

In the Matter of CITY OF WORCESTER

and

NEW ENGLAND POLICE BENEVOLENT ASSOCIATION,
INC.

and

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES

Case No. MCR-09-5360

32. *Binding Effect of a Unit Determination*
34.93 *severance*
35.812 *dispatchers*
35.825 *police dispatchers*

April 5, 2010

Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member
Harris Freeman, Board Member

Lisa M. Carmody, Esq. *Representing the City of
Worcester*
Diane S. Byrnes, Esq. *Representing NEPBA, Inc.*
Timothy G. Bailey, Esq. *Representing NAGE*

DECISION

Statement of the Case

On January 29, 2009, the New England Police Benevolent Association, Inc. (NEPBA or Petitioner), filed a petition in Case No. MCR-09-5360 with the Division of Labor Relations (Division). The petition indicates that the NEPBA sought to represent the police dispatchers and senior police dispatchers in the City of Worcester (City), employees whom the former Labor Relations Commission¹ certified in *City of Worcester*, 8 MLC 1335 (1981). On or about February 11, 2009, the National Association of Government Employees (NAGE or Union), the incumbent exclusive collective bargaining representative of the City's dispatchers and senior dispatchers, filed a motion to intervene in the case, and the Division allowed the motion. On April 1, 2009, the NEPBA filed an amended representation petition to correct the job title of the petitioned-for employees and to clarify that it seeks to sever the dispatchers and senior dispatchers currently employed by the City out of the NAGE bargaining unit and represent them in a separate unit.

NAGE and the City opposed the NEPBA's petitions, and on November 10, 2009, a duly designated Division hearing officer (Hearing Officer) conducted a hearing at which all parties had the opportunity to be heard, to examine witnesses, and to introduce

evidence. The parties filed post-hearing briefs on or about February 19, 2010.

Stipulations of Fact

1. The City of Worcester ("City") is a public employer within the meaning of Section 1 of G.L. c. 150E (the "Law").
2. The New England Police Benevolent Association, Inc. (NEPBA) is an employee organization within the meaning of Section 1 of the Law.
3. The National Association of Government Employees, SEIU (NAGE) is an employee organization within the meaning of Section 1 of the Law.
4. NAGE, through NAGE, SEIU Local 495, is the exclusive representative of various employees in the City of Worcester, including all dispatchers and senior dispatchers in the Communications Department.
5. By decision dated October 18, 1978, the former Massachusetts Labor Relations Commission issued a decision and directed an election in two units of City employees. Unit 1 consisted of: "All full-time and regular part-time service, maintenance and custodial laborers and craft employees." Unit 2 consisted of: "All full-time and regular part-time technical employees." See Exhibit 10, 5 MLC 1332.
6. An election was held on December 14, 1978, and SEIU Local 495 was certified as the representative of Unit 1, consisting of full-time and regular part-time service, maintenance and custodial laborers and craft employees on January 22, 1979. See Exhibit 3.
7. The results of the December 14, 1978 election in Unit 2, consisting of full-time and regular part-time technical employees, were challenged.
8. The former Commission issued a Decision and Order on Challenged Ballots (6 MLC 1104), and NAGE was certified as the exclusive representative of Unit 2 on July 3, 1979. See Exhibit 12.
9. By decision dated September 10, 1981, the Commission ordered an election in a unit of: "All regularly employed police dispatchers and senior police dispatchers." 8 MLC 1335. An election was held on September 21, 1981, and Local 495, SEIU was certified as the exclusive representative of the unit. See Exhibit 13.
10. NAGE is currently the exclusive representative of all employees in Local 495. In 1993, NAGE was elected as the exclusive certified bargaining representative for members of Local 495.
11. Historically, the City of Worcester and SEIU, NAGE Local 495 have negotiated one collective bargaining agreement (CBA) covering all employees. Within the contract, Special Articles 13 and 14 apply only to dispatchers and senior dispatchers.

