

## State of New Hampshire

### PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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Londonderry Executive Employee Association

Petitioner

v.

Town of Londonderry

Respondent

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Case No. M-0781

Decision No. 2001-118

### REPRESENTATIVES

#### For the Londonderry Executive Employee Association:

Vincent A. Wengers, Jr., Esquire

#### For the Town of Londonderry:

Mark T. Broth, Esquire and William Wardwell, Labor Relations Specialist

#### Also Appearing as Witnesses:

Joseph E. Ryan, Police Chief  
Troy Brown, Acting Town Manager  
Janusz Czyzowski, Director of Public Works  
Kevin Coyle, Prosecutor

### BACKGROUND

The Londonderry Executive Employee Association, (hereinafter referred to as the "Association") filed a Petition for Certification with the Public Employee Labor Relations Board (hereinafter referred to as the "PELRB") on August 3, 2001 proposing creation of a single bargaining unit comprised of the heads of various departments and executive employees within the Town of Londonderry (hereinafter referred to as the "Town"). On that same day, the PELRB forwarded a "Notice of Filing" to the Acting

Town Manager. On August 17, 2001 counsel to the Town filed its Exception to the Petition for Certification. The parties next received a "Notice of Hearing" from the PELRB establishing an evidentiary hearing for October 19, 2001.

A hearing on the matter was held at the PELRB offices before the undersigned hearing officer on October 19, 2001. Both parties were represented and allowed to present evidence, examine witnesses and make their arguments. At the commencement of the hearing, the Town, by oral motion of its counsel, withdrew its exception objecting to the inclusion of the Administrative Services Director on the specific basis of having any alleged supervisory authority over others within the unit. Without objection, the Hearing Officer accepted the withdrawal of that specific basis for exclusion of the Administrative Services Director. Based upon the entire record, the Hearing Officer makes the following findings of fact:

#### FINDINGS OF FACT

1. The Town of Londonderry ("Town") employs persons to carry out the functions of municipal government within the Town of Londonderry and therefore is a public employer within the meaning of RSA 273-A:1 X.
2. The Londonderry Executive Employees Association ("Association") seeks to become the exclusive bargaining representative of a proposed bargaining unit comprised of certain employees of the Respondent who perform work for the Town of Londonderry and listed by position as follows:

Chief of Police	Public Works Director
Fire Chief	Executive Secretary-Police
Administrative Services Director	Prosecutor-Police
Building Inspector	Director of Planning & Economic
Town Assessor	Development
Director of Cable Services	Elderly Affairs Coordinator
Finance Director	Assistant Public Works Director
Recreation Director	Family Mediation Coordinator

3. All subject positions are employed by the Town of Londonderry and are paid subject to a common pay plan. They are all involved in the common mission of the delivery of municipal services to the citizens of Londonderry by the Town of Londonderry from points of delivery within the jurisdiction of the Town. The proposed positions operate within a single, interrelated organizational unit as depicted on the organizational chart included as part of the Town's Administrative Code (Petitioner's Exhibit #1). The persons employed in these positions are subject to the directives of the Town Manager as the head administrator of the Town acting within the parameters of policy established by the Town Council. These positions are hired by the Town Manager and are subject to removal by him or her.

