STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case Nos. 20-UC-01 and 20-UD-01
Issued: January 3, 2020

REGIONAL SCHOOL UNIT 57, BOARD OF DIRECTORS	)	
Petitioner/Employer,	)	UNIT CLARIFICATION AND DETERMINATION REPORT
and	)	
MASSABESIC EDUCATION ASSOCIATION	)	
Incumbent/Labor Organization.	)	

I. Statement of the Case

On June 28, 2019, Regional School Unit 57's Board of Directors (Employer or School) filed with the Maine Labor Relations Board (MLRB) the above-captioned petitions for Unit Clarification and Unit Determination. In effect, the petitions seek a determination as to the scope of the existing bargaining unit currently composed of certain professional employees of the Employer represented by the Massabesic Education Association (Union or Association). In particular, the parties are in a dispute over whether employees who have been employed for less than six months are members of the bargaining unit.

On July 9, 2019, I determined that the petitions were procedurally sufficient to warrant further processing. On July 24, 2019, the Union filed motions to dismiss the petitions. The Employer filed its response to the motions on August 19, 2019. In lieu of a hearing to adjudicate the petitions and motions, the parties agreed to submit stipulations of fact and legal briefs. The parties filed their stipulated facts on October 16, 2019, and their briefs on November 15, 2019.

After consideration of the entire record, I have determined that (1) the bargaining unit in question should be clarified to exclude employees who have been employed for less than six months as provided by 26 M.R.S.A. § 962(6)(F), and (2) the petition for unit determination should be dismissed.

II. Stipulated Facts[1]

1. The School is a public employer, as that term is defined in 26 M.R.S.A. § 962(7).

2. The Association is a bargaining agent, as that term is defined in 26 M.R.S.A. § 962(2) for a bargaining unit of teachers employed by the School.

3. In early 2019, the Parties entered negotiations for a successor agreement to a collective bargaining agreement that would expire on August 31, 2019.

4. The Recognition Clause of that agreement read as follows: "RSU 57 Board of Directors (hereinafter the Board) hereby recognizes the Massabesic Education Association as the sole and exclusive bargaining representative as defined under the State of Maine Public Law Chapter 424, Section 962, for all certified professional employees of the Board excluding the Superintendent; principals and assistant principals who spend more than 50 percent of their time in administration; supervisors; and educational technicians."

5. On or about January 10, 2019, the School proposed new language in the agreement's Recognition Clause that specifically recognized the Association as the bargaining representative for certified employees employed by the School in the following classifications: "teachers, guidance counselors, speech clinicians, social workers, technology integrators, nurses, librarians, instructional coaches, math specialist, occupational therapists, and literary specialist."

6. The School's proposal also specifically excluded from recognition "temporary, seasonal, or on-call employees; and employees who have been employed for less than six months."

7. The Association rejected this proposal and stated that it was the Association's position that individuals who had been employed by the School for fewer than six months were members of the bargaining unit.

8. Prior to this exchange, the School had never communicated to the Association its position that employees employed by the School for fewer than six months were not bargaining unit members.

9. Prior to this exchange, the Association had never communicated to the School its position that employees employed by the School for fewer than six months were bargaining unit members.

[1] The parties attached the following exhibits to their stipulations: (A) the then-existing recognition clause referenced in Stipulation 4; (B) the proposed recognition clause referenced in Stipulations 5 and 6; (C) the proposed recognition clause referenced in Stipulation 10; and (D) the settlement package referenced in Stipulations 12 and 13.

10. During negotiations on or about January 31, 2019, the School submitted a compromise proposal for the Recognition Clause, which removed the enumerated classifications listed in Paragraph 5 above, and added new language specifically excluding from the unit "school psychologists" and "all employees who are not public employees as defined by statute."

11. The Association rejected this proposal.

12. On April 4, 2019, the School presented the Association with a settlement package, which did not resolve the Parties' dispute over the composition of the bargaining unit.

13. The package stated that the School "maintains that only public employees are members of the bargaining unit and does not consent to the inclusion of temporary, season, on call employees or employee who have been employed less than six months in this bargaining unit." The School also expressly "reserve[d] the right to file a unit determination/clarification petition with the MLRB" to resolve this matter.

14. During the course of negotiations, the parties were unable to resolve their disagreement over this matter, and no change related to this issue was made to the Recognition Clause.

15. The parties executed a successor agreement on June 5, 2019, which will be in effect until August 31, 2022.

16. Under Maine law, bargaining unit composition is a permissive subject of bargaining.

17. Neither party is aware of any employee organization other than the Association that has made a claim for recognition as the bargaining agent for this bargaining unit.

18. Neither party has any reasonable grounds to believe that should the M.L.R.B. find that individuals employed by the School for fewer than six months are not bargaining unit members, the Association would be at risk of losing majority support for its representation of the bargaining unit.

