

STATE OF MAINE

MAINE LABOR RELATIONS BOARD

Case No. 12-UC-03

Issued: August 20, 2013

_____)	
AFSCME COUNCIL 93,)	
)	
Petitioner,)	
)	
and)	UNIT CLARIFICATION REPORT
)	
PENOBSCOT COUNTY SHERIFF'S)	
DEPARTMENT,)	
)	
Employer.)	
_____)	

PROCEDURAL HISTORY

This unit clarification proceeding was initiated on April 27, 2012, when James Mackie, staff representative of AFSCME Council 93 ("AFSCME," or "Union"), filed a Petition for Unit Clarification with the Maine Labor Relations Board ("MLRB," or "Board") for a determination of whether part-time employees should be included in the Penobscot County Sheriff's Department Line Unit Corrections Division pursuant to 26 M.R.S.A. § 966(3) of the Municipal Public Employees Labor Relations Law. On May 14, 2012, Timothy Pease, Esq., filed a timely response to the petition on behalf of Penobscot County ("County"). A hearing was initially scheduled for December 12, 2012, but was rescheduled by the MLRB for February 27, 2013. That hearing was again rescheduled by the MLRB for April 22, 2013. A hearing notice was issued on March 5, 2013 and posted for the information of the affected employees. The hearing was conducted on April 22, 2013. AFSCME was represented by Shawn J. Sullivan, Esq. The County was represented by Timothy A. Pease, Esq. The parties were afforded the full opportunity to examine and cross-examine witnesses, and to present evidence. The following witnesses were presented at hearing: for AFSCME, James Mackie, staff representative of AFSCME Council 93, and Mark Domenech, AFSCME Local President, Corrections Line Unit; and for

the County, Glenn Ross, Penobscot County Sheriff. Following the conclusion of the hearing, the parties agreed that they would submit briefs 30 days after receipt of the hearing transcript. The transcript was provided to the parties on May 30, 2013, and briefs received on July 2, 2013.

JURISDICTION

Jurisdiction of the executive director of the MLRB or his designee to hear this matter and make a determination lies in 26 M.R.S.A. §§ 966(1) and (3). Any subsequent statutory references in this report are all to Title 26 of the Maine Revised Statutes Annotated unless otherwise noted.

EXHIBITS

The following exhibits were admitted without objections of the parties:

- A-1: Unit Clarification Petition, dated April 27, 2012.
- A-2: Response to Unit Clarification Petition, dated May 14, 2012.
- A-3: Second revised Notice of Hearing, dated March 5, 2013.
- U-1: Collective Bargaining Agreement ("CBA") between the County and Penobscot County Line Unit, expires 12/31/2013.
- U-2: Dues authorization cards.
- U-3: 3/1/2012 letter refusing to deduct union dues.
- U-4: Report of hours worked for part-time corrections officers 2011 to present.
- U-5: Average hours summary.
- U-6: Job description information.
- U-7: 2009- 2013 hours reports.

- U-8: Hours summary.
- E-1: Collective Bargaining Agreement between the County and Penobscot County Line Unit, expires 12/31/2010.
- E-2: Letter from the County to Mr. Mark Ayotte dated May 14, 2002.
- E-3: Fact-finding report by the Maine Labor Relations Board.
- E-4: Supplemental fact-finding report by the Maine Labor Relations Board.
- E-5: Letter from the County dated November 11, 2011, to the fact-finding panel of the Maine Labor Relations Board.
- E-6: A narrative history of scheduling at the Penobscot County Jail.
- E-7: County policy pertaining to extra rules/ assignments.
- E-8: Comparison of costs between part-time and full-time employees.
- E-9: Sample line unit schedule (1).
- E-10: Sample line unit schedule (2).
- E-11: Report of hours worked for part-time corrections officers.
- E-12: Line unit contracts proposals.
- E-13: Part-time hours 2011 to February 2013.

FINDINGS OF FACT

1. AFSCME is the certified bargaining agent for the Penobscot County Line Bargaining Unit within the meaning of § 962(2).

2. Penobscot County is a public employer within the meaning of § 962(2).

3. The Penobscot County Line Unit Corrections Division was originally part of the Penobscot Sheriff's Department Employee's Bargaining Unit, which was created in December, 1981.