4. Joseph Ryan has been employed by the Town for 23 years and has been its Chief of Police for the last six years and testified that he was familiar with the structure and organization of the Town's administration. He is also familiar with its labor relations history as it related to the existence of the several bargaining units for the various groups of Londonderry employees. He testified that a bargaining unit comprised of employees from several municipal departments or divisions already existed entitled the "Londonderry Administrative Employees Association". Chief Ryan also testified that the 15 proposed positions and the positions of Town Manager and Secretary to the Town Council were the only non-unionized employees within the Town. He made a brief reference without further explanation in his testimony that the position of Assistant Director of Public Works and Engineering was specifically excluded from the existing Londonderry Administrative Employees Association at the time he was hired.
5. All proposed positions are subject the Town's "Personnel & Compensation Policy for Non-Represented Employees" (Petitioner's Exhibit #2) which, among other items, provides for a common system of compensation for these positions and was "intended to assure uniformity of treatment for every non-represented Town employee". (Id. Section I, B.) Police Chief Ryan provided testimony that the formulation of policies contained within this document were discussed between the Town Manager and those employees covered. He also testified that the document incorporates much of the structure and content of a collective bargaining agreement negotiated by the Town Manager with the aforementioned Londonderry Administrative Employees Association (LAEA).
6. All of the proposed positions have been historically treated as a unit for purposes of wages and other benefits by the Town and no credible evidence was provided that would indicate that the newly created position of Elderly Affairs Coordinator, yet to be filled with an employee, would not otherwise be similarly treated.
7. Troy Brown is the Administrative Services Director and also is acting Town Manager at the present time. He testified that as the Administrative Services Director he does not supervise the heads of any of the departments listed in his group, namely the Cable Coordinator, Recreation Director, Library Director or Family Mediation Coordinator. He further testified that they each are responsible for formulating their own division's budget and submitting it to the Town Manager. He does not supervise any other position proposed for inclusion in this bargaining unit. As Administrative Services Director he prepares and presents his own budget to the Town Manager.
8. The Family Mediation Coordinator is a year round position. There have been two persons who have held the position over the course of the last twelve years. Each of them held it for approximately six years. The Town withdrew

its contention that this position was not a Town employee and the parties thereafter stipulated that this position is a Town employee. This is a less than full time position that is responsible for handling referrals received from the courts, the police department and probation workers. The Family Mediation Coordinator also recruits and arranges appropriate training for volunteers who assist the target constituency. No set office hours are kept within the Town Hall, but rather most work is coordinated from the employee's home. While the employee does not have an office within the Town Hall, she does report and is responsible to the Town Manager. She does not supervise any other town employees. This employee prepares and presents her own budget to the Town Manager.

9. The Recreation Director position has been held by the same person for eighteen years. The incumbent is also employed as a full time assistant principal in the school system. Although it appears that the responsibilities of the office are greater in the summer months than at other times of the year, there is sufficient testimonial evidence of the Police Chief and the Administrative Services Director to establish it functions throughout the year. Additionally, the Administrative Services Director, Troy Brown, testified that the job is not a seasonal position. Examples of non-summer responsibilities are the operation of the ski club, as testified to by Chief Ryan, and the indoor soccer league, as testified to by Mr. Brown. Further testimony indicated that the position averaged approximately fifteen hours per week over the year but that more hours were performed during the summer recreation season and fewer during the colder months. There was no weekly work schedule set by the Town. During other than the summer months, work is performed after school hours and on weekends. There is some contemplation by the Town Administration to combine this position with another position, e.g. Welfare Director, and make the position a full time position. However, it presently is a separate position funded by the Town. The incumbent does not operate out of an office within the Town Hall. The Recreation Director prepares and administers his own budget. The duties of the Recreation Director are to supervise all of the athletic activities within the Town.
10. The Assistant Public Works Director is a recent position that requires the employee to be a licensed engineer. His duties and responsibilities are governed by professional engineering standards and the Director leaves him to the application of these standards in the performance of his work. The Public Works Director and Chief of Police testified that this employee worked with the Public Works Director as part of a team. The Public Works Director characterized the relationship between the two as collegial more than supervisory. The written job description indicates that the Assistant reports to the Director "who provides policy guidance, assigns areas of responsibility and evaluates performance." (See Petitioner's Exhibit #3). The job description and testimony also indicates that the Assistant Director assists in the management of the department and the technical nature of the position. While

the Director's performance evaluation of this position constitutes only a recommendation to the Town Manager, it does allow him to recommend a wage increase. The Director also testified that he has the authority to recommend discipline of the Assistant Director to the Town Manager.

