

AFSCME COUNCIL 93,)	
)	
Appellant,)	
)	
and)	DECISION AND ORDER ON
)	UNIT CLARIFICATION
PENOBSCOT COUNTY,)	APPEAL
)	
Appellee.)	
)	

This unit clarification appeal was filed by AFSCME Council 93 on August 30, 2013, pursuant to §968(4) of the Municipal Employees Labor Relations Law, 26 M.R.S.A. §961 et seq., and Chapter 11, §30 of the Rules and Procedures of the Maine Labor Relations Board. The Unit Clarification Report which is the subject of this appeal was issued on August 20, 2013. In that proceeding, AFSCME Council 93 sought to add part-time employees to an existing bargaining unit of the Penobscot County Sheriff's Department Line Unit Corrections Division. The Hearing Examiner denied the unit clarification petition because the circumstances surrounding the formation of the bargaining unit had not changed sufficiently to warrant modification of the unit, as required by 26 M.R.S.A. §966(3). AFSCME appeals that decision.

Written briefs were submitted by Shawn J. Sullivan, Esq., representing AFSCME Council 93, and by Frank T. McGuire, Esq., and John K. Hamer, Esq., representing Penobscot County. The Board members reviewed the written briefs submitted by the parties, the Unit Clarification Report, the record of evidence before the Hearing Examiner, and met on November 14, 2013, to consider this appeal.

JURISDICTION

AFSCME Council 93 is an aggrieved party within the meaning of 26 M.R.S.A. §968(4) and the bargaining agent within the meaning of 26 M.R.S.A. §962(2). Penobscot County 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).

DISCUSSION

The standard of review for bargaining unit decisions by a hearing examiner is well established:

... "We will overturn a hearing examiner's rulings and determinations if they are 'unlawful, unreasonable, or lacking in any rational factual basis.'" Council 74, AFSCME and Teamsters Local 48, MLRB No. 84-A-04 at 10 (Apr. 25, 1984), quoting Teamsters Local 48 and City of Portland, MLRB Report of Appellate Review at 6 [78-A-10] (Feb. 20, 1979). It thus is not proper for us to substitute our judgment for the hearing examiner's; our function is to review the facts to determine whether the hearing examiner's decisions are logical and are rationally supported by the evidence.

MSAD #43 and SAD #43 Teachers Assoc., 84-A-05, at 3 (May 30, 1984), affirming No. 84-UC-05.

The issue on appeal is whether the Hearing Examiner was correct in her legal conclusion that the petitioner had failed to show a change in circumstances sufficient to justify a modification to the existing bargaining unit, as required by the Act. 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.

The requirement that the petitioner show that the circumstances surrounding the formation of the existing bargaining unit have changed sufficiently to warrant a modification of the unit is a threshold question in a unit clarification proceeding, and the petitioner bears the burden of establishing the requisite change. MSAD No. 14 and East Grand Teachers Assoc., No. 83-A-09, at 7 (Aug. 24, 1983), and State of Maine v. MSEA, No. 82-A-02, at 16 (June 3, 1983, Interim Order).

In addition to these statutory requirements, the Board's rules further provide that a unit clarification petition may be dismissed if the question raised should properly be settled through the election process or the issues could have been but were not raised during negotiation of an agreement containing a bargaining unit description. MLRB Rule Chapter 11, § 6(3).

The statute and the Board rules impose limitations on the unit clarification process in part because stability is promoted when the scope of the bargaining unit remains constant during the term of a bargaining agreement. If a modification of the unit is desired, the parties are encouraged¹ to raise the issue in negotiations for a successor contract, as bargaining unit compos-

¹ Section 966 as a whole and the unit clarification prerequisite in §966(3) "that the parties are unable to agree on appropriate modifications" establish a statutory policy to encourage parties to agree on unit composition issues.

ition is a proper (i.e., not illegal) subject of bargaining.² If an agreement is not possible, a unit clarification may be filed, as provided by §966(3). The limitations on unit clarification petitions continue after the expiration of an agreement because such petitions do not require a submission of a showing of interest from the affected employees, as do unit determination or election petitions. See MLRB Rule Chapter 11, § 7(11) and § 8; 26 M.R.S.A. § 967. If the changed circumstances requirement did not exist, the unit clarification process could be used after the expiration of the agreement to change the make-up of a unit without presenting the showing of interest that would be required for a unit determination petition.

