

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CITY OF LODI,

Employer,

and

LODI PROFESSIONAL & TECHNICAL
EMPLOYEES,

Petitioner,

and

AFSCME LOCAL 146,

Exclusive Representative.

Case No. SA-SV-168-M

PERB Decision No. 2142-M

November 16, 2010

Appearance: Kevin Gaither, Representative, for Lodi Professional & Technical Employees.

Before Dowdin Calvillo, Chair; McKeag and Wesley, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (Board) on appeal by the Lodi Professional & Technical Employees (LPTE) of a dismissal (attached) of a severance petition by an administrative law judge (ALJ). The petition sought the severance of approximately ten employees in eleven classes designated within the City of Lodi's general services unit. The ALJ dismissed the petition for failure to establish sufficient justification for the proposed unit based on a separate and distinct community of interest.

We have reviewed the entire record in this matter and agree that LPTE failed to establish, pursuant to Section 10 of the City of Lodi's Employer-Employee Relations Rules, that its proposed unit possessed a community of interest which was separate and distinct from the other employees in the general services unit. Accordingly, we find the dismissal was well-

reasoned, adequately supported by the record and in accordance with applicable law.

Accordingly, the Board hereby adopts the ALJ's dismissal of the petition as the decision of the Board itself.

ORDER

The severance petition in Case No. SA-SV-168-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Dowdin Calvillo and Member Wesley joined in this Decision.

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REPRESENTATION
CASE NO. SA-SV-168-M

PROPOSED DECISION
(12/17/2008)

Appearances: Dean Gualco, Human Resources Manager, for the City of Lodi; Kevin Gaither, Representative, for the Lodi Professional & Technical Employees; and Felix M. Huerta, Jr., Business Agent, for AFSCME Local 146.

Before Shawn P. Cloughesy, Administrative Law Judge.

PROCEDURAL HISTORY

On March 19, 2008, the Lodi Professional & Technical Employees (LPTE) filed a severance petition with the Public Employment Relations Board (PERB). LPTE seeks severance of approximately ten employees in eleven classes¹ designated within the City of Lodi (City) General Services Unit. The current titles of these classes are Assistant Engineer, Assistant Planner, Associate Civil Engineer, Associate Engineer, Engineering Technician I and II, Junior Engineer, Junior Planner, Senior Engineering Technician, and Water Services Technician I and II. LPTE contends that these eleven classes have a separate and distinct community of interest from the General Services Unit. AFSCME Local 146, the exclusive

¹ The ten employees include one Associate Civil Engineer, one Junior Engineer, three Senior Engineering Technicians, two Engineering Technician II's, two Junior Planners, and one Water Services Technician II.

representative of the General Services Unit, opposes the petition contending that the eleven classes should remain in the General Services Unit as they do not have a separate and distinct community of interest. The City acknowledges that the proposed unit has “similar classifications” that may “facilitate their representation as one unit.” It did not initially oppose the creation of a separate unit other than to state its overall concern about fragmentation of bargaining units resulting in a unit containing a small number of employees.

On April 14, 2008, PERB determined that the severance petition had been timely filed with an adequate proof of support.

A settlement conference was conducted on May 6, 2008, but failed to produce resolution. Formal hearing was conducted on August 15, 2008. Preparation of the transcript was delayed due to the lack of a State budget. The transcripts were finally mailed to AFSCME on October 28, 2008, and post-hearing briefs were to be postmarked to the ALJ and the opposing representatives in thirty days. Unfortunately, the due date fell on a State holiday (Thanksgiving). LPTE submitted its post-hearing brief before the deadline. AFSCME’s post-hearing brief was dated Monday, December 1, 2008, but it was postmarked December 3. As AFSCME’s post-hearing brief was postmarked on December 3, it will not be considered.² The City stated that it would not submit a post-hearing brief and did not.

FINDINGS OF FACT

Background

The City has nine bargaining units: Firefighters, Fire Mid-Management, Electric Utility, Dispatchers, Police Officers, Police Mid-Management, Maintenance and Operators, Mid-Management, Executive Management and General Services.

² On December 10, 2008, LPTE asked that AFSCME’s brief not be considered as it was postmarked December 3.

