STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 07-UDA-01
Issued: January 16, 2007

COUNTY OF CUMBERLAND, Appellant, and TEAMSTERS UNION LOCAL 340, Appellee.	DECISION AND ORDER ON UNIT DETERMINATION APPEAL

PROCEDURAL HISTORY

This unit determination matter began when Teamsters Union Local 340 ("Teamsters" or "union") filed a unit determination/ bargaining agent election petition with the Maine Labor Relations Board ("Board") seeking a determination that certain positions employed by the County of Cumberland ("County" or "employer") comprised an appropriate bargaining unit for purposes of collective bargaining. By agreement of the parties, the Teamsters effectively withdrew the petition on behalf of certain positions, and continued to seek a bargaining unit consisting of a single job classification, Cook II's (five employees). The County contended that these employees should not be placed in their own bargaining unit, but should instead be placed in a larger, existing jail division bargaining unit, represented by a different bargaining agent (American Federation of State, County and Municipal Employees - AFSCME). This was and is the sole matter of dispute between the parties in this matter.

In order to expedite the Board's consideration of this dispute, the parties signed stipulations relating to all facts relevant to this matter. The parties stipulated that based upon MLRB precedent and based upon their agreement that a community of interest exists amongst the Cook II's, the executive director

would approve the creation of a bargaining unit of Cook II's. The executive director subsequently adopted the stipulations as the unit determination report in the matter, creating a bargaining unit of Cook II's. As part of the stipulations, the County filed its appeal from this report, in compliance with Chap. 11, § 30 of the Board Rules.

JURISDICTION

Teamsters Union Local 340 is a public employee organization within the meaning of 26 M.R.S.A. § 962(2); the County of Cumberland is a public employer within the meaning of 26 M.R.S.A. § 962(7). The jurisdiction of the Maine Labor Relations Board to hear this appeal and to render a decision herein lies in 26 M.R.S.A. § 968(4) of the Municipal Public Employees Labor Relations Law ("MPELRL"). The subsequent references in this decision are all to Title 26, Maine Revised Statutes Annotated.

DISCUSSION

The sole issue presented here is whether the Board should uphold the determination of the executive director (based upon the stipulations of the parties) that a bargaining unit consisting of Cook II's is appropriate for purposes of collective bargaining. The Teamsters argue that the determination should be upheld; the County argues that this group of employees should be placed in an existing jail division bargaining unit that is represented by AFSCME.

In most disputes regarding bargaining unit configuration, the parties are unable to agree whether the employees are public employees as defined by § 962(6) and/or whether the employees share a community of interest as defined by § 966(2) and Chap. 11, § 22(3) of the Board Rules. In the present matter there is no dispute about either of these issues. The parties have stipulated that the Cook II's are public employees as defined and

that they share a clear and identifiable community of interest.

The Board has long held that the existence of a community of interest is the foundation of an appropriate bargaining unit. As we have explained:

> Title 26 M.R.S.A. § 966(2) requires that the hearing examiner consider whether a clear and identifiable community of interest exists between the positions in question so that potential conflicts of interest among bargaining unit members during negotiations will be minimized. Employees with widely different duties, training, supervision, job locations, etc., will in many cases have widely different collective bargaining objectives and expectations. These different objectives and expectations during negotiations can result in conflicts of interest among bargaining unit members. Such conflicts often complicate, delay and frustrate the bargaining process.

AFSCME and City of Brewer, No. 79-A-01, at 4 (MLRB Oct. 17, 1979). In determining whether employees share the requisite community of interest, the following factors, at a minimum, must be considered: (1) similarity in the kind of work performed; (2) common supervision and determination of labor relations policy; (3) similarity in the scale and manner of determining earnings; (4) similarity in employment benefits, hours of work and other terms and conditions of employment; (5) similarity in the qualifications, skills and training among the employees; (6) frequency of contact or interchange among the employees; (7) geographic proximity; (8) history of collective bargaining; (9) desires of the affected employees; (10) extent of union organization; and (11) the employer's organizational structure. Chap. 11, § 22(3) of the Board Rules. It is these factors that the parties have stipulated exist amongst the employees in the proposed bargaining unit.