The requirement of changed circumstance has as its reference point the formation of the unit. A classic example of a sufficient change in circumstances is when a new job classification is created following the conclusion of negotiations. The Board has consistently held that a new job classification clearly meets the required change in circumstances, as it is simply impossible to consider the bargaining unit status of a position before it exists. See MSEA and State of Maine Department of Inland Fisheries and Wildlife, Nos. 83-UC-43 and 91-UC-11, at 8 (May 4, 1993).

Similarly, a change in job duties may be a sufficient change in circumstances if the change is substantial and pertinent to the question of whether the position continues to be properly included or excluded from the unit. See discussion in AFSCME Council 93 and Town of Sanford, No. 08-UC-02 at 15-17 (July 23, 2008). When a party files a unit clarification petition to

²If the parties are unable to agree, however, the dispute must come off the table as bargaining unit composition is not a mandatory subject of bargaining.

remove a classification from a unit because it allegedly falls into one of the statutory exclusions, the change must be pertinent to the analysis used to decide whether the position should be excluded. See, e.g., Maine Maritime Academy and MSEA, No. 03-UC-02, at 12-13 (Jan. 21, 2003) (adding significant management duties and reporting directly to Academy President were changed circumstances and were relevant to whether position was statutorily excluded); modified on other grounds, No. 03-UCA-01 (May 15, 2003); and Lincoln Sanitary District and Teamsters Local 340, No. 92-UC-02 (Nov. 17, 1992) (secretary's new duty to type documents on employer's negotiation strategies raised question as to whether position was statutorily excluded as "confidential" employee).

On the other hand, merely renaming a position and making minor changes in its duties and responsibilities does not constitute a sufficient change to warrant modification in the composition of a bargaining unit through a unit clarification petition. For example, in Portland Public Library Staff Association and Portland Public Library, even though some duties were changed, the basic character of the positions remained essentially unchanged since the negotiation of the most recent agreement. No. 88-UC-03, at 9 (June 2, 1988). Similarly, in AFSCME and Town of Sanford, the union sought to add the General Assistance Director to the existing unit because of a reorganization returning the position to a full-time job after a few years of having the duties essentially split between the finance director and the caseworker. AFSCME and Town of Sanford, No. 08-UC-02, at 18 (July 23, 2008). The hearing examiner noted that the position was expressly excluded from the unit when it was created 20 years previously, and there was no evidence that the union had ever attempted to include the position in the unit. Id. at 13. The only change was that someone had again been hired

to perform the position full-time and the amount of casework performed had increased over the most recent period. Id. at 14-15. The hearing examiner concluded that this was not a substantial change because "the essence or primary functioning of the position has not changed since the formation of the bargaining unit." Id. at 18. The hearing examiner noted that the changes were insignificant when considering the duties the position had historically performed and were not pertinent to any argument that the position should be considered for placement in the unit mid-term after so many years of being excluded by agreement of the parties. Id. at 17.

When positions have historically been excluded from a unit by choice, the underlying reason or reasons for that decision may not be as apparent as when the exclusion is based on a statutory exclusion or a decision issued under §966. 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. This is similar in import to ensuring that the showing-of-interest requirement is met when attempting to add positions to an existing unit through a unit determination petition. Mountain Valley Educ. Assoc./MEA/NEA and MSAD #43, No. 94-UD-13 (Nov. 3, 1994) (holding that the showing-of-interest must come from the classifications sought to be added to a unit, not from the unit being expanded); and Cumberland County v. Teamsters Union Local 340, No. 07-UDA-01 (Jan. 16, 2007) (rejecting the employer's attempt to add the small unit proposed by the union to an existing larger unit in part because there was no showing of interest to join that larger unit.)

In the present case, the Hearing Examiner made several factual findings relevant to the changed circumstances analysis

which are not in dispute: The Sheriff's Department Employees Unit was created in 1981; the most recent collective bargaining agreement between AFSCME and Penobscot County, effective from August 15, 2008 through December 31, 2010, had a recognition clause referring to all regular full-time employees in the unit; there was no mention in that agreement that part-time employees were covered; and on October 19, 2009, the parties filed an Agreement on Appropriate Bargaining Unit splitting the Line Unit Corrections Division from the larger unit. Report at 4. The Hearing Examiner's findings on the average hours worked by part-time employees in 2008 through 2012 are not in dispute, nor are total number of hours worked by part-time employees for the same period. Report at 7.