The General Services Unit is made up of approximately 53 classes containing 83 employees which include: Accounting Clerk, Administrative Clerk, Administrative Secretary, Animal Services Officer, Building Inspector (I and II), Buyer, Civil Engineer (Junior, Assistant and Associate), Community Improvement Officer, Customer Service Representative, Data Processing Programmer Analyst, Engineering Technician (I, II and Senior), Field Service Representative, Finance Technician, Information Systems Specialist, Librarian (I and II), Library Assistant, Meter Reader, Network Technician, Office Supervisor, Parking Enforcement Assistant, Parks Program Specialist, Planner (Junior, Assistant and Associate), Police Records Clerk, Public Works Inspector (I and II), Purchasing Technician, Storekeeper, and Water Services Technician (I and II).

The Association of Lodi City Employees (ALCE) has been the exclusive representative of the General Services Unit for a prolonged period of time up to the present. ALCE affiliated with AFSCME Local 146 (AFSCME) in 1999, and AFSCME has provided representation for the unit since then. Business Agent Felix Huerta, Jr. (Huerta) has been assigned by AFSCME to represent ALCE since 2003. Kevin Gaither (Gaither) was the President of ALCE until he resigned in 2006. Mark Ruggiero (Ruggiero) succeeded Gaither as ALCE President.

Dean Gualco (Gualco) has been the City's Human Resources Manager and Chief Negotiator since October 2007.

Employer-Employee Relations Rules for Appropriate Units

The City adopted Employer-Employee Relations Rules (EERR's) pursuant to MMBA section 3507 in 1976. The EERR does not contain a section on severing a bargaining unit, but EERR section 10 defines an "appropriate unit," providing:

(A) The Municipal Employee Relations Officer,^[3] after reviewing the petition filed by an employee organization seeking formal recognition as majority representative, shall determine whether the proposed unit is an appropriate unit. The principal criterion in making this determination is whether there is a community of interest among such employees. The following factors, among others, are to be considered in making such determination:

- (1) Which unit will assure employees the fullest freedom in the exercise of rights set forth under this Resolution.
- (2) The history of employee relations: (i) in the unit; (ii) among other employees of the City; and (iii) in similar public employment.
- (3) The effect of the unit on the efficient operation of the City and sound employer-employee relations.
- (4) The extent to which employees have common skills, working conditions, job duties or similar educational requirements.
- (5) The effect on the existing classification structure of dividing a single classification among two or more units. Provided, however, no unit shall be established solely on the basis of the extent to which employees in the proposed unit have organized.

(B) In the establishment of appropriate units,

- (1) [P]rofessional employees shall not be denied the right to be represented separately from non-professional employees; . . . [Emphasis added.]

Common Skills, Working Conditions, Job Duties and Educational Requirements

Associate Civil Engineers are registered civil engineers, and possess a bachelor's degree in engineering. Assistant and Junior Engineers also have bachelor's degrees. The subprofessional Senior Engineering Technician and the Engineering Technician I and II classes do not require a college education.

³ The EERR further identifies the Municipal Employee Relations Officer to be the City Manager. (EERR section 12.)

Associate and Assistant Planner classes require a bachelor's degree in city or regional planning. Junior Planners also have a bachelor's degree with major course work in city, regional, urban or transportation planning.

Water Services Technicians I and II perform subprofessional engineering, and water and wastewater systems planning. The Water Services Technician II must have college-level courses in civil engineering, hydraulics, statistics, and geographic information systems, and a Department of Health Services (DHS) Water Distribution Operator License Grade II certificate, or a DHS Water Treatment Plant Operator License Grade II certificate and a DHS Water Distribution Operator License Grade I certificate. The specific duties of the class are:

Performs complex drafting and mapping assignments using computer-aided methods; Under the supervision of a licensed engineer, designs and prepares plans, specifications and cost estimates for Division projects. Assist in developing and managing the City's water meter program. Assist in coordinating water conservation programs and analyzing water consumption/conservation data. Reduces survey field notes, prepares quantity take-offs, calculates material quantities; maintains and updates accurate records, survey data and progress reports; . . . Performs paraprofessional engineering work in the compilation and analysis of data for special projects and prepare various reports as required; Compile data, perform research and statistical analysis, and prepare reports, graphs, and visual presentations of data for regulatory permits and other uses; Assist, monitor and analyze all aspects of regulatory compliance for the City's water and wastewater facilities; Assist in coordinating safety programs for compliance with State and Federal safety regulations

Other classes in the General Services Unit which require college education include:

Librarian I and II (Masters of Library Science degree); Information Systems Specialist (two years college with supplemental data processing courses); Network Technician (Associate of Arts degree supplemented by computer-related coursework); and Parks Projects Coordinator (Associate of Arts degree with emphasis on park operations, public recreation, or natural

sciences). Bargaining unit classes which require or prefer a competency certification include Building Inspector II.

The City's Engineers and Engineering Technicians report to the City Engineer, Public Works Department, Engineering Division at City Hall where most General Service Unit positions are located. The Planners and Building Inspectors report to the Community Development Department Director who is also at City Hall. The Water Service Technicians report to the Water/Wastewater Superintendent, Public Works Department at the Municipal Service Center, a separate work location than City Hall.

LPTE contends that the classes in the unit proposed for severance are consistent with bargaining units in other local public agencies. LPTE introduced Memoranda of Understanding (MOU's) from City of Chula Vista, County of Contra Costa, and City of Newport Beach. The grouping of classes for Chula Vista include Engineers (Assistant, Associate, Senior and Transportation), Surveyors (Assistant and Land) and Plans Examiner (including Senior); and for Contra Costa are Blue Print Technicians, Engineering Records Technician (including Specialist and Senior), Engineering Technician (Entry, Journey and Senior), and Hydrographer (including Senior).

The Newport Beach unit includes Accountants (including Senior), Building Inspector (I, II, Principal, and Senior), Buyer, Civil Engineer (including Junior, Associate and Senior), Surveyor, Code and Water Quality Enforcement (including Trainee and Officer), Construction Inspection, Emergency Services Assistant, Engineering Technician (including Senior), Fire Information Systems Coordinator, Geographic Information Systems (Technician, Analyst and Coordinator), Harbor Resources Technician (I and II), Information Technology (Applications Analyst, Applications Analyst Senior, Applications Coordinator, Operations Coordinator, Specialist, Senior Specialist and Technician), Library Information Systems Coordinator,

Management Assistant, Permit Technician (including Trainee), Planner (Assistant, Associate and Senior), Public Works Inspector (I, II and Senior), Residential Building Records Inspector, Revenue Audit, Subtrade Plans Examiner, Telecom/Network Coordinator, Telecom Specialist, Traffic Engineering Technician, Urban Forester, and Water Conservation Coordinator.

History of Employee Relations

Since 1999, AFSCME has negotiated four successive MOU's. Huerta asserted that AFSCME has successfully addressed the issues raised by employees of the proposed unit through the meet and confer process and labor/management meetings.

The MOU for the General Services Unit covering July 1, 2003 to June 30, 2006 provides an extra \$23.08 monthly per certificate for subprofessional engineering employees who obtain certificates of engineering in training, land surveyor in training and/or land surveyor. Additionally, a \$150.00 safety boot allowance was provided for the Associate Civil Engineer, Associate Traffic Engineer, Engineering Technician, Junior/Assistant Engineer, and Senior Engineering Technician.

Since October 2007, Human Resources Manager Gualco has participated with AFSCME in biweekly labor/management meetings to resolve employment problems. Both Huerta and Gualco consider the meetings to be productive, although the agendas provided for the meetings demonstrate that a number of issues recur and are unresolved.

One issue involved an augmentation to salary, certification pay, that the Water Services Technician was to receive for obtaining certification. The Water Services Technician is a relatively recent class for which Huerta updated Gaither.⁴ The proposed class required the

⁴ Gaither was consulted about the class, but he did not want to contribute to development of the position because he would be a future applicant for the position when it would be advertised. Gaither is the only Water Services Technician employed by the City who is on the roster of General Service Unit employees.

incumbent to obtain a DHS Distribution Operator License certificate. AFSCME argued that the City should compensate the employee for obtaining the certification, and the City agreed.

After the class was finalized, the certification pay was left off the job description. Gaither notified Huerta that certification pay was not in the job description and Huerta pursued the issue with the City in labor/management meetings for a number of weeks, yet resolution was not achieved. After a month, Gaither sent an e-mail to the City Manager and Gualco, stating that the matter was simple and should be fixed. After receiving the e-mail, the City Manager directed Gualco to resolve the problem. Gualco informed AFSCME of a proposed salary increase for the position, which was approved.

MOU section 8.1 authorizes that General Service Unit employees covered by the Fair Labor Standards Act of 1938 (FLSA), 29 USC section 201 et seq., to be paid overtime after eight hours of work, or over forty hours in a workweek. MOU section 13.1 specifically exempts Junior Planners, Assistant Planners, Associate Planners, Junior Engineers, Assistant Engineers and Associate Civil Engineers from FLSA coverage, but they receive administrative leave benefits instead. The City proposed to expand the number of FLSA-exempt classes and thereby removing any FLSA-related benefits. AFSCME sought to maintain and expand these benefits for bargaining unit employees.

Huerta testified that AFSCME assisted Junior Planner Immanuel Bereket (Bereket) when the City proposed to transfer Bereket to another department. AFSCME asked Bereket if the proposed transfer was acceptable to him and he agreed to it.

Efficiency of Operations of the City/Fragmentation of Units

AFSCME contended severing the unit would decrease its bargaining power and lead to a proliferation of bargaining units. The City opposed moving in any direction which created a proliferation of one to two person units.

ISSUE

Do the professional and technical positions in the proposed unit share a community of interest that is separate and distinct from the classes in the General Services Unit under the local EERR factors?

CONCLUSIONS OF LAW

The MMBA does not explicitly contain a provision governing the severance of units. MMBA section 3507(a) provides that a local public agency may adopt reasonable rules and regulations for the administration of employer-employee relations concerning:

(4) Exclusive recognition of employee organizations formally recognized pursuant to a vote of the employees of the agency or an appropriate unit thereof, subject to the right of an employee to represent himself or herself as provided in Section 3502.

* * *

(9) Any other matters that are necessary to carry out the purposes of this chapter. [Emphasis added.]

The City's EERR also does not provide for a provision governing the severance of units. PERB Regulation 61000 provides:

Except as otherwise ordered pursuant to Chapter 1, or as provided for by Public Utilities Code, Division 10, Part 16, Chapter 5 (section 105140 et seq.), the Board will conduct representation proceedings and/or agency fee rescission elections under MMBA in accordance with the applicable provisions of this Chapter only where a public agency has not adopted local rules in accordance with MMBA section 3507. [Emphasis added.]

Additionally, PERB Regulation 61420(a) provides:

Whenever a severance petition is filed with the Board, the Board shall investigate and, where appropriate, conduct a hearing . . . , or take such other action as deemed necessary to decide the questions raised by the petition.

While none of the parties challenged the local EERR community of interest factors for an appropriate unit, these factors are substantially similar to those set forth in City of Glendale (2007) PERB Order No. Ad-361-M (Glendale) which was found to be consistent with MMBA and National Labor Relations Board (NLRB) precedent. (Glendale, supra, PERB Order No. Ad-361-M, pp. 5 and 6.) Thus, the City's community of interest factors will be applied in this case.

While a severance petitioner has the burden of proving its proposed unit is an "appropriate unit" (Glendale, supra, PERB Order No. Ad-361-M), it need not demonstrate that its proposed unit is "the ultimate unit or the most appropriate unit." (Alameda County Assistant Public Defenders Assn. v. County of Alameda (1973) 33 Cal.App.3d 825, 830 (Alameda County) and Santa Clara County Dist. Attorney Investigator Assn. v. County of Santa Clara (1975) 51 Cal.App.3d 255, 260 (Santa Clara County)). A petitioner must show that the proposed unit has a community of interest "separate and distinct" from other employees within the existing bargaining unit. (Alameda County, supra, 33 Cal.App.3d 825, 831 and Elk Grove Unified School District (2004) PERB Decision No. 1688, p. 24 and 25.)