4. The County and AFSCME filed an Agreement on Appropriate Bargaining Unit on October 19, 2009. Pursuant to this agreement, the following positions were included in the Line Unit Corrections Division: corrections officers, transport officers, clerical, cooks, and public works officers.

5. On May 12, 2011, the National Correctional Employees Union filed a Decertification/Bargaining Agent Election Petition with the Board.

6. As the result of the election, which was held on August 9, 2011, AFSCME was certified as the bargaining agent for the Line Unit Corrections Division.

7. The most recent collective bargaining agreement between AFSCME and the County, which ran from August 5, 2008 through December 31, 2010, states in Article 2, the Recognition Clause, that the "employer recognizes the Union as the sole and exclusive Bargaining Agent for all regular full time County employees in the Unit for purposes of negotiating salaries, wages, hours of work, and all other working conditions for the said employees within the Bargaining Unit."

8. There is no mention in the contract of part-time County employees in the Unit being covered by the CBA.

9. Article 17 of the contract in the "Inside Extras" section for the Corrections Division allows "the sheriff or his designee [to] call any qualified employee including part-time employees to perform the work"[,] "after the first 48 hours following notice of the absence."

10. The CBA proposed between AFSCME and the County that would expire on 12/31/13 contained identical language regarding coverage.

11. On July 26, 2011, AFSCME filed a unilateral Request for

Fact Finding with the MLRB. Although one of the issues raised in this request was "Extra Work," it did not include any reference to an increase in overtime hours by part-time employees alleged by AFSCME in its April 27, 2012, Unit Clarification Petition.

12. The Fact-Finding Report was received by the MLRB on January 9, 2012. Section 8 contained a section on Extra Work, and addressed access to overtime by full- and part-time employees, i.e., in which order overtime will be offered.

13. Section 8 of the Fact-Finding Report recommended that in the case where a vacancy occurred in the "rover" (6-hour) position, that the first such vacancy in any day be offered first to a full-time employee on the rotating overtime list.

14. Any other "rover" positions or other vacancies would be filled by the Sheriff or his designee with any qualified employee, including part-time employees.

15. The Fact-Finding Report did not address an increase in the use of part-time employees and does not appear, from the contents of the report, to have been an issue identified by AFSCME.

16. At hearing, James Mackie, a representative from AFSCME who had taken over negotiations from a previous representative, testified that when he filled out the Petition for Unit Clarification, he determined that the County was expanding the unit with the number and use of part-time employees over the last several years, all of whom were performing the same duties as full-time employees.

17. Mr. Mackie instructed the employees to sign cards for dues deductions so they could be represented by AFSCME Council 93. As a result, twelve part-time employees filled out dues deductions cards (Exh. U-2).¹

¹Two of those cards belonged to persons, Timothy Davis and Ryan Warner, who had no work or hour records in the Union or Employer exhibits.

18. Mr. Mackie testified that he did not define the employees in question as "part-time employees;" rather, he testified that after looking at the hours and the make-up of the group, seeing that they were getting prime shifts and overtime shifts and working side by side with the current union members, in his opinion, he did not feel that these were part-time employees.

19. On March 1, 2012, the County's attorney wrote a letter notifying the union that it would not recognize or process dues deduction authorizations for the group of twelve employees who had signed cards because they were part-time employees and, therefore, not covered by the collective bargaining agreement.

20. Mr. Mackie acknowledged that the only direct proposal that related to the part-time issue up until this point in negotiations was that part-time employees were being offered preferential treatment for open shifts.

21. Mr. Mackie stated that there was no discussion at the time of fact-finding² about including part-time employees in the collective bargaining unit itself.

22. Part-time employees must meet the same minimum qualifications as the full-time employees, including that they must be 21, have a high school diploma or its equivalent, have no serious criminal history or motor vehicle record, and possess a current Maine driver's license. Preference is given to Certified Corrections Officers.

23. Part-time officers must also meet the same requirements as full-time employees, including successful completion of Department Testing Procedures;³ successfully passing a full personal, criminal, and motor vehicle background check; successful completion of a physical assessment based on the Departmental

²The negotiating dates were November 16 and December 7 of 2011, and the report was written in January 2012.

³These include the employee evaluation, Department oral boards, administrative oral board, polygraph, and physician assessment.