1. Pursuant to Chapter 145 of the Acts of 2007, the Division "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission." The Commonwealth Employment

Relations Board (Board) is the Division agency charged with deciding adjudicatory matters. References to the Board include the Commission.

12. Until 1994, police dispatchers and senior police dispatchers were under the direction and control of the Chief of Police. See Exhibit 2.
13. In or about June 1978, the fire alarm operation for the City of Worcester was transferred to Police Headquarters but remained functionally separate.
14. On 7/1/91, the job titles of all fire alarm operators were changed to dispatchers and the fire alarm and police dispatch operations were combined. At this point, the emergency dispatch operations came under the direction of the Chief of Police.
15. By ordinance #6620 passed on 10/18/94, the City established a Communications Department and created the position of a civilian Director of Communications. The dispatchers and senior dispatchers were transferred under the direction and control of the civilian Director of Communications. See Exhibit 2.
16. The Communications Department is responsible for dispatch of all law enforcement and fire services in the City of Worcester. The Communications Department receives calls for emergency medical services, which are then directed to a separate ambulance dispatch center. The employees are civilian employees under the supervision of the Director of Communications.
17. The City no longer has any employees holding the title of police dispatcher, senior police dispatcher and fire alarm operator. See Exhibit 14.
18. The City's civil service classification plan as well as the City's classification plan established by ordinance does not contain the titles of police dispatcher and senior police dispatcher. The titles in both classifications are dispatcher and senior dispatcher. See Exhibit 15.
19. Only employees holding the title of dispatcher and senior dispatcher perform dispatching functions, which is a civilian function provided for the police and fire departments and not a police or fire function.
20. The collective bargaining agreement between the City and NAGE recognizes the job classification of dispatcher and senior dispatcher as part of the unit for which NAGE is the exclusive bargaining representative.
21. At one time, approximately 1978, the collective bargaining agreement between the City of Worcester and Local 495 included language that stated that "employees in classifications covered by the parts indicated in the prefix to the Agreement constitute separate bargaining units under the collective bargaining act." See Exhibit 10.
22. The collective bargaining agreement between the City and NAGE no longer contains any language stating that any reference to a "unit" is to be considered as a separate unit.
23. The reference to "units" in the collective bargaining agreement between the City and NAGE is based on the organizational structure of City departments identified as Unit I, Unit II and Unit III. The so-called "units" I, II, and III, are part of Local 495.
24. NAGE, Local 495 represents employees from the Department of Public Works and Parks, Inspectional Services, Worcester Public Library, Public Health, Worcester Regional Airport, and Worcester Police Department.
25. All members of NAGE, Local 495 vote as a whole unit and ratification is based upon the majority vote of all employees.
26. There is only one collective bargaining agreement between the City and NAGE, Local 495 for all members of the bargaining unit.
27. The special articles address the unique job characteristics or functional distinctions of the various union members and professions within NAGE, Local 495. They are bargained for in the course of successor contract negotiations for all members of Local 495.
28. On January 1, 2002, Special Article 14, applicable to the Communications Department dispatchers, provided a "4 and 2" schedule for "employees in the classification of Dispatcher and Senior Dispatcher in the Communications Department." This Special Article 14 was bargained by the NAGE bargaining team.
29. Prior to the implementation of the new Special Article 14, the Communications Department members were on a "4 and 2" schedule but were paid for only 4 days. This version of the "4 and 2" schedule was negotiated prior to 1993.
30. Under the new "4 and 2" schedule, the dispatchers were now paid for an extra seventeen (17) days off a year. No other civilian employees of the City of Worcester or members of NAGE have this special "4 and 2" schedule.
31. A member of the Communications Department has held the position of Executive Board Recording Secretary as far back as 1996 and participates in the collective bargaining process. See Exhibit 16.
32. The NAGE Executive Board ("E Board") consists of representatives of each City department. All members of the E Board are members of the NAGE negotiating team including representatives from the Communications Department. See Exhibit 16.
33. Historically, NAGE, Local 495 has had a single negotiating team and there has always been a Communications Department employee on the negotiating team. See Exhibit 16.
34. Prior to every successor contract bargaining, the NAGE negotiating team has sent negotiation surveys to all bargaining unit members, including those members of the Communications Department. The survey was developed to solicit input from bargaining unit members on contract issues they want addressed during contract negotiations. This practice of soliciting the members' input for inclusion in proposals of the NAGE bargaining team goes back to approximately 1993.
35. The employees of the Communications Department have submitted proposals during successor contract negotiations between the City of Worcester and NAGE Local 495.