The employer here argues that while a community of interest exists amongst the Cook II's, a community of interest also exists between the Cook II's and the various employees in the existing

jail division bargaining unit, and that placing the Cook II's in that larger, more "wall-to-wall" unit is the preferred unit placement for these employees. The outcome proposed by the employer would be contrary to several well-established lines of MLRB precedent. First and foremost, the Board has long held that the employees' guaranteed right to full freedom in the exercise of their representational and bargaining rights is best protected when the Board considers first the bargaining unit as proposed by the employees, only rejecting such if no community of interest is established. Based upon this tenet, the Board has found that the hearing examiner's duty is to "determine whether the unit proposed by the petitioner is an appropriate one, not whether the proposed unit is the most appropriate unit." Town of Yarmouth and Teamsters Local Union No. 48, No. 80-A-04, at 4 (MLRB May 29, 1987) (rejecting the employer's request that the unit proposed by the employees be split into two units, along the employer's divisional lines). There are numerous Board cases following this tenet.[1] The Board has also found that the employees' right to self-organization is best protected when their judgment on the appropriate unit is respected, as long as the positions share the requisite community of interest. Portland Administrative Employee Ass'n and Portland Superintending School Committee,

[1] Granite City Employees Ass'n and City of Hallowell, No. 01-UD-04 (MLRB May 23, 2001)(wall-to-wall municipal unit petitioned for and approved; employer's argument to create four separate bargaining units rejected); Lewiston Food Service Managers/MEA/NEA and Lewiston School Committee, No. 99-UD-10 (MLRB May 27, 1999)(food service managers unit petitioned for and approved; employer's argument that the managers should be placed in the food service workers unit, even though the employer and the bargaining agent for the workers unit had agreed to remove the managers from that unit over ten years before, rejected); MSAD No. 48 Teachers Ass'n and MSAD No. 48, No. 97-UD-03 (MLRB Dec. 23, 1996)(wall-to-wall educational support unit petitioned for and approved; employer's argument to create two separate bargaining units rejected); East Grand Teachers Ass'n/MTA/NEA and MSAD No. 14 Board of Directors, No. 92-UD-01 (MLRB Oct. 1, 1991)(same; employer's argument to create separate bargaining units for each classification rejected).

No. 86-UD-14, at 28, aff'd, No. 87-A-03 (MLRB May 29, 1987). The Portland Administrative case is particularly instructive here as it is the only unit determination found by the Board in which some employees in the petitioned-for unit were placed in three of the seven existing bargaining units, while the remaining ten employees were placed in a separate, new "residual" unit. However, the placement of employees in existing units was only considered after the hearing examiner found that a community of interest did not exist amongst all of the employees in the originally-proposed unit. Further, the same bargaining agent represented the employees in the units where some of the employees were placed, therefore not raising the troubling representational issues present in this matter.

Second, a fundamental right protected by the MPELRL is the right of public employees to join labor organizations of their own choosing. This right is explicitly stated in both § 961 (Purpose) and § 963 (Right of public employees to join labor organizations). Section 967, which provides for the manner of determining the bargaining agent, also makes clear that employee choice must be respected. For instance, § 967(1) provides that the employer shall grant voluntary recognition to a public employee organization that can demonstrate majority support in the proposed unit. Section 967(2) provides that an election shall be conducted upon signed petition of at least 30% of the public employees that they desire to be represented by the organization; the ballot in such election shall contain the name of that organization and any other organization showing written proof of at least 10% representation of the unit employees. The organization receiving the majority of votes of those voting shall be certified as the bargaining agent. In the present matter, the union has provided showing of interest cards signed by a sufficient number of Cook II's authorizing the Teamsters to act as their bargaining agent; there is no proof in this record