III. Analysis and Conclusions

A stated purpose of the Municipal Public Employees Labor Relations Law, 26 M.R.S.A. § 961, *et seq.* (Law) is to provide public employees the right to be represented by labor organizations for the purposes of collective bargaining. 26 M.R.S.A. § 961. Notably, the Law, since its inception over fifty years ago, has explicitly defined the term "public employee" as "any employee of a public employer, except any person…who has been employed less than 6 months." 26 M.R.S.A. § 962(6)(F) (edits supplied). See also Chapter 11, § 22(1) of the MLRB Rules. The Law also provides that in the event of a dispute over the composition of a bargaining unit, the MLRB's Executive Director shall make the determination whether a position is included in the bargaining unit, "except that anyone excepted from definition of public employee under section 962 may not be included in a bargaining unit." 26 M.R.S.A. § 966(1).

In the matter at hand, both parties affirm that, until their 2019 successor agreement negotiations, neither ever stated a position regarding the bargaining unit status of individuals employed less than 6 months. Given the argument that arose during the 2019 negotiations over this precise subject, and which continues through the litigation of these petitions, the question before me now is whether the Employer is procedurally entitled to a determination that excludes individuals who have been employed less than 6 months from the bargaining unit.

a. Unit Clarification

Section 966(3) of the Law permits a party to file a petition for unit clarification if (1) there is a currently recognized or certified bargaining unit, (2) the circumstances surrounding the formation of the bargaining unit are "alleged to have changed sufficiently to warrant modification in the composition of the bargaining unit," (3) the parties are unable to agree on appropriate modifications, and (4) there is no pending question concerning representation. 26 M.R.S.A. § 966(3).

A petitioner for unit clarification bears the burden of establishing the change in circumstances that would warrant the modification of an existing bargaining unit. E.g. *AFSCME Council 93 and Penobscot County*, No. 14-UCA-01 at 3 (December 17, 2013) (*Penobscot County*). When deciding whether this prerequisite is satisfied, one must determine what constitutes the qualifying change that would justify a unit clarification. The answer is subject to a fair level of interpretation because, fundamentally, the Law does not define the governing statutory term "changed sufficiently."

Most commonly, qualifying changes are found when either a new job classification is created after the parties conclude negotiations, or, the job duties of an existing position are substantially adjusted. *Penobscot County* at 3-4 (internal references omitted). The parties' bargaining history may be relevant. In particular, "[a] long and silent history of exclusion (or inclusion) suggests a certain degree of stability in the bargaining relationship. To change the status of a classification without a substantial showing of changed circumstances would be an improper use of the unit clarification procedure." *Penobscot County* at 5.

A party's change in its position regarding the bargaining unit-status of an employee may also constitute a sufficient change in circumstances. *Ashland Area Teachers Ass'n and MSAD No. 32 Brd. of Directors*, No. 05-UC-02 at 17-18, 22 (October 19, 2005) (*Ashland*) (hearing examiner found employer's "recent, clear and unequivocal" statement of exclusion constituted a sufficient change where, prior to the parties' last contract negotiations, the status of the position was "far from clear"); see also *Town of Thomaston and Teamsters Local Union No. 340*, No. 90-UC-03 at 13-14 (February 22, 1990) (*Thomaston*) (hearing examiner determined employer's reversal of its long-standing position regarding a statutory exclusion represented a sufficient change to support, in theory, a unit clarification petition).

Importantly, the Law not only permits, but encourages, parties to negotiate and attempt to reach consensus on the composition of a bargaining unit, including changes to existing bargaining units, prior to seeking MLRB intervention. *Penobscot County* at 2-3; see also 26 M.R.S.A. § 966(3); *Thomaston* at 11; *Town of Topsham and Local S/89, IAMAW*, No. 02-UC-01 at 3

(December 21, 2001) (*Topsham*); *City of Augusta and AFSCME*, Nos. 81-UD-20 and 81-E-01 at 6 (June 2, 1981). In turn, a unit clarification petition may be denied if the petition requests clarification of unit placement questions which could have been raised, but were not, prior to the conclusion of negotiations that resulted in an agreement containing a bargaining unit description. See Chapter 11, § 6(3) of the MLRB Rules. To emphasize this point, a hearing examiner declined to exclude two employees from a bargaining unit - despite the examiner's determination that the positions would normally be prohibited by statute from unit membership - because the employer previously agreed to their inclusion during successor contract negotiations, and, failed to raise or preserve the sought-after exclusions during bargaining. *Thomaston* at 12-15; see also *Ashland* at 12; *Topsham* at 9, FN 3.[2]

Here, there is no dispute that the Employer's unit clarification petition satisfies three out of the four required statutory elements for a viable petition where the bargaining unit in question is currently recognized, the parties are unable to reach agreement on appropriate modifications, and there is no question concerning representation. That leaves as the determinative issue the question of whether there has been a change in circumstances surrounding the bargaining unit's formation, such that the composition of the unit should be modified.

