it here because of the limited purposes of the remand. The City's cause of action, the modification petition, was filed under Rule PUB 302.05 (a). In order to prevail with such a petition, the City must successfully carry the burdens of going forward and of proof that circumstances surrounding the formation of an existing bargaining unit, in this case one dating to May 24, 1956 (Finding No. 2 in Decision No. 2000-038), have changed sufficiently to warrant a modification in its structure. For the reasons stated, it has failed to do this. While our examination of the record shows the job descriptions and duties of the lieutenants and captains to have changed vis-à-vis written evaluations and the language of Article IX, Section 12 to be new with the 1996-2000 CBA, there has not been a sufficient change in the role, function or consequences of evaluations conducted by lieutenants and captains to warrant undoing almost fifty years of successful labor-management relations with the bargaining unit structured as it is today.

Based on the foregoing, we AFFIRM our previous dismissal of the City's modification petition and our finding, under the circumstances presented to us, that there is no basis to exclude captains and lieutenants from the existing bargaining unit. Having so found, we do not address the issues of laches in detail, with the exception of noting that if the City were allowed to proceed, there would be what it called "resulting prejudice" (City brief, p. 17) because the remaining lieutenants and captains would be less than ten in number.

So ordered.

Signed this 1st day of August, 2002.

JACK BUCKLEY
Chairman

By unanimous vote. Chairman Jack Buckley presiding. Members Seymour Osman and E. Vincent Hall present and voting.

NH Supreme Court affirmed Decision No. 2002-087 on 10-1-2003, Slip Op. No. 2002-675 (NH Supreme Court Case No. 2002-675)

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MOTION FOR REHEARING

The Board, meeting at its offices in Concord, New Hampshire, on September 24, 2002, took the following actions:

1. It reviewed the City's Motion for Rehearing filed on August 30, 2002, and the Union's objections thereto filed on September 13, 2002.

2. It examined the Supreme Court decision in Appeal of the City of Laconia, 147 NH 495 (2002) and, in particular, the issues remanded, the City's Memorandum of Law dated and filed April 29, 2002 and the Union's Memorandum dated and filed April 29, 2002.

3. It reviewed the Board's decision on remand (Decision No. 2002-087) in this matter dated August 1, 2002.

4. It DENIED the City's Motion for Rehearing.

So ordered.

Signed this 25th day of September, 2002.

BRUCE K. JOHNSON
Alternate Chairman

By unanimous vote. Alternate Chairman Bruce K. Johnson presiding. Members Richard Roulx and E. Vincent Hall present and voting.