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In the Matter of CITY OF BOSTON / BOSTON PUBLIC  
LIBRARY

and

PROFESSIONAL STAFF ASSOCIATION, CWA, LOCAL  
1333

and

AFSCME, COUNCIL 93

Case Nos. CAS-07-3708 and CAS-07-3692

23. *Contract Bar*  
34.92 *clarification*  
45.1 *contract bar*  
45.21 *arbitration*  
91.13 *mootness*  
93.4 *petition for clarification*

May 14, 2010

Marjorie F. Wittner, Chair

Harris Freeman, Board Member<sup>1</sup>

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Staff Association, CWA, Local  
133*

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Council 93*

## DECISION

### Introduction and Statement of the Case

These petitions arise out of a dispute that the City of Boston (City) and the Professional Staff Association, CSA, Local 133 (PSA) have over the appropriate bargaining unit placement of two accounting positions in the Boston Public Library's Accounting Department. The City asserts that both positions belong in the bargaining unit that AFSCME Council 93, AFL-CIO (AFSCME) represents at the Library. To this end, on April 15, 2007, the City filed a CAS petition with the former Labor Relations Commission (Commission)<sup>2</sup> in Case No. CAS-07-3692 claiming that one of the positions at issue in this case, which it refers to as "Accountant BC-9," was appropriately placed in AFSCME's bargaining unit (2006 BC-9 Accountant).

On August 8, 2007, the PSA filed its own CAS petition in Case No. CAS-07-3708 seeking to accrete the 2006 BC-9 Accountant to its own unit, on the grounds that this position is a professional and/or technical position that shares a greater community of interest with its unit, which had been included in the PSA's bargaining unit for more than twenty-five years. Through this petition, the PSA also sought to accrete a different BC-9 Accountant position that has

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1. Board Member Elizabeth Neumeier has recused herself from this decision.

2. Pursuant to Chapter 145 of the Acts of 2007, the Division of Labor Relations (Division) "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission."

been included in AFSCME's bargaining unit since 2002 (2002 BC-9 Accountant).

AFSCME Council 93 filed a motion to intervene in both matters and that motion was granted. After filing Case No. CAS-07-3708, the PSA filed a motion to consolidate it with Case No. CAS-07-3692. That motion is granted.

After the PSA filed Case No. CAS-07-3708, on September 14, 2007, AFL-CIO President John Sweeney wrote a letter to the Division asking it to hold this petition in abeyance pending resolution of an Article XX proceeding.<sup>3</sup> On November 11, 2007, AFSCME wrote a letter to the Division indicating that the Article XX matter had been resolved by the PSA agreeing to withdraw a third CAS petition (not at issue here) and by the parties agreeing to "litigate" Case Nos. CAS-07-3692 and CAS-07-3708 at the Division.

All three parties filed comprehensive written submissions and replies to each other's submissions in 2007 and 2008. In addition, on November 21, 2007 AFSCME filed a motion to dismiss both petitions on grounds of contract bar and on their merits. Both the PSA and the City filed responses to this motion.

On January 29, 2010, the Division of Labor Relations (Division) sent a letter to the parties asking if an arbitration award concerning the 2006 BC-9 Accountant position had resolved the pending petitions and requesting a copy of the award. Only AFSCME and the PSA responded to this request.

For the reasons set forth below, the Board dismisses both petitions without reaching their merits and without prejudice to refile at an appropriate time.

#### Background<sup>4</sup>

##### *Bargaining Units and Bargaining History*

**PSA** - Since in or around 1973, the City has recognized the PSA as the exclusive representative of the following bargaining unit of employees:

[A]ll employees classified in the Pre-Professional Library Service, all Professional Library services employees in grades P-1-P-4, all employees in grades LA -10, M-10 and C-10, but excluding personnel officers and all other employees.<sup>5</sup>

The PSA and the City were parties to a Memorandum of Agreement that was in effect from July 1, 2005 to September 30, 2006 that supplemented and amended their collective bargaining agreement that expired on June 30, 2004.