A review of the record shows there has, in fact, been a material change in circumstances surrounding the formation of the teachers' bargaining unit represented by the Union. Foremost, after years of silence, each party clarified its position regarding the unit status of new employees during the 2019 successor contract negotiations. *Ashland* at 17-18, 22. Given the parties' currently polar views on the issue, and the preceding lack of *any* discussion, it is evident that this matter was "far from clear" prior to each party unequivocally staking out a position during the 2019 negotiations. *Id*.[3]

Now that the parties have clearly stated their positions, but failed to reach agreement, the unit status of new employees is ripe for clarification. As described above, the parties' recent, unequivocal assertions regarding the status of new employees constitutes a sufficient change in circumstance given the preceding ambiguity on this matter. *Ashland* at 17-18, 22. Moreover, in accordance with MLRB policy that encourages parties to negotiate potential changes to existing bargaining units, the Employer attempted to bargain this matter during successor contract negotiations, and, absent agreement on this issue, preserved its right to seek clarification from the MLRB. Chapter 11, § 6(3) of the MLRB Rules; *Thomaston* at 12-15; *Ashland* at 12; *Topsham* at 9, FN 3. As a result, the Employer is entitled to a unit clarification.

The Union argues that, even if the Employer's petitions were dismissed, the Employer would still have recourse to raise the argument of new employee bargaining unit-status to an arbitrator

[2] The *Thomaston* hearing examiner also indicated had the employer raised, pursued, and preserved the exclusions during negotiations, the employer would presumably have been entitled to unit clarification. *Thomaston* at 12.

[3] The Contract's arguably ambiguous recognition clause may have contributed to the preceding lack of common understanding. On the one hand, from the Union's presumed perspective, new employees would naturally be included in a bargaining unit that is defined as "***all*** certified professionals," given the Contract includes no limitation on the term "all". On the other hand, the Employer could reasonably conclude new employees are excluded from the unit where the Law explicitly prohibits their inclusion, and, there is no record of the parties' specific agreement to knowingly depart from the statutory prohibitions on bargaining unit membership.

through grievance arbitration. This result would be inconsistent with the Law because the Maine Legislature has delegated the authority to resolve disputes over bargaining unit membership *only* to the Executive Director (or designee), subject to appeal to the MLRB and the courts. 26 M.R.S.A. § 966; see also *Washington Post Co. and Washington-Baltimore Newspaper Guild*, 254 NLRB 168 at FN 21 (1981) (under the National Labor Relations Act, the issue of whether an employee is barred by statute from inclusion in a bargaining unit is a matter for the National Labor Relations Board to determine).

In sum, a unit clarification for the matter at hand is the resolution that is most consistent with the Law and MLRB precedent. It is clear the employees in dispute are expressly prohibited by the Law from bargaining unit membership. Although the parties did not discuss this matter for years, the Employer was nonetheless entitled to raise it during negotiations, and, when no agreement was reached, submit the matter to the MLRB. Therefore, a denial of this petition would not effectuate the purposes of the Law.

b. Unit Determination

The Law mandates the MLRB's Executive Director to render a decision when parties disagree over a bargaining unit's composition. 26 M.R.S.A. § 966(1); see also Chapter 11, § 1(1) of the MLRB Rules. However, in order to qualify for such a decision, a unit determination petition filed by an employer must also involve a labor organization's claim to represent certain bargaining unit employees at issue in the petition. Chapter 11, § 7(9) of the MLRB Rules; see also *City of Bangor and Local 1599, Int'l Ass'n of Firefighters*, No. 80-A-03 at 3 (July 18, 1980) (*City of Bangor*).

In the case at hand, the Employer asserts the Union's recent, express claim that the existing bargaining unit includes employees who have worked less than 6 months constitutes a claim for recognition. The Employer's interpretation of the term "claim for recognition" is not consistent with the intent of the Law and MLRB Rules. Specifically, an employer-initiated unit determination is most appropriate in those circumstances when a labor organization asserts that it newly represents a bargaining unit, or a portion of a bargaining unit, that is either unrepresented or represented by a separate labor organization. *City of Bangor* at 3. That is not the case here where the Union argues, in effect, that it represents certain employees who, from the Union's perspective, have always been a part of the existing unit. As a result, the Employer's petition for unit determination is subject to dismissal.

IV. Order

For the foregoing reasons, the undersigned hearing examiner ORDERS:

1. The Employer's unit clarification petition is granted. The bargaining unit of professionals employed by the School is clarified to exclude those individuals who have been employed by the School for less than six months, as required by 26 M.R.S.A § 962(6)(F).

2. The Employer's unit determination petition is dismissed.

V. Right to Appeal

The parties are hereby advised of their right, pursuant to 26 M.R.S.A. § 968(4), to appeal this report to the Maine Labor Relations Board. To initiate such an appeal, the party seeking appellate review must file a notice of appeal with the MLRB within fifteen (15) days of the date of the issuance of this report. See Chapter 10 and Chapter 11, § 30 of the MLRB Rules.

Dated this 3rd day of January 2020

/s/ Neil P. Daly
Neil P. Daly
Executive Director