While the EERR lists a number of community of interest factors to be considered in an appropriate unit, the parties presented evidence and argument on only the following factors: common skills, working conditions, job duties, or similar educational requirements; history of employee relations; and efficient operation of the City and sound employer-employee relations.

Common Skills, Working Conditions, Job Duties and Educational Requirements

The Engineer, Engineering Technician and Water Services Technician classes are related to either professional or subprofessional engineering work. The Planner classes are professional classifications which are tangentially related to engineering. LPTE must show that the proposed unit shares a community of interest “separate and distinct” from the General Services Unit. By contrast, the proposed unit has much in common with the General Services Unit. If the petition was granted, both units would contain employees with diverse educational requirements; professional and technical employees; employees who work at the same location; and employees reporting to the same chain of command. Thus, LPTE has failed to show that its proposed unit is separate and distinct from the General Services Unit.

LPTE also contended that bargaining units in three outside public agencies (City of Chula Vista, County of Contra Costa and City of Newport Beach) demonstrated that its proposed unit was appropriate. A close analysis of those units does not support LPTE’s contention, however. While Chula Vista and Contra Costa units contain a limited number of professional and technical classes centered around engineering, with the addition of Plan Examiners, Surveyors, and Hydrographers, those units do not include a Water Services Technician class or its equivalent. The Newport Beach unit is a large professional and technical unit that includes the classes of Building Inspector, Buyer, Information Technology, and Public Works Inspector which are in the City’s General Service Unit, but are excluded from the proposed unit. While it is difficult to consider these units without background knowledge as to their reporting structure, work location and bargaining history, the Chula Vista and Contra Costa units are very different from the Newport Beach unit. The Chula Vista and Contra Costa units are limited professional and technical units while the Newport Beach

unit is a more expansive professional and technical unit. LPTE has shown only that the inquiry into the units goes beyond mere groupings of classes.

History of Employee Relations

The MOU negotiated by AFSCME provides for specific needs of employees in the proposed unit, such as extra pay for certifications and a boot allowance. While AFSCME's representation on the Water Services Technician certification pay issue was not flawless, it still successfully advocated for the certification pay initially and, with Gaither's insistence, secured the pay augmentation. LPTE did not prove that the history of employee relations between AFSCME and the City was unstable, or that AFSCME was inadequately represented the interests of the proposed unit's employees.

Efficiency of Operations of the City/Fragmentation of Units

The proposed unit has ten employees in eleven classes. The professional employees within the proposed unit have a right to be represented separately from the subprofessional employees, if they were to later request that the unit be severed again. (MMBA section 3507.3 and EERR section 10(B).) Presumably, those professional employees would be the Assistant Engineer, Associate Civil Engineer, Associate Engineer, Junior Engineer, Junior Planner and Assistant Planner which would constitute four employees in six classes.⁵ A four-employee unit of professional employees, and a six-employee unit of subprofessional/technical employees would not be efficient for the administration of labor relations, and would lead to fragmentation of bargaining units and a decrease in collective influence.

⁵ MMBA section 3507.3 specifically enumerates engineers as professional employees. In Alameda County, *supra*, 33 Cal.App.3d 825, the County of Alameda found that a planner was also a professional employee.

CONCLUSION

LPTE failed to show that the classes in the proposed unit share a commonality of duties, educational requirements, work locations, and reporting structure that is separate and distinct from the overall General Services Unit. Additionally, a history of stable and successful negotiations exists between the employer and the exclusive representative. Finally, because the professional employees have a right to belong to a separate unit, to grant the petition might lead to a fragmentation of bargaining units. In sum, based on the community of interest factors reviewed, petitioner has failed to set forth sufficient justification for the proposed unit based on a separate and distinct community of interest.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the severance petition in Case No. SA-SV-168-M, City of Lodi and Lodi Professional & Technical Employees and AFSCME Local 146, is hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4174
(916) 322-8231
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered filed when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130; see also Government Code sec. 11020(a).) A document is also considered filed when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Shawn P. Cloughesy
Administrative Law Judge