**AFSCME** - In or around 1967, the City voluntarily recognized AFSCME as the exclusive representative of a bargaining unit of employees in the Library and several other City departments. At

all times relevant to this proceeding, AFSCME, Local 1526, has represented Library employees in pay grades BLA 2-8; BC 3-9; D-2; and BM-3-8.

AFSCME and the City were parties to a collective bargaining agreement that was effective by its terms from July 1, 2002 to September 30, 2006. On June 12, 2007, AFSCME and the City executed a Memorandum of Agreement (MOA) containing the terms of a successor agreement. The stated duration of the MOA was from October 1, 2006 to September 30, 2007 and October 1, 2007 to September 30, 2010. The MOA was signed by both City and AFSCME representatives, including the City's Director of Labor Relations, John Dunlap, and Local 1526 President Elissa Cadillic. The first paragraph of the MOA states that it "is conditioned upon ratification of the union membership and approval of the Mayor as well as approval of the City Council." The bottom of each page of the MOA states, "Tentative Agreement Subject to Ratification and Approval."

Members of Local 1526 ratified the MOA on July 14, 2007. On July 31, 2007, Mayor Menino forwarded a request to fund the collective bargaining agreements to the City Council, who approved the request on August 1, 2007. On August 14, 2007, Mayor Menino signed both the 2006-2007 and 2007-2010 MOAs, which fully incorporate all of the terms agreed to in the June 12, 2007 MOA.

*The Former Assistant Principal Accountant, Richard Campagna*

The Library's Accounting Office has included the title of Assistant Principal Accountant (APA) since at least 1975. Richard Campagna (Campagna) served as the APA from 1979 until 2006, when he retired. From 1976 to 1979, the APA was classified at pay grade C-10, in the PSA's bargaining unit. When Campagna assumed the position in 1979, the City reclassified it as a C-9, thereby placing it in AFSCME's unit. In or around 1981, under conditions that the City and PSA dispute, the City reclassified the APA title as a P-3, thereby returning it to the PSA. The title remained in the PSA's unit until Campagna's retirement in March 2006.<sup>6</sup> At that point, under circumstances that are also disputed, the City regraded and reclassified the position as an Accountant BC-9, and put it back in AFSCME's unit. The City posted the 2006 BC-9 Accountant position on June 30, 2006 and hired Eunice Andrade (Andrade) to fill it sometime in early 2007.

*Accountant - Lai Fong Bruns*

In 2002, AFSCME filed a compensation grade appeal on behalf of bargaining unit member Lai Fong Bruns (Bruns), who was employed in the City's Accounting Department as an Accountant BC-7. The City and AFSCME settled the grade appeal by upgrading Bruns's job content and reclassifying her as a BC-9 Accountant.

3. Article XX of the AFL-CIO Constitution provides an internal union mechanism through which affiliates of the AFL-CIO can seek the assistance of the AFL-CIO to resolve inter-union contests to represent certain groups of employees.

4. The Board's jurisdiction is uncontested.

5. In the PSA unit, the letters before employees' grades stand for the following: P=Professional; M=Mechanical; C=Clerical; and LA = Library Assistant. AFSCME

bargaining unit members are graded the same way, except that at some unspecified date, AFSCME asked that a B be put before AFSCME bargaining unit positions to avoid confusion with PSA positions. In addition, AFSCME represents positions in the Development or "D" pay grade.

6. The PSA unsuccessfully sought to upgrade the position to a P-4 in 2000.

tant. In its response to the City's petition in Case No. CAS-07-3692, the PSA states that it was not advised of the upgrade agreement or of the additional duties given to Bruns's position until May 2007.