36. The successor contract proposals contained issues for negotiation that were drafted and submitted by Communications Department bargaining team members.

37. Proposals are submitted to the Local on a form filled out and presented by a member either on the negotiating team or invited to come explain the proposal(s) to the negotiating team. The written records of the proposals are kept and maintained by the local.

38. The proposals are contained in:

a) A Document entitled Master Proposals for the City of Worcester From N.A.G.E., Local 495, June 26, 1996.

b) A Document entitled Contract Proposals from N.A.G.E., Local 495, SEIU, AFL-CIO, to the City of Worcester for Contract Years, July 1, 2000 - June 30, 2003.

c) A Document entitled Additional Contract Proposals from N.A.G.E., Local 495, SEIU, AFL-CIO to City of Worcester, June 29, 2005 (Third Meeting After Ground Rules) See Exhibit 17.

39. During each of those negotiation sessions, a member of the Communications Department served on the negotiating team. See Exhibit 16.

40. In addition to any members on the Executive Board and negotiation team, there was always a steward from the Communications Department serving as a department representative.

41. Robert Odgren (Odgren) has been employed by the City of Worcester as a dispatcher since 3/16/87. From 1/14/92 through 6/30/95, Mr. Odgren was on a leave of absence and served as national representative of NAGE, Local 495.

42. The position of Building Maintenance Craftsman in the Fire Department should be included in Joint Exhibit No. 18.

43. The dispatchers are functionally distinct from other employees and job titles in the existing NAGE bargaining unit. They possess specialized skills, different job functions, and do not share duties with any other bargaining unit employees.

Findings of Fact

Dispatcher and bargaining unit member Jacqueline Coles (Coles) served as a NAGE steward from 2005 to 2008. In April of 2008, during Coles's tenure as steward, Sean Maher (Maher) became NAGE's Local President. In June of 2008, Maher asked Coles to resign her steward position. Maher believed that Coles had done a good job as a NAGE steward, but he requested her resignation because he had difficulty communicating with Coles, and believed that she had "a lot on her plate" at that time. Jeff Makala (Makala) succeeded Coles as steward, but the parties dispute whether Makala held the steward position as of the date of the hearing.

The overtime provisions of the CBA are the same for all bargaining unit members. However, the Communication Department has maintained a unique split-shift procedure that allows eight-hour overtime shifts to be split into four-hour shifts and gives the dispatchers various options for taking a four-hour or eight-hour shift.

In late 2008, Maher learned that two overtime issues had arisen. One of the issues concerned whether to change or continue the dis-

patchers' unique split-shift procedures. NAGE representatives met with the dispatchers to address this issue in or about January of 2009, but the meeting did not produce a consensus of opinion on how to proceed. Consequently, NAGE decided to resolve the matter by conducting a vote and giving the dispatchers the opportunity to decide whether to continue or modify the existing practice. Forty-seven dispatchers voted, and the majority opted to maintain the current practice.

The second issue involved the distribution of overtime to dispatchers who were working a regular shift when an overtime opportunity arose. At that time, overtime was assigned by a rotating list. A dispatcher who was already working a shift was bypassed on the list and not offered the overtime. Odgren, a day shift dispatcher, objected to the bypass because it limited the overtime opportunities that a day shift dispatcher could receive.

