



NH Supreme Court declined appeal of this decision on February 17, 1989. NH Supreme Court Case No. 88-453.

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

CITY OF SOMERSWORTH

Petitioner

v.

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
COUNCIL 93, LOCAL 863

Respondent

CASE NO. M-0529:3

DECISION NO. 88-74

APPEARANCES

Representing City of Somersworth:

Dorothy M. Bickford, Esq., Counsel

Representing AFSCME, Local 863:

Harriett Casey, Staff Representative
James C. Anderson, Staff Representative

Also appearing:

Gregory Mack, Public Works Director
Philip L. Munck, City Manager
Carter W. Ames, General Foreman
Alfred Couture, Jr., Mechanic
Denis Michaud

BACKGROUND

The City of Somersworth filed a petition for Declaratory Judgment requesting the Public Employee Labor Relations Board (the "Board") to rule upon whether or not a certain position, namely that of General Foreman, should be in the bargaining unit consisting of employees of the Public Works Department in the City of Somersworth. The Board held two days of hearings on the matter and issued its decision #88-25, May 9, 1988, which unanimously found that the position of General Foreman failed to rise to the degree of significant discretion necessary to exclude it from the certified unit. The City subsequently filed a Motion for Rehearing, alleging that the Board's order was inaccurate; violated standards of impartiality, and was incorrect on the facts. The Board granted a rehearing which was held on August 11, 1988 at the Board's office in Concord.

The factual dispute in this matter began in October of 1985 when City Manager, Philip Munck created a new position of General Foreman in the Public Works Department. An agreement was reached between the City and the Union which established a job description for the General Foreman and the inclusion of that position within the bargaining unit. Thereafter, a long series of disputes arose about this position and how it was filled. The matter has been the subject of at least two arbitrations wherein the Union challenged the City's selection of the General Foreman. In each instance, the arbitrator sustained the Union's allegations having the effect of negating the City's choice of appointment to the position.

Following their losses in arbitration, the City attempted to negotiate the position out of the bargaining unit during the following collective bargaining negotiations, but agreed in the dispute settlement process to bring this matter to the Board's attention.

DISCUSSION

The Board is most cognizant of its responsibilities and obligations under the statute, in particular to define the scope and composition of bargaining units. However, the Board also has developed rules and regulations to set forth the proper methods by which to bring these matters to the Board's attention, namely a petition for a new bargaining unit or for modification of a bargaining unit. The Board also places great weight upon the agreements reached by the parties in their continuing relationship.

In the instant case, this Board defined a collective bargaining unit some years ago that established a broad unit which excepted bonafide supervisory employees. Subject to that certification, the parties, both represented by experienced professionals in this area, met and reached an agreement as to the job description and the decision to include the General Foreman within the bargaining unit.

It cannot now be gainsaid that the intention of the City was any different than the result which was reached, that being that the position was at all times treated as any other position within the bargaining unit. That observation is further evidenced by the subsequent arbitrations in which the question of arbitrability with respect to such a position was never argued.

It was only after the City's double loss in arbitration of its attempts to supplant the terms of the collective bargaining agreement with its own action in naming the General Foreman, that this matter arose.

From the testimony and conduct of the parties, it is a fair assumption that this matter would never have come to the Board's attention had the City prevailed in its choice of individual to fill that position. The Board also notes that the City was free to bring this matter to the Board at the time of creation of the position and should have properly done so, except that at that time it is the City's testimony that they decided the position should be in the unit.

The City's attempt to now have the Board negate their actions is nothing but an attempt at a second bite at the apple. To grant the Petitioners relief would place the Board in the unenviable position of promoting further disharmony in the workplace by permitting a party to freely enter into agreements only to repudiate them when that agreement fails to achieve self-serving reasons.

FINDINGS OF FACT

The Board finds the following:

1. That the City failed to meet its burden of proof to show that an actual conflict of interest existed with respect to Member Molan's sitting on the Board in either the initial or rehearing of this matter. The alleged conflict cannot be sustained by the record, namely that the certification of the City's Fire Department is clear as to the composition of that bargaining unit and that there is no actual dispute before the Board or for that matter, to anyone's knowledge, before any forum.
2. That the City Manager and the representative of the Union reached an agreement as to the job description and responsibilities of the General Foreman and agreed that the position would be in the bargaining unit.
3. That the duties and responsibilities of the General Foreman have not changed since the date of its creation as was testified to by the City Manager and stipulated to by City's Counsel.
4. That the parties conducted themselves throughout the period of the then existing contract as though this position was in the bargaining unit.
5. That the filling of this position was twice grieved, ultimately to arbitration in which cases the City failed to raise the issue of arbitrability as to jurisdiction over this position.
6. That despite its allegations, the City's Petition for Declaratory Judgment was in actuality a Petition for Modification of the Bargaining Unit which is subject to PUB 302.05 of the Board's Rules.
7. The Board's Rules provide that the modification of a bargaining unit petition will be honored if the circumstances surrounding the formation of an existing bargaining unit are alleged to have changed. Specifically the Rule provides that a petition which attempts to modify the composition of a bargaining unit negotiated by the parties may be denied if alleged changes actually changed prior to negotiations on the collective bargaining unit presently in force.
8. That the Complainant's allegations as set forth both in their Petition and in testimony fails to meet the requirements of the Rule and must be dismissed.

DECISION

The Board, on the basis that the Complainant's Petition fails to meet the requirements of the Board's Rules, reaffirms Decision #88-25 and dismisses the Petition.

Signed this 1ST day of NOVEMBER 1988.


EDWARD J. HASELTINE, Chairman

By unanimous vote. Chairman Edward J. Haseltine presiding. Members Richard E. Molan, Esq., Richard W. Roulx and Seymour Osman present and voting. Also present, Executive Director, Evelyn C. LeBrun.