*The PSA Grievance/Arbitration award*

In December 2006, the PSA filed a grievance over the City's reclassification of Campagna's former APA position from a Grade P-3 to a Grade BC-9. The grievance proceeded to arbitration and, on September 13, 2007, the arbitrator ruled that the City had violated Article XI, Section 5<sup>7</sup> of its agreement with the PSA by reclassifying and regrading the 2006 BC-9 Accountant position without satisfying its obligations under the PSA's collective bargaining agreement. The arbitrator ordered the City to restore the *status quo ante* by restoring the position's former title and grade (APA, P-3) and ordered a make-whole remedy.<sup>8</sup> With respect to future efforts by the City to modify this position, the arbitration award states:

If the Library wishes, after the restoration of the status quo ante, it may provide proper notice to the PSA of its desire to update the job content of the position, which Campagna had vacated, potentially resulting in a reclassification into a different pay grade that might place the position within a different bargaining unit. After that notice is given, and any discussion as timely requested by the PSA has been completed, the Library may in good faith amend the job content of that position and may reclassify the position into a new pay grade so long as it does so in a manner consistent with the updated job content. If the job content and corresponding pay grade so warrant, the position may be moved by the Library into a different bargaining unit, consistent with its properly adjusted pay grade.

Discussing the Division's role in this matter, the Arbitrator stated:

The PSA suggests that ultimately, the [Division] will have the opportunity to determine the proper unit placement of the position in question. That may be so, if the parties after compliance with Article XI, Section 5 of the agreement, remain in disagreement about the proper bargaining unit placement of the updated position.

On February 6, 2008, the PSA and the City entered in an agreement implementing this award. This agreement reflects that, as of November 23, 2007, the City reclassified the 2006 BC-9 Accountant as an APA, Grade P-3. The Agreement also described the specifics of the make-whole remedy.

*The AFSCME Grievance/Arbitration Award*

On January 4, 2008, after the City complied with the PSA arbitration award, AFSCME filed the following grievance:

The Library is violating the CBA [between the City and AFSCME] by deeming Ms. Andrade a "PSA" member while she is continuing to perform AFSCME job duties and as such is entitled to all AFSCME contractual benefits.

The grievance proceeded to arbitration, where the arbitrator ruled, as a threshold matter, that the grievance was not arbitrable. In particular, the arbitrator ruled that AFSCME has no standing to file a grievance on behalf of an employee who is not part of AFSCME's bargaining unit and for whom it is not the exclusive bargaining representative. In so holding, the Arbitrator concluded that the earlier award had "nullified and voided the actions the City had taken in reclassifying the [APA] and moving into AFSCME's unit."

Opinion

A unit clarification petition is the appropriate procedural vehicle to determine whether newly-created positions should be included or excluded from a bargaining unit or to determine whether substantial changes in the job duties of existing positions warrant either their inclusion or exclusion from a bargaining unit. *Sheriff of Worcester County*, 30 MLC 132, 136 (2004) (citing *North Andover School Committee*, 10 MLC 1226, 1230 (1983)). Further, a unit clarification petition is appropriate if the outcome sought by the petition is "[c]learly supported by an apparent deficiency in the scope of the existing unit and must be, at least arguably, within the realm of what the parties intended when the unit was first formulated." *Sheriff of Worcester County*, 30 MLC at 136-7. However, the Board will not allow a petitioner in a unit clarification proceeding to accomplish what it cannot gain at the bargaining table. *North Andover School Committee*, 10 MLC at 1230.

With these principles in mind, we turn first to the City's petition in Case No. CAS-07-3692. The City filed this petition in April 2007 to ascertain the appropriate unit placement of the BC-9 Accountant position that it created in December 2006. Five months later, an arbitrator issued an award ordering the City to restore the position to the PSA's bargaining unit, with its former title and grade. The City fully complied with this order, and the restored APA position has remained in PSA's unit since November 2007. The City has taken no steps to reclassify or upgrade the job content of the restored position since that date. Under these circumstances, a CAS petition is not the appropriate procedural vehicle to examine either the appropriate unit placement of the 2006 BC-9 Accountant or the restored P-3, APA position.