Functional Job Description; and either present certification as a Corrections Officer from the Maine Criminal Justice Academy, or successful completion of all mandatory levels of the MCJA Corrections Officers training.

24. The average weekly hours worked by part-time employees in 2008 were 28.7. In 2009, the average hours were 31. In 2010, the average hours were 36.6. In 2011, the average hours were 26. In 2012, the average hours were 26.2. (U-8).

25. The total number of hours worked by part-time employees in 2008 was 19,550.2. In 2009, the total number of hours was 25,800.7. In 2010, the total number of hours was 26,353. In 2011, the total number of hours was 19,830.3. In 2012, the total number of hours was 27,132.7. (U-8).

26. Glenn Ross has been with the Penobscot County Sheriff's Department since June of 1977 and has been the Sheriff since August of 2002.

27. As Sheriff, he is responsible for overseeing the corrections officers and also supervises Captain Rick Clukey, who is in charge of the jail.

28. Sheriff Ross was the union chair when collective bargaining came in to the counties, and was at the first contract negotiation when language was inserted referring to the use of part-time employees.

29. Sheriff Ross stated that the use of part-time employees has been continuous over the last 30 years.

30. Sheriff Ross testified that generally speaking, the use of part-timers has not increased or expanded over time with two exceptions. The first was a jail variance given by the Department of Corrections to the County that ran out in 2009, which allowed the jail to keep more inmates than it had been previously licensed to keep. The second was when a crisis was reached (no date given) with "force outs," forcing employees to work overtime. During that time, some employees procured doctors' notes that said they

couldn't work overtime, thus causing other employees to face an unfair burden. That year, rather than have one cycle of hiring part-time corrections workers, labor-management agreed to start having two hiring processes a year.

31. Sheriff Ross testified that part-time correction employees are not regularly scheduled but are scheduled based on the facility's need.

32. Part-time employees have no expectation to a particular shift for the week they are being scheduled.

33. After the full-time employees put in for various types of leave, the part-time employees make their availability known to the scheduling officer, who then plugs in the part-time employees throughout the schedule to meet the needs of the jail. The tentative schedule is made on the Wednesday preceding the Sunday on which the schedule starts, and is made final on that Friday.

34. Sheriff Ross testified that he could not operate the jail within the standards under which he is obligated to operate it without the flexibility of using part-time employees.

DISCUSSION

Section 966(3) of the Municipal Public Employees Labor Relations Law provides:

3. Unit clarification. Where there is a certified or currently recognized bargaining representative and where the circumstances surrounding the formation of an existing bargaining unit are alleged to have changed sufficiently to warrant modification in the composition of that bargaining unit, any public employer or any recognized or certified bargaining agent may file a petition for a unit clarification provided that the parties are unable to agree on appropriate modifications and there is no question concerning representation.

Chapter 11, Section 6(3) of the Board Rules reiterates the statutory requirements of 966(3), and further provides that a unit clarification petition may be denied if the petition requests the

clarification of unit placement questions which could have been but were not raised prior to the conclusion of negotiations which resulted in an agreement containing a bargaining unit description.

The parties do not dispute that three of the four requirements are present here: AFSCME is the certified bargaining agent for the corrections line bargaining unit, there is no question regarding representation, and the parties have been unable to reach agreement on the issue of whether part-time employees should be included in the bargaining unit. The parties do not agree, however, on whether the circumstances surrounding the formation of the bargaining unit have changed sufficiently to warrant modification of the unit.

"The requirement for changed circumstances is a 'threshold question' in a unit clarification proceeding." *AFSCME Council 93 and Town of Sanford*, 08-UC-02, at 12 (MLRB July 23, 2008), quoting *MSAD No. 14 and East Grand Teachers Association*, No. 83-A-09, at 7 (MLRB Aug. 24, 1983). It is the petitioner in a unit clarification proceeding who "bears the burden of alleging the requisite change and, further, of establishing the occurrence of said change in the unit then at issue." *State of Maine and MSEA*, No. 82-A-02, at 16 (MLRB June 2, 1983) (Interim Order). Here, AFSCME alleges that the use of part-time employees in terms of hours worked has increased over time sufficient to have created changed circumstances such that the unit should be modified to include part-time employees. The County argues that AFSCME could have raised the issue in contract negotiations that have been ongoing, and that evidence from the most recent round of negotiations demonstrated that AFSCME only raised one limited issue regarding bidding on open shifts by part-time corrections officers. The County further argues that the Union has had 30 years to negotiate the inclusion part-time workers in the bargaining unit, but has failed to do so. Because of that failure, and because the contract as written specifically states that it applies only to

"all regular full time County employees" in the bargaining unit, the County argues that AFSCME has not met its burden of demonstrating changed circumstances.