11. The Elderly Affairs Coordinator is a new position that is funded but not filled at the time of the petition or the time of hearing. The responsibilities and duties have not been specified yet nor have the hours been established. There is some discussion within the Town Administration that it could be combined with another unnamed position, but until such time it is presently funded at \$18,000.00. (See Respondent's Exhibit #2). This position would be covered under the existing personnel plan for non-represented employees if it were presently filled. While the Town is required to develop a job description for all the positions in this proposed unit, it has not yet done so for this position.
12. The position of Police Prosecutor reports to the Chief of Police and operates under the general supervision of the Chief. Over the last six years, the Chief has performed an annual employee evaluation of the Police Prosecutor. This evaluation is conducted in consultation with officers who testify at court and, if the Chief feels it necessary, with judges, the county attorney, and the Attorney General's Office as they are in a better position to evaluate the prosecutor's performance. Any evaluation is sent to the Town Manager and may be accompanied with a wage increase recommendation. The Police Chief does not have the authority to grant a wage increase to the prosecutor. The Chief testified that his role is one of performing an oversight function over the prosecutor. He indicated that he would not tell the Police Prosecutor how to prosecute a case, procedurally or in substance. He considers the prosecutor self-directed in the performance of his work.
13. Kevin Coyle is the Police Prosecutor and testified that he has worked for two police chiefs and neither has sought to interfere with his work. While he may consult with the Police Chief on various cases, he takes his prosecutorial direction from the Attorney General and the County Attorney. He is not a sworn police officer. He reports to the Police Chief and has had performance evaluations performed by the chief for the last five years. He testified further that his position is subject to the hiring and firing authority of the Town Manager.
14. The position of Executive Secretary reports to the Police Chief as his administrative support staff. She takes direction from the Chief of Police and he undertakes a performance evaluation of her that is submitted to the Town Manager. The Police Chief's authority to discipline is limited to a written reprimand. Barring an emergency situation, he has no authority to suspend this employee. He does not have authority to demote, terminate or hire an employee in this position. That authority is reserved to the Town Manager.

15. Janusz Czyzowski is the Director of the Public Works Department . He testified that he does not supervise the Assistant Director of Public Works and Engineering. He views the relationship with the assistant as a collegial relationship and states that the assistant performs the responsibilities of the engineering department within the Department of Public Works and Engineering with little supervision from him. He does supervise project completion and the work ethics of the Assistant Director. Otherwise, the performance of the position is guided by engineering principles implemented by a professionally licensed engineer. He undertakes a performance evaluation of the assistant and can make a recommendation to the Town Manager for a pay increase. He can recommend discipline of the Assistant Director to the Town Manager but has no authority to administer the discipline himself.
16. There is insufficient evidence to establish that any of the proposed unit members stands in a confidential relationship with the Town Manager or is involved in confidential matters related to labor relations that involve members of the proposed group. In the absence of an incumbent Town Manager at the time of hearing, the Administrative Services Director was acting in that capacity.
17. No position named in the Petition for Certification testified against inclusion in the proposed bargaining unit.

### **DECISION AND ORDER**

The legislative mandate of the Public Employee Labor Relations Board (PELRB) includes, *inter alia*, the determination of appropriate bargaining units. The PELRB has the responsibility for deciding whether a public employee collective bargaining unit is appropriate for certification, and, if so, the composition of that bargaining unit. RSA 273-A:8. Each bargaining unit is to be reviewed on its own circumstances on a case by case basis. Appeal of Town of Newport, 140 N. H. 343, 352 (1995). "Ultimately, the question is whether there exists a mutuality of interest in working conditions such that it is reasonable for the employees to negotiate jointly." University System v. State of New Hampshire, 117 N. H. 96, 100 (1977), see also Appeal of the University System of New Hampshire, 120 N. H. 853, 855 (1980).

The Petitioner requests the approval of the formation of a new bargaining unit representing fifteen employees who presently are referred to collectively as "Non-Represented Employees." (Petitioner's Exhibit #2). The position titles include department heads, division heads and three other positions, namely: Assistant Director of Public Works and Engineering, Executive Secretary and Police Prosecutor. (Finding of Fact #2). Of the fifteen positions sought to be included in the new bargaining unit, the Town asserts that a community of interest does not exist generally among the positions and it has made additional specific objections to the inclusion of the following positions:

Administrative Services Director, Executive Secretary-Police, Police Prosecutor, Family Mediation Coordinator, Assistant Public Works Director, Recreation Director, and the Elderly Affairs Coordinator.

This analysis begins with the consideration of whether or not a community of interest exists among the proposed members of the bargaining unit. Statutory language and administrative rules provide some guidance as to some criteria that may contribute to a determination of the existence of a "community of interest. (See RSA 273-A:8 I and Pub 302.02 (b). Such a consideration in this case reveals that all employees included in the petition are employed by the Town of Londonderry and perform their work within the same organizational unit within the Town of Londonderry as depicted on the chart in the Town's "Administrative Code" (Petitioner's Exhibit #1). All of these proposed members are subject to the conditions of work as outlined in the personnel rules and the compensation provisions contained within the Town's "Personnel & Compensation Policy for Non-Represented Employees" (Petitioner's Exhibit #2). That policy was adopted on January 12, 1998 and continues in effect, subject to revisions made on July 31, 2000. It is the stated purpose of this written policy document to "assure uniformity of treatment" of the employees covered therein. (*Id.*, Section I, B.)