In or before December of 2008, Communications Director David Clemons (Clemons) modified the bypass procedure by offering overtime opportunities to individuals who were currently working. Maher objected to the modification because he believed that "backing up the roster" violated the CBA and permitted the City to abuse overtime distribution. Maher voiced his objections to Clemons and Clemons reverted to the prior practice. NAGE did not schedule a vote on this issue and did not tell the bargaining unit members of Maher's meeting with Clemons or its outcome. There is no evidence that anyone other than Odgren objected to the original bypass procedure.

In September of 2007, the dispatchers learned of a newly issued comprehensive Emergency Communications Standard Operating Procedures Manual (the Manual) that the City intended to implement on January 1, 2008. The Manual addressed numerous dispatcher working conditions, including: dress codes, seniority, work schedules, staffing, scheduling, time off procedures, training, complaint procedures, and discipline. This was the first procedural manual issued, and Odgren believed that it contained new procedures. Odgren explained his concerns to NAGE Executive Secretary and dispatcher Kate Anderson (Anderson) in October of 2007, and suggested that NAGE demand bargaining and file an unfair labor practice charge. Anderson raised the issue with Maher in December of 2007, and she met with Maher and NAGE National Representative Bernard Loughnane (Loughnane) to review the Manual on January 18, 2008.

On January 22, 2008, Loughnane sent Clemons an electronic message that articulated the following concerns:

1. Meal break/lunch period. Will employee be able to leave the workplace?
2. Comp time/earned time. Appears that there is an issue as to how comp time is charged after it is earned as overtime.
3. More information is needed as to exactly how holdovers and early-ins are to be handled.
4. Extension of employee probation. Appears to be in conflict with CBA and P&P.
5. Use of sick day prohibited on snow day. This is in conflict with City Manager policy and the CBA.

6. Vacation?

7. Paragraph 7, [i]n violation of HIPAA privacy rules. Suggest that language be change[d] to indicate that employee will present original and management will create a copy for their files.

8. Establish a uniform procedure for smoking breaks.

The Union of course preserves its right to grieve any of the policies that may conflict with the CBA, City Ordinances, State and Federal law, or disciplinary actions adversely affecting Union members.

Maher and Loughnane met with Clemons on or about January 24, 2008 to further explain NAGE's objections to the Manual. At the conclusion of the meeting, Loughnane understood that Clemons would address the issues that NAGE had raised, and Loughnane believed that NAGE's concerns had been resolved. Loughnane did not inquire into whether the City changed any of the procedures outlined in the Manual after the meeting, and the record does not indicate whether the City subsequently implemented any changes.

NAGE did not meet with the dispatchers (other than Anderson) to discuss the manual or the meeting with Clemons. Instead, NAGE relied on Anderson to highlight important issues and relay Maher's and Loughnane's discussions with Clemons to the other dispatchers.² NAGE did not file an unfair labor practice charge over the Manual's implementation. NAGE believed that any changes in dispatcher working conditions could be grieved, and it subsequently filed a grievance that challenged, in part, the compensatory time provisions of the Manual.

Opinion

This case presents two issues for the Board's consideration: 1) whether the NEPBA's petition properly seeks to sever the dispatchers out of the City-wide bargaining unit; and 2) if so, whether severance is appropriate. The NEPBA contends that the dispatchers need not be severed out of the City-wide unit, because the former Commission certified the dispatchers as a separate bargaining unit in 1981, and that unit retains its separate status. In the alternative, the NEPBA argues that severance is appropriate under the Board's traditional severance standards. NAGE and the City argue that the dispatchers have been merged into the overall NAGE unit and should not be severed out now into a separate unit.

The Severance Question

We address the procedural question first. The NEPBA asserts that when parties litigate a bargaining unit, we must review the unit based on the statutory criteria included in Section 3 of the Law rather than on the parties' prior agreements. The NEPBA specifically contends that the dispatchers' inclusion in the existing City-wide unit is inappropriate because: 1) no community of interest exists between the dispatchers and other unit members; 2) the former Commission certified a separate unit of dispatchers in 1981; and 3) the dispatcher unit never lawfully merged into the

overall unit because the dispatchers never agreed to inclusion within the overall unit.

The NEPBA correctly notes that the Board will modify previously determined unit structures to best effectuate the purposes of the Law where the existing units are no longer appropriate. *City of Springfield*, 24 MLC 50, 54 (1998). Neither lawful recognition nor stipulations by the parties as to an appropriate bargaining unit structure will bind the Board or other parties in future cases where the existing unit structure is disputed and the issues are litigated for Board determination. *Id.* Here, however, there is no factual basis for the NEPBA's contention that the dispatchers do not share a community of interest with the employees in the overall bargaining unit. The Board consistently favors broad comprehensive units over small, fragmented ones, *Higher Educational Coordinating Council*, 23 MLC 194, 197 (1997), and has declined to sever employees who perform dispatching functions out of large, diverse units. *See e.g., City of Boston*, 25 MLC 105 (1999); *City of Lynn*, 23 MLC 151 (1996). Although the former Commission decided that a separate dispatcher unit was an appropriate bargaining unit in 1981, that decision rested solely on two factual stipulations regarding part-time dispatchers and employees performing dispatching duties intermittently, and the decision did not consider whether a City-wide unit including dispatchers could also have been appropriate. *See City of Worcester*, 8 MLC 1335, 1336 (1981).

Further, the Law permits employers and unions to structure bargaining units in a manner that is mutually beneficial, *City of Quincy*, 26 MLC 190 (2000), and thus, the 1981 certification does not prevent the Union and the City from subsequently agreeing to merge the dispatchers into the City-wide unit. The stipulated facts show that in 1994, the City transferred the dispatchers and dispatching function from the Police Department to a newly created Communications Department and discontinued use of the titles of police dispatcher and senior police dispatcher. The parties' stipulations do not detail how the dispatchers blended into the NAGE bargaining unit, but the stipulations clearly establish that they are part of the NAGE unit now. The CBA recognizes the job classification of dispatcher and senior dispatcher as part of the unit for which NAGE is the exclusive representative. Prior contractual language differentiating employee groups as Units I, II, or III (dispatchers) no longer exists, and the contractual reference to Units I, II, and III now represents the organizational structure of City departments. Moreover, there is a single negotiating team that has included dispatchers, a single collective bargaining agreement that includes provisions uniquely pertaining to the dispatchers, and ratification is based on the majority vote of all employees, including dispatchers. This evidence demonstrates that the City and NAGE have agreed to recognize the dispatchers as members of the City-wide bargaining unit and not as a separate bargaining unit. *See City of Quincy*, 26 MLC at 190.

2. Anderson advised Odgren that NAGE believed that it could challenge the Manual after its implementation. The record does not indicate whether Anderson discussed the Manual with any other dispatcher.

Further, the NEPBA has cited no case law holding that dispatcher approval was required to facilitate their merger into the overall unit. The Board may take employee wishes into consideration in a unit determination case, but those wishes are not controlling. *See Town of Dedham*, 3 MLC 1332, 1333 (1976). Further, there is no evidence that the dispatchers ever objected to inclusion in the overall unit until the petition was filed. Rather, the evidence shows that they participated in bargaining for the combined unit.

In these circumstances, we find that the dispatchers have been merged into the overall bargaining unit. Therefore, we view the NEPBA's petition as a severance petition that raises a question concerning representation and will apply the Board's traditional severance standards to this case.

The Severance Standard

To sever a group of employees from an existing bargaining unit, the NEPBA must demonstrate that the petitioned-for employees constitute a functionally distinct appropriate unit with special interests sufficiently distinguishable from those of other unit employees, and that special negotiating concerns resulting from those differences have caused or are likely to cause conflicts and divisions within the bargaining unit. *Lowell School Committee*, 35 MLC 193, 196 (2009) (citing *City of Boston*, 25 MLC 105, 119 (1999)). The Board does not favor severance petitions and has declined to sever employees from a bargaining unit to fix imperfectly constructed bargaining units. *City of Fall River*, 32 MLC 162, 169 (2006). Where the facts fail to demonstrate serious divisions and conflicts within a bargaining unit, the Board has maintained the historical bargaining unit structures that are not fully consonant with the general principles of initial bargaining unit determinations. *New Bedford School Committee*, 12 MLC 1058 (1985) (former Commission declined to sever clerical employees from an existing bargaining unit that included both clerical employees and maintenance employees, because the record established a long history of stable labor relations, and there was no evidence that serious intra-unit conflicts existed).