On appeal, AFSCME contends that the Hearing Examiner made an error of law in concluding that AFSCME had failed to demonstrate changed circumstances sufficient to warrant modification of the bargaining unit. AFSCME argues that the Hearing Examiner's failure to recognize the significance of the recent increase in hours worked by part-time employees is an error of law.

In her Unit Clarification Report, the Hearing Examiner noted the similarities with the facts in the Sanford case, where the "essence or primary functioning of the position" had not changed. Report at 10, citing No. 08-UC-02 at 18. The Hearing Examiner concluded that changed circumstances had not been established by the petitioner because,

. . . 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.

Report at 10.

AFSCME argues that a significant change in circumstances is demonstrated by looking at the total hours of part-time employees expressed in terms of full-time equivalents ("FTE"). AFSCME calculates the number of FTE's by dividing the total part-time employee hours worked by 2020, obtaining a figure of 9.4 FTE's for 2008 and 13.0³ FTE's for 2012. This increase in full-time equivalents, AFSCME argues, should be considered a sufficient change to proceed with the unit clarification petition. AFSCME's argument is unavailing, as the data for the years between 2008 and 2012 show fluctuation, whether that data is presented as raw totals or in terms of FTE's. The Hearing Examiner concluded that during the period in question the hours worked fluctuated over the five years of data,⁴ and that the fluctuations did not override the fact that there was no evidence that the use of or duties of the part-time employees had changed. We find no error in the Hearing Examiner's legal conclusion that the changes in the hours worked by part-time employees during this period was not a sufficient change in circumstances to warrant proceeding with the unit clarification.

AFSCME further argues that the unique circumstances of the case justify granting the unit clarification petition, as the hearing examiner did in AFSCME Council 93 and State of Maine, No. 89-UC-07 (Aug. 10, 1990), aff'd No. 91-UCA-02 (Feb. 12, 1991), aff'd sub nom Bureau of Employee Relations v. MLRB, 611 A.2d 59 (Me. 1992). Reliance on that case for the proposition that a remedy should be made available is misplaced, as it involved the denial of the protections of the statute through improperly

³AFSCME misstated this figure as 13.4 ; $27,132 \div 2080 = 13.04$.

⁴The Hearing Examiner's factual findings shows the fluctuation in total hours worked: The hours worked by part-time employees rose from 19,550 hours in 2008 to 25,800 hours in 2009 and 26,353 hours in 2010, back down to 19,830 hours in 2011, and up to 27,132 in 2012.

classifying employees as temporary, seasonal or on-call, that is, employees who are excluded from coverage of the collective bargaining statute.⁵ In the present case, the part-time employees have not been denied any protections of the Act. The part-time employees are free to organize themselves into a bargaining unit by filing a unit determination and election petition. As they are not part of an existing bargaining unit, there is no contract bar to the creation of their own bargaining unit. They may wish to be a separate bargaining unit, or they may wish to eventually merge with the bargaining unit of the Line Unit Corrections Division through the process in §966(4).

CONCLUSION

The Hearing Examiner's conclusion that the petitioner had failed to show a change in circumstances sufficient to justify a modification to the existing bargaining unit, as required by §966(3) of the Municipal Public Employees Labor Relations Law was not unlawful, unreasonable, or lacking in any rational factual basis.

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:

⁵In the other case cited by the appellant, Ashland Teachers Association and MSAD No. 32 Board of Directors, No. 05-UC-02 (Oct. 19, 2005), the hearing examiner found a sufficient change in circumstances based on the Employer's vehement objection to including part time teachers in the unit after years of inconsistent conduct that warranted the Union's assumption that the employer considered them part of the bargaining unit, and where the union had specifically raised the issue at the bargaining table in the most recent negotiations.

that the appeal of the Penobscot County Sheriff's Department, filed with respect to the Unit Clarification Report in Case No. 12-UC-03, is denied.

Dated at Augusta, Maine, this day of December, 2013.

MAINE LABOR RELATIONS BOARD

The parties are advised of their right to seek review of this decision and order by the Superior Court by filing a complaint pursuant to 26 M.R.S.A. § 968(4) and in accordance with Rule 80C of the Rules of Civil Procedure within 15 days of the date of this decision.

Abigail C. Yacoben
Chair

Patricia M. Dunn
Employer Representative

Wayne W. Whitney
Employee Representative