that any of the Cook II's wish to be represented by AFSCME. Indeed, the collective bargaining history of the jail division bargaining unit--where only eight years ago, the Cook II's and several other classifications petitioned to be severed from the unit, the employer and AFSCME agreed to sever all the petitioning positions, and AFSCME disclaimed representing those positions--strongly suggests that the Cook II's do not wish to be represented by AFSCME in that unit. Therefore, it would be contrary to the fundamental right of choice as expressed in the MPELRL to place the Cook II's in the jail division bargaining unit, particularly in the circumstances presented here.

Finally, while the Board has expressed concern with the proliferation of small bargaining units, it has not been in circumstances similar to the present matter. The Board's rationale behind its "non-proliferation policy" has been oft-cited:

> Small bargaining units must be bargained for and serviced just as do large bargaining units. The State is obligated to provide under 26 M.R.S.A. § 965 the same mediation and arbitration services for small units as are provided for large units. The formation of small bargaining units among employees in the same department can thus result in the employer, the union, and the State expending an amount of time, energy and money all out of proportion to the number of persons served.

MSAD No. 43 and MSAD No. 43 Teachers Ass'n, No. 84-A-05, at 4-5 (MLRB May 30, 1984). This policy has developed primarily around the placement of supervisors in the same bargaining unit as the rank-and-file employees whom they supervise; the Board's policy has been to include supervisors in rank-and-file units rather than to establish one- or two-person bargaining units. SAD No. 43, supra, at 4. We have explicitly declared, however, that the savings of larger units should not be "exalted" over the statutory right of employees to be included in a unit with other

employees with whom they share a clear and identifiable community of interest. Portland Superintending School Committee, supra, No. 87-A-03, at 5 (creating ten-person residual bargaining unit, the eighth unit in the workplace). Small units have often been approved, without reference to the non-proliferation policy, when the employees petitioned for a small unit. See, e.g., York County and MSEA, No. 04-UD-04, aff'd 04-UDA-01 (MLRB Oct. 8, 2004) (unit of two, deputy registrar of probate and of deeds, approved); Town of Kennebunk and Teamster Local Union No. 48, No. 82-UD-33, aff'd No. 83-A-01 (MLRB Oct. 4, 1982) (unit of three police lieutenants and corporals approved); Town of Fairfield and Teamsters Local Union No. 48, No. 78-UD-42, aff'd No. 78-A-08 (MLRB Nov. 30, 1978) (unit of three, deputy treasurer, tax collector and social worker, approved). Similarly here, the Cook II's have petitioned for the creation of a small, separate unit; the Board's non-proliferation policy does not undermine the creation of such a unit in these circumstances.[2]

In summary, it would be a significant departure from Board precedent to deny the creation of a small bargaining unit as petitioned for by the employees, and to place those employees in a larger, existing unit. This is especially true when the affected employees have signed no showing of interest in being represented by the bargaining agent for the larger unit.

One further argument of the employer's will also be addressed. The employer urges that the Board utilize National Labor Relations Board precedent regarding accretion and, upon this basis, add the Cook II's to the jail division bargaining unit (Employer's Brief at 3-4). If such a procedure were used here, the Cook II's would be added to the larger unit and would

[2]It should also be noted that at least one of the four bargaining units presently organized in Cumberland County is also quite small - the corrections supervisor unit - with four classifications and six employees when it was created in 2006. This unit was created by the agreement of the parties.

be represented by the bargaining agent of that unit (AFSCME) without further process or election. The Board finds that the NLRB accretion precedent is inapposite to the facts presented here.

An accretion is the addition of employees to an existing bargaining unit where these additional employees share a sufficient community of interest with unit employees and have no separate identity. The additional employees are then absorbed into the existing unit without first having an election and are governed by the unit's choice of bargaining representative. Consolidated Papers v. NLRB 649 F.2d 754, 756-777 (7th Cir. 1982). The accretion doctrine is applied restrictively since it deprives employees of the opportunity to express their desires regarding membership in the existing unit. Staten Island University Hospital v. NLRB, 24 F.3d 450, 454-455 (2d. Cir. 1994). The National Labor Relations Act provides that the Board shall designate an appropriate unit for bargaining to secure employees the fullest freedom in exercising their rights. The NLRB balances individual freedom against the need for efficiency and stability in bargaining when determining an appropriate unit. But as the statute expressly dictates, employee freedom must be paramount. Sheraton-Kauai Corp. v. NLRB, 429 F.2d 1352 (9th Cir., 1970).

The NLRB has a well-developed accretion policy because a variety of situations occur in the private sector which result in operations where employees represented by rival unions begin to work together or where represented and unrepresented employees begin to work together (the most typical examples being mergers, acquisitions, opening of new plants, facilities, and stores, etc.). Only under such "compelling conditions" does the NLRB apply the doctrine, foreclosing as it does the employees' basic right to select their bargaining representative. Boire v. International Brotherhood of Teamsters, 479 F.2d 778, 796-797

(5th Cir. 1973). There is nothing about the facts of this matter which would "compel" us to place the Cook II's in the jail division bargaining unit: the positions are not new, nor are the positions newly-merged with the jail division function. Further, and as stated before, the fact that these positions were previously in the jail division unit and successfully sought to be severed from that unit adds greatly to the conclusion that this is not a factual situation where this Board should "accrete" these positions back into that same unit.

Finally, accreting these positions back into the jail division unit would arguably violate the well-reasoned conclusion reached in Mountain Valley Education Ass'n and MSAD No. 43, No. 94-UD-13 (MLRB Nov. 3, 1994) that a group of employees, in existing positions historically excluded by choice, cannot be added to a bargaining unit without a sufficient showing of interest from the employees to be added. In that case, the hearing examiner analyzed the NLRB accretion precedent, as well as other states' public sector precedent, to conclude that § 966(2) of the MPELRL prohibits employees who have been historically excluded from a bargaining unit from being added to that unit without a meaningful opportunity to vote on whether they wish to be represented. Mountain Valley, supra, at 39. Accreting the Cook II's into the jail division unit without a showing of interest from those employees would violate this sound principle.

In conclusion, while we sympathize with the employer's concern about efficiency of operations and negotiations, our precedent based upon fundamental rights declared in the MPELRL fully supports a conclusion here that a bargaining unit of Cook II's be created. While we might have decided the matter differently if the Teamsters represented the jail division unit, such is not the case, and it would trample the rights of employees to be represented by an agent of their own choosing to

place them in a unit represented by a different bargaining agent.

ORDER

On the basis of the foregoing discussion and pursuant to the power granted to the Maine Labor Relations Board by the provisions of 26 M.R.S.A. § 968(4), it is ORDERED:

> that the appeal of the County of Cumberland, filed with respect to the adopted unit determination report in Case No. 07-UD-01, is denied and the report is affirmed as set forth above. A bargaining agent election for this unit will be conducted forthwith.

Dated at Augusta, Maine, this 16th day of January 2007.

The parties are hereby advised of their right, pursuant to 26 M.R.S.A. § 968(4) (Supp. 2006) to seek review of this Decision and Order on Unit Determination Appeal by the Superior Court. To initiate such a review an appealing party must file a complaint with the Superior Court within fifteen (15) days of the date of issuance of this decision and order, and otherwise comply with the requirements of Rule 80C of the Maine Rules of Civil Procedure.

MAINE LABOR RELATIONS BOARD

/s/_____
Peter T. Dawson
Chair

/s/_____
Karl Dornish, Jr.
Employer Representative

/s/_____
Carol B. Gilmore
Employee Representative