Here, the parties have stipulated that the dispatchers are functionally distinct from other employees and job titles in the existing NAGE bargaining unit, and that they possess specialized skills, different job functions, and do not share duties with any other bargaining unit employees. We adopt this stipulation and turn to assess whether the dispatchers have special negotiating concerns resulting from their differences that have caused or are likely to cause conflicts and divisions within the unit that will interfere with collective bargaining.

The NEPBA acknowledges that to establish the requisite degree of conflict, it must show that the petitioned-for employees play no role in the representation process and cannot participate on the negotiating team, and that the incumbent representative subordinates their interests to the interests of other bargaining unit members. *City of Quincy*, 31 MLC 35, 39 (2004). The NEPBA asserts that it has satisfied its burden because the facts show that NAGE has

failed to: 1) appoint a steward to replace Makala after he resigned; 2) address Odgren's and Coles's concerns; 3) demand bargaining over the Manual; and 4) inform the dispatchers of the meeting with Clemons and its outcome.

We are not persuaded by these arguments. The stipulated facts demonstrate that the dispatchers have a significant role in the representation process. The NAGE Executive Board includes a dispatcher representative; a dispatcher has held the position of Union Executive Board Recording Secretary as far back as 1996; and there was always a steward from the Communications Department serving as a Department representative. NAGE has a single negotiating team, and there has always been a Communications Department employee on the negotiating team. The fact that NAGE negotiated a unique "4 & 2" schedule for the dispatchers that provides seventeen additional days off per year indicates that NAGE has not routinely subordinated the dispatchers' interests to the interests of other employees. *See Town of Marshfield*, 15 MLC 1130, 1136 (1988).

Further, the petitioning employees' inability to achieve their bargaining goals within a large unit or their dissatisfaction with their exclusive representative's accomplishments is insufficient to establish the irreconcilable conflict necessary to warrant severance. *City of Boston*, 25 MLC at 120. Therefore, the fact that NAGE did not resolve the overtime issues to Odgren's satisfaction or challenge the implementation of the Manual as Odgren desired is not dispositive. Moreover, NAGE was not indifferent to the dispatchers' concerns. NAGE did not ignore the split-shift overtime issue, but administered an informal vote that enabled the dispatchers to decide for themselves whether to change or continue that overtime procedure. Maher challenged Clemons's change to the bypass procedure because it contravened the prior practice, and because Maher believed that the new procedure was susceptible of abuse. Maher's intervention into this situation does not rise to the level of irreconcilable conflict warranting severance. *See Town of Marshfield*, 15 MLC at 1136 (union's intervention in an informal library job-sharing arrangement did not show the degree of conflict and division required to sever positions from a bargaining unit). NAGE received dispatcher input regarding the Manual from Anderson, articulated objections to Clemons, and followed up its objections with a grievance challenging a specific provision in the Manual. Finally, Maher's decision to request Coles's resignation and any subsequent confusion over who fills the steward position is inconsequential.³ In sum, the petitioning employees' disagreement with NAGE's strategic decisions and communication methods shows some dissatisfaction with NAGE's representation of certain of its members, but it does not show the requisite degree of internal conflict to warrant severance. Therefore, the evidence does not show that the petitioned-for employees have special negotiating concerns that have caused or are likely to cause serious conflicts or divisions within the bargaining unit that effectively interfere with bargaining.

3. The parties stipulated that there was always a steward from the Communication Department serving as a department representative.

Conclusion

For the foregoing reasons, we decline to sever the dispatchers from the existing NAGE bargaining unit, and we dismiss the NEPBA's petition.

SO ORDERED.

Investigation /

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Charging Party