The Board will not examine the appropriate unit placement of the 2006 BC-9 Accountant because, as a practical matter, that position no longer exists by operation of the arbitration award and the parties' agreement implementing that award. The Board generally does not take up unit clarification petitions for positions that are unfilled unless the parties to the petition can stipulate as to the job duties of the position that are material to the questions raised in the petition. *Upper Cape Cod Regional Vocational Technical School Committee*, 9 MLC 1503, 1506-7 (1982). There are no such stipulations before us. In any event, all of the City's arguments that the 2006 Accountant BC-9 position should be accreted to AFSCME's

7. This provision states:

Prior to the Library's making a decision not to fill a vacancy within the bargaining unit or a decision to reclassify a vacant bargaining position outside the bar-

gaining unit, the Library shall notify the Association of the vacancies in question and afford the Association an opportunity to discuss such vacancies.

8. AFSCME attended this arbitration but was not permitted to intervene as a party.



unit were based on its claim that this position was a newly created position that was fundamentally different from Campagna's P-3 APA position. Those arguments are no longer valid in light of the events that occurred after the petition was filed.

In addition, under the criteria set forth above, this petition is not the appropriate vehicle to examine the unit placement of the P-3 APA title because the City reestablished this position pursuant to an arbitrator's order to restore the status quo. By definition therefore, it is not a new or changed position. Furthermore, nothing in the record suggests that the continued inclusion of this position in the unit creates an apparent deficiency in the scope of that unit.

Finally, as the Union points out, it has been over two years since the City restored the P-3 position to the PSA's unit and the City has taken no steps to reclassify it or change its job content in accordance with the contractual procedures set forth in its Agreement, as construed in the award. We agree with the arbitrator that, if the City seeks to reclassify the APA position into another bargaining unit, it may do so by filing a CAS petition only after it has complied with its contractual obligations in this regard. *North Andover School Committee*, 10 MLC at 1230. For this reason and those set forth above, we DISMISS the City's petition in Case No. CAS-07-3692.<sup>9</sup> We also dismiss that aspect of CAS-07-3708 that seeks to restore Campagna's former position to the PSA's unit because the arbitration award and subsequent agreement have rendered this aspect of the PSA's petition moot.

The remainder of the PSA's petition in Case No. CAS-07-3708 seeks to accrete the BC-9 Accountant position that the City created in 2002 to the PSA unit. We dismiss this aspect of the PSA's petition on grounds of contract bar. The contract bar rule is set forth in Section 14.06(1)(b) of the Division's regulations. It states that:

Except for good cause shown, no petition seeking clarification or amendment of an existing bargaining unit shall be entertained during the term of an existing valid collective bargaining agreement, unless such petition is filed no more than 180 days and no fewer than 150 days prior to the termination date of said agreement, provided that a petition to alter the composition or scope of an existing unit by adding or deleting job classifications created or whose duties have been substantially changed since the effective date of the collective bargaining agreement may be entertained at other times.

456 CMR 14.06(1)(b). The purpose of this rule is to establish and promote the stability of labor relations and to avoid instability in labor agreements, in part, by ensuring that both labor and management know which positions are included in the bargaining unit covered by their collective bargaining agreement. *Town of North Andover*, 30 MLC 75, 76 (2003) (citations omitted).

In support of its claim that CAS-07-3708 is contract barred, AFSCME argues that the successor Memorandum of Agreement that it executed with the City on June 12, 2007 barred the PSA's petition, which was filed on August 8, 2007. In response, the PSA argues that because the Mayor did not sign the final MOA until

August 14, 2007, its petition is timely. The PSA further argues that AFSCME waived its right to assert the contract bar by agreeing, as settlement of the Article XX dispute, to litigate its claims at the Division and by failing to raise contract bar issues at any point prior to the motion to dismiss. AFSCME disputes this assertion, noting that it specifically reserved its rights to raise the contract bar argument when it entered into the Article XX settlement. The PSA does not refute this point.

For a collective bargaining agreement to bar the processing of a petition, the evidence must establish the existence of a complete and final agreement signed by all parties prior to the filing date of the rival petitions. *Town of Westminster*, 23 MLC 153, 155 (1996). To be complete, an agreement must contain substantial terms and conditions of employment and may not be conditioned upon further negotiations. *Id.* (citing *Town of Burlington*, 14 MLC 1632, 1635, n. 10 (1988)). If an agreement is contingent upon ratification, it must be ratified before the rival petition is filed for the Commission to determine that the agreement is final. *Town of Westminster*, 23 MLC at 155 (citing *Commonwealth of Massachusetts*, 7 MLC 1825, 1829-1839 (1981)). Informal memoranda or even exchanges of telegram may suffice to show the contractual terms, so long as the evidence establishes the existence of a complete and final agreement to which all parties have acquiesced by their written signatures or initials. *Town of Burlington*, 14 MLC at 1635.

In this case, the MOA signed by the City and AFSCME on June 12, 2007 contains all of the contractual terms that made it into the final executed document on August 14, 2007. Even though the June 12, 2007 MOA was made expressly contingent on Union ratification, Mayor approval and City Council funding, the documents submitted by AFSCME demonstrate that all three of these contingencies occurred on or before August 1, 2007, the date the City Council approved the funding. We conclude that as of that date, a contract was in place that sufficiently barred the processing of Case No. CAS-07-3708, which was filed on August 8, 2007. Therefore, except for good cause shown, the Board's contract bar rule requires dismissal of this petition unless the facts establish that: 1) the 2002 BC-9 Accountant position is newly created, or 2) its duties have substantially changed since August 1, 2007. There is no such evidence in this case.<sup>10</sup>

Nor has the Town otherwise demonstrated good cause for the Board to waive the contract bar rule in this case. Although this exception is applied rarely, the Board has found good cause to waive the contract rule where a different party had previously filed a unit clarification petition over the same position and that petition was pending during the term of the contracts affected by resolution of the unit placement issue. *Chief Justice of the Administration and Management of the Trial Court*, 29 MLC 10, 13-14 (2002). That exception does not apply here however. Although Case No. CAS-07-3692 was pending during the course of AFSCME's successor negotiations, that petition, unlike the PSA's petition in

9. In its Motion to Dismiss, AFSCME argued that Case No. CAS-07-3692 should be dismissed on grounds of contract bar. Because we have dismissed this petition on other grounds, we do not address AFSCME's argument with respect to the City's petition.

10. Although the PSA claims that it was not notified of the existence of the 2002 Accountant BC-9 position in 2002, its submissions reflect that it learned about this position in May 2007, before the effective date of the MOA.

CAS-07-3708, did not raise the issue of the unit placement of the 2002 BC-9 Accountant position. Rather, just days after AFSCME and the City finalized a successor contract, the PSA filed Case CAS-07-3708 seeking to remove this position from AFSCME's unit. Because AFSCME and the City had counted on this position remaining in AFSCME's unit while they were negotiating a successor contract, allowing the petition in CAS-07-3708 to go forward would run counter to the purpose of the contract bar rule—to avoid instability in labor agreements. *Town of North Andover*, 30 MLC at 76.

Finally, the Board does not find that AFSCME has waived its right to raise the issue of contract bar. AFSCME apparently reserved its right to do so at the time it settled the Article XX proceeding. In ad-

dition, the fact that AFSCME did not raise this issue when the City first filed CAS-07-3692 does not mean that it was foreclosed from doing so when the PSA filed CAS-07-3708, particularly since only that petition concerns 2002 BC-9 Accountant. The Board therefore concludes that the Case No. CAS-07-3708 is barred with respect to the 2002 BC-9 Accountant and **ALLOWS AFSCME'S** motion to dismiss.

Conclusion

For the reasons stated above, both unit clarification petitions are **DISMISSED**.

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