In *AFSCME and Town of Sanford*, MLRB 08-UC-02 (July 23, 2008), petitioner AFSCME filed a unit clarification petition seeking a determination of whether the General Assistance ("GA") Director should be included in the Town of Sanford's general services bargaining unit pursuant to 26 M.R.S.A. Sec. 966(3). Although the bargaining unit had existed in some form for over 20 years, there was no evidence that the union had ever attempted to include the GA director in the unit. In support of its unit clarification position, the union argued that the requisite changed circumstances were met when a full-time GA director was hired. In her analysis, the hearing officer examined the job descriptions for the GA Director that had evolved over the years and determined that:

[T]he essence or primary functioning of the position has not changed since the formation of the bargaining unit. The decision in 2008 to change the position back to a full-time one and the hiring of a new employee to fill the position are not the type of "changed circumstances" which can support a petition to review the unit placement of the position, mid-term, within the meaning of Sec. 966(3).

Sanford at 18. The hearing officer rejected the union's argument that the position was now a "new" position, and as a result, rejected the unit clarification petition filed by the Union. Similarly, it is difficult to see how in the present case, changed circumstances can be found when there is no evidence that the use of part-time employees and the duties incumbent upon them have changed over the 30-year history that the part-time workers have been an essential part of the County's corrections work force, notwithstanding fluctuation in the number of part-time employees and the total number of part-time hours worked per year.

Although AFSCME draws a parallel between the scheduling here

and that in *Teamsters Union Local 340 and City of Westbrook*, MLRB 13-UD-01 (Feb. 13, 2013), the two cases are distinguishable. In *Westbrook*, the part-time, per diem employees adhered to regular schedules based in large part on a templating system. Similarly, in *Town of Berwick and Teamsters Local Union No. 48*, MLRB No. 80-A-05 (July 24, 1980), although the "Part-time officers work[ed] far fewer hours than [did] the Full-time officers, the Part-time officers worked year-round on regularly scheduled shifts." *Town of Berwick* at 3.

In the present case, there was no evidence that the employees' schedules are regular, and the employees are given very short notice of days and shifts they are expected to work. Although there was a great deal of evidence admitted regarding the number of hours worked by the County's part-time employees between 2009 through the beginning of 2013, the evidence was also clear that the part-time employees had no expectation of working a particular shift or week. Tentative schedules are made on the Wednesday preceding the Sunday on which the schedule starts, and the schedule is made final on that Friday, just two days before the schedule is to begin. Based on that evidence, these employees' schedules are more akin to the matrons in *Council 74, American Federation of State, County and Municipal Employees, AFL-CIO and County of Knox*, MLRB 82-UD-17 (Jan. 18, 1982). In that case, the hearing officer determined that jail matrons were excluded from the Knox County Deputies' Association Bargaining Unit because they were on-call employees. He based this determination on his findings that the matrons were scheduled to work either temporarily or from a rotation list "contingent upon events, the arrest or incarceration of women, which are beyond the control of the employer." *County of Knox* at 5. Like the matrons in *County of Knox*, the part-time employees in this case have historically been scheduled dependent on the needs of the jail for a given shift or week. The facts do not now support placing the

part-time employees into the bargaining unit because of changed circumstances.

ORDER

On the basis of the foregoing facts and discussion, and pursuant to 26 M.R.S.A. § 966(3), AFSCME's Petition for Unit Clarification, seeking to add part-time employees to be included in the Penobscot County Sheriff's Department Line Unit Corrections Division, is denied.

Dated at Augusta, Maine this, 20th day of August, 2013.

MAINE LABOR RELATIONS BOARD

Gwendolyn D. Thomas
Hearing Examiner

The parties are hereby advised of their right, pursuant to 26 M.R.S.A. Sec. 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 Board within fifteen (15) days of the issuance of this report.