Since this action involves the formation of a new bargaining agreement, these proposed members do not have a history of collectively bargaining with the Town. However, credible testimony was provided by Police Chief Joseph Ryan that the formulation of policies incorporated in this personnel plan were the subject of discussion between the Town Manager, himself and other of those employees to be covered by its terms. (Finding of Fact #5). A review of the Town's Administrative Code reveals an organizational scheme in which all of the proposed members are subject to the directives of the Town Manager as the head administrator acting within the policy parameters established by the Town Council. (Finding of Fact #3). Other benefits accruing to the proposed members are also embodied in that personnel plan. Through the testimony in favor of the proposed bargaining unit by the Police Chief, Administrative Services Director, Director of Public Works, and the Police Prosecutor, a sufficient and uncontroverted, self-felt community of interest was expressed. There was no testimony offered that could be interpreted as contradicting the support the proposed bargaining unit has from those it intends to include. No position named in the Petition for Certification testified against inclusion in the proposed bargaining unit. (See also Finding of Fact #17).

Based upon all of the factual circumstances that appear above, a sufficient community of interest is found to exist among all of these proposed members with the exception of the Executive Secretary-Police. The evidence presented does not support the inclusion of this position among the others listed of which it can be said perform a significantly higher level of administrative work in furtherance of the delivery of municipal services to the Town's citizens and other members of the public. The testimony provided indicates that the duties of the other positions involve the application of professional norms or the exercise of professional discretion, the exercise of budgetary discretion in its formulation, the executive planning and administration of a department or division, or the coordination of interdepartmental operations. When such testimony

concerning the various positions is weighed with the written responsibilities and duties of the several positions that can be said to be of a "Department/Division Head" status, (See Administrative Code, Petitioner's Exhibit #1), it becomes obvious that the Executive Secretary-Police does not share these characteristics.

The analysis then proceeds to weigh whether or not specific exceptions affecting certain positions call for their exclusion from the proposed unit. Specifically, the Town has requested that the Administrative Services Director be excluded because he stands in a supervisory position to the Recreation Director, Elderly (Senior) Affairs Coordinator, and the Family Mediation Coordinator. The Town also asserts that this position should be excluded because of the existence of a confidential relationship of this position with the Town Manager and Town Council. For purposes of consideration of the formation of a bargaining unit, the present fact that there is no incumbent Town Manager and that the person holding the position of Administrative Services Director is temporarily acting as Town Manager does not control. The Town did not present any witnesses as part of its own case and did not otherwise sufficiently meet its burden through cross-examination or the submission of exhibits to establish that the Administrative Services Director is a "confidential" employee under RSA 273-A:1, IX(c).

Since its creation, the PELRB has retained the primary authority to define and interpret the term "supervisory" in the context of collective bargaining. Department of Revenue Administration v. Public Employee Labor Relations Board, 117 N. H. 976 (1977); Appeal of the City of Concord 123 N. H. 256 (1983). When the PELRB is asked to examine exclusions based upon a supervisory relationship, it is guided, in part, by the standard expressed by the court in Appeal of East Derry Fire Precinct, 137 NH 607, 611 (1993) which provides that "A supervisory relationship exists when the supervisor is genuinely vested with significant supervisory authority that may be exerted or withheld depending on his or her discretion." Further guidance provided by the court indicates that the PELRB should consider the employee's authority to evaluate other employees, the employee's supervisory role, and the employee's disciplinary authority as well as other factors. Ibid. at 610. (See also, Appeal of City of Manchester, Slip Opinion, Docket # 98-684, issued October 29, 2001).

