CITY OF GLOUCESTER AND GLOUCESTER SUMMER EMPLOYEES ASSN., MCR-2000 (10/11/74).

(30 Bargaining Unit Determination)
35.1 casual and temporary employees

Commissioners participating: Alexander Macmillan, Chairman; Madeline H. Miceli; Henry C. Alarie.

Appearances:

Garry J. Wooters - Counsel for the Commission
Wayne Soini - Representing the Petitioner

DECISION

Statement of the Case

On July 1, 1974, the Gloucester Summer Employees Association, herein called the Association, filed a Petition[1] with the Labor Relations Commission, seeking certification as the exclusive representative for the purposes of collective bargaining of certain employees of the City of Gloucester, herein called the Municipal Employer.

The Commission investigated the Petition pursuant to its powers under Chapter 150E of the General Laws, herein called the Law. A copy of the Petition and Notice of Hearing were duly served on all parties in accordance with the rules and regulations of the Commission. Pursuant to notice, a hearing was held on August 8, 1974, before Alfonso M. D'Apuzzo, Executive Secretary. Full and fair opportunity was afforded to all parties to be heard, to examine and cross-examine witnesses and to introduce evidence.

Findings of Fact and Discussion

Upon all of the evidence and the record as a whole, the Commission finds:

1. The City of Gloucester is a municipal corporation situated in the County of Essex, and is a Public Employer within the meaning of Section 2 of the Law.

2. The Gloucester Summer Employees Association is an Employee Organization within the meaning of Section 2 of the Law.

3. The Petitioner seeks a unit described in its Petition as "all temporary laborers of the Department of Public Works, City of Gloucester."

The record in this case reveals that the City of Gloucester employs each summer approximately twenty-five employees who work within the Department of Public Works for the summer months. The employees are hired from a Civil Service list, with approximately half of the employees in any season being returnees from the previous year. They perform many of the same tasks, and work under the same supervision as the regular employees of the department. The summer help receive a lower wage rate, and do not share in many of the benefits received by permanent help, including vacation accrual.

[1]The Petitioner had attempted to file the Petition at an earlier date. The Commission had on May 31, 1974 declined to accept further Petitions due to the pendency of Chapter 150E.

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The regular employees are represented; however, the exclusive representative of the full time employees has consistently declined to represent the summer help.

Opinion

The appropriateness of bargaining units containing substantial numbers of "seasonal" employees has normally been determined based upon the expectation these employees have of continuing employment. If there is substantial stability in the work force, year after year, the "seasonals" are either included in a bargaining unit with the regulars, or held to constitute their own separate unit. Maine Sugar Industries, 169 NLRB 189 (1948); John S. Barnes Corporation, 180 NLRB 911 (1970); Shields, Inc., 180 NLRB 1001 (1970).

This "expectation" factor is commonly expressed as a percentage of employees in any year who were employed the previous year. If the percentage is high enough, the employees are considered to have a significant enough interest in the affairs of the bargaining unit that they are allowed to participate in its formation and operation. If the rate is below a certain figure, the employees are deemed to be "casuals" and excluded from the bargaining unit. Cf. State of New York and New York State Employees Council 20, PERB, 5-3022 (N.Y. 1972); See's Candy Shops, Inc., 82 LRRM 1575 (1973).

In the public sector, however, the problem is more complex. We have noted in numerous decisions that the complexities of municipal law and finance are a major factor to be considered in representation cases. See City of Pittsfield, MCR-1227 (6/6/74). If the present Petition were to be allowed, bargaining would have to be conducted during the months of June, July and August. Most municipalities would have completed action on their budgets for the next July to July fiscal year before negotiations had begun. Thus any funding required would not be secured for at least one year from the date of ratification of the agreement. If the funding request were voted down, it would be difficult to renegotiate until the summer months.

Although the Association might arrange its affairs in such a manner that officers of the Association would be available on a year round basis, contact with the bulk of the membership during the school year would be limited. While it is also true that the Association could represent its members effectively on non-economic matters, we may not ignore what would be a substantial impediment to a large area of bargaining.

The Commission is persuaded that these employees may enjoy full exercise of their statutory rights only in a bargaining unit comprised of both full time and part time employees, who work side by side at the same tasks. We further conclude, in spite of the able argument of the Petitioner, that to certify a unit in which the employees could not exercise their bargaining rights and responsibilities, would not be in the best interests of either the employees or the Public Employer.

Conclusions

Upon all of the evidence in this matter the Commission concludes: that no question has arisen concerning the representation of employees of the Employer, and that the Petition in the instant case ought to be, and hereby is DISMISSED.

CITY OF SALEM, POLICE DEPT. AND SALEM POLICE PATROLMEN'S ASSN. (PETITIONER) AND AFSCME (INTERVENOR), MCR-2026 (10/17/74).

(20 Jurisdiction of the Commission)
23. Contract Bar
(40 Selection of Employee Representative)
42. Decertification
42.1 contract bar
42.2 defunctness
42.3 loss of majority status
42.4 schism

Commissioners participating: Alexander Macmillan, Chairman; Madeline H. Miceli; Henry C. Alarie.

Appearances:

Joellen D'E. Bogdasarian, Esq. - Counsel for the Commission
Robert A. Ledoux, Esq. - Counsel for the Petitioner
Augustus J. Camelio, Esq. - Counsel for the Intervenor
George F. McInerny, Esq. - Counsel for the Employer

RULING ON MOTION TO DISMISS PETITION

Statement of the Case

On July 23, 1974, the Salem Police Patrolmen's Association (hereinafter "the Association"), pursuant to Chapter 150E, Section 4 of the General Laws, filed with the Labor Relations Commission (hereinafter "the Commission") a petition seeking certification as the exclusive representative for the purposes of collective bargaining of "all permanent patrolmen excluding all men above the rank of patrolmen" of the Police Department of the City of Salem. Pursuant to the rules and regulations of the Commission, the petition and notice of hearing were duly served on all interested parties. The American Federation of State, County and Municipal Employees, AFL-CIO, Local #1721 (hereinafter "AFSCME"), the incumbent employee organization, intervened.

Pursuant to notice, a hearing was conducted on September 24, 1974 before Chairman Alexander Macmillan and Commissioners Madeline H. Miceli and Henry C. Alarie, at which all parties were afforded full opportunity to be heard, and to introduce evidence concerning the Motion To Dismiss filed by the intervening incumbent. AFSCME maintained that its collective bargaining agreement with the City of Salem constituted a bar to the petition, while the Association contended that the existence of substantial and pervasive employee disaffection with the incumbent union was good cause for suspending the application of the normal contract-bar rule. The City of Salem, stating a wish to remain neutral in what it believed was essentially an intraunion conflict, nevertheless took the position that the collective bargaining agreement it negotiated with AFSCME was valid, and therefore constituted a bar to the petition. The City further opined that the petitioned-for unit was inappropriate.

Findings of Fact

Upon the entire record herein, the Commission finds:

1. That the City of Salem is an Employer within the meaning of Section 1 of the Law;

2. That the Salem Police Patrolmen's Association is an Employee Organization within the meaning of Section 1 of the Law;

3. That the American Federation of State, County and Municipal Employees, AFL-CIO, Local #1721 is an Employee Organization within the meaning of Section 1 of the Law.

On or about January 22, 1969, AFSCME was certified by the Commission as the exclusive representative for purposes of collective bargaining of all employees of the City's Police Department who hold the rank of Patrolman, Sergeant, Lieutenant and Captain, excluding the Marshal, Reserves and all civilian employees. Thereafter, the City and AFSCME negotiated successive collective bargaining agreements of which the most recent with which we are concerned, was executed on July 22, 1974, to be effective for the period running from July 1, 1974 to June 30, 1976. A Petition for Certification was filed by the Association on July 23, 1974, one day after the execution of the agreement with AFSCME. A pre-investigation conference was held at the offices of the Commission on August 9, 1974. Approximately two weeks thereafter on August 26, 1974, a Petition for Decertification signed by thirty-four of the fifty-five patrolmen in the existing bargaining unit was also filed by the Association. A formal hearing was held before the full Commission on September 24, 1974 at which the Association presented testimony intended to demonstrate that a high degree of dissatisfaction with the incumbent was felt by a majority of unit members. In support of its Motion To Dismiss AFSCME submitted not only the collective bargaining agreement executed by the City and Local #1721, but also a fact-finder's "Report and Recommendations" together with minutes of a Union meeting at which the membership voted by secret ballot to accept the said "Report and Recommendations." (Intervenor's Exhibits 1-4 inclusive).

Opinion

In a series of recent decisions we have clarified and refined our contract-bar doctrine, and find it unnecessary to restate the rationale here. (See In Re City of Quincy, MCR-1311 (4/22/74); In Re Department of Public Welfare, SCR-112 (5/23/74); In Re City of Worcester, Department of Police, MCR-1387 (8/14/74). Suffice it to say that we find no justification for suspending our contract-bar rule on the facts in the instant case. While there may exist a measure of disaffection among certain members of the bargaining unit with their duly certified representative, we have held that mere unhappiness of unit employees with their bargaining representative is not sufficient to remove a valid contract as a bar. In Re City of Worcester, Department of Police, MCR-1387 (8/14/74). Further, suspension of the contract-bar rule is not warranted by application of either the "schism" doctrine, or the "defunctness" doctrine, which require a demonstration that a union has abandoned employees or is otherwise unable or unwilling to represent them. Hershey Chocolate Corporation 121 NLRB 901, 911 (1958). The record in this matter reflects that AFSCME is willing and able to assume its responsibilities. Union representatives participated in mediation and fact-finding sessions when collective bargaining negotiations reached an impasse in May, 1974, and subsequently presented the recommendations of the fact-finder to the membership for a vote at a meeting held for that purpose on July 12, 1974. Further, we find nothing in the collective bargaining agreement or elsewhere in this record from which we may properly infer that the union is unable or unwilling to represent the interests of each employee in the unit "without discrimination and without regard to employee organization membership." (See Chapter 150E, Section 5).

ORDER

WHEREFORE, on the basis of the foregoing, the Commission concludes:

1. That no question has arisen concerning the representation of the

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patrolmen of the City of Salem, Police Department, within the meaning of Chapter 150E, Section 4 of the General Laws.

2. That the Motion To Dismiss ought to be and is hereby granted.