The court has on occasion reviewed specific facts and concluded differently from the PELRB as to whether circumstances in a particular case created the level of supervisory authority vested in employees performing certain supervisory functions that would elevate them to that level of "supervisory authority involving the significant exercise of discretion" contemplated by RSA 273-A:8 II. Appeal of E. Derry Fire Precinct, 137 N. H. 607 (1993); Appeal of Town of Newport, 140 N. H. 343 (1995); and In re Town of Stratham, 144 N. H. 429 (1999). Neither the PELRB nor the Court has ignored nor abandoned the underlying purpose served by this separation, which is the avoidance of "conflicts between the two groups because of the differing duties and relationships which characterize each group." Ibid. Appeal of E. Derry Fire Precinct, at 610, citing Appeal of Manchester Bd. of School Comm., (1987) 129 N. H. 151,153. Thus, both an examination of the degree of significance of the exercise of discretion and the propensity to create conflict within the bargaining unit because of the differing duties



and relationships should also be considered when determining the exclusion of certain employees from a bargaining unit that otherwise would be appropriate for their inclusion.

The instant matter involves certain persons employed in the line management of various municipal services, namely cable services, recreational services, services for the elderly, and family mediation services and the relationship each has to the Administrative Services Director. It does not present the circumstances that were at issue in either of the firefighter/fire officer cases, Appeal of University System of N. H., 131 N. H. 368 (1988) or Appeal of E. Derry Fire Precinct, 137 N. H. 607 (1993). In Appeal of University System of N. H., 131 N. H. 368 (1988) those cast in supervisory roles participated in evaluations where their evaluation was given weight in granting merit pay increases and in terminating new employees. Supervisory duties included assigning work, ensuring shifts were fully staffed and taking command at the scene of a fire. Likewise in the East Derry case, the evaluations undertaken by those fire officers influenced the hiring and terminating firefighters and included the authority to send unfit firefighters home. The evidence presented in the instant case does not disclose a genuine vesting of supervisory authority involving the significant exercise of discretion to the Administrative Services Director over these positions. His testimony that he did not supervise any of these other positions and that they each prepared and supervised their own budgets and submitted them to the Town Manager was both credible and uncontroverted. (Finding of Fact #7). There was no evidence presented that he undertook any performance evaluations of these division heads nor exercised any discipline over them. The Administrative Services Director is not deemed a "supervisor." Not having been found either a supervisor nor a confidential employee, the Administrative Services Director is therefore not excluded from eligibility in the proposed bargaining unit.

The Town objects to the inclusion of the Assistant Director of Public Works & Engineering into the proposed bargaining group on the grounds that he is supervised by the Director of that department, Janusz Czyzowski. Both the Director and the Police Chief testified regarding the working relationship of the Assistant Director to the Director. Of the two, the testimony of the Director of Public Works & Engineering is deemed more accurate because of his greater familiarity of the workings within his own department. Mr. Czyzowski testified that this position requires the incumbent to hold a professional engineering license. This department apparently has two functions, public works and engineering. The performance of the engineering function is guided by professional engineering principles more than by any standards established by the Town. (Finding of Fact #11). Mr. Czyzowski testified that he works in a collegial manner with the Assistant Director, with the latter responsible for all undertakings within the engineering department subject to the Director's supervision of "project completion and work ethics." The Director's relevant supervisory status *vis à vis* the Assistant Director consists of undertaking a performance evaluation and having the authority to make recommendations to the Town Manager on issues of a wage increase or discipline. As this position involves the performance of highly technical tasks and the application of professional engineering principles, it is believed that the performance evaluation recommendations of the Director of Public Works & Engineering to the Town Manager would effectively be determinative on the issue of discipline or termination even though

the final authority to implement any such recommendation rests with the Town Manager and not the Director. One of the underlying purposes for maintaining a separation between certain ranks of employees is to avoid conflicts developing between the two because of inclusion in the same bargaining unit. Where one position has the responsibility to "assist" in the management of the department then the propensity of conflicts developing between the two that could affect the delivery of services may be potentially acute. In this particular circumstance, and lacking any testimony of the Assistant Director or introduction of the actual evaluation document, or language existing in any relevant job description for the Assistant Director or the Director that would mitigate the apparent authority in the Director to exercise significant supervisory discretion over the Assistant, the Assistant Director of Public Works & Engineering is excluded from the proposed unit.

It should be noted that there was some testimony to the effect that the Assistant Director holding this position was specifically excluded from membership in the Londonderry Administrative Employees' Association at the time of his hiring. (Finding of Fact #4). That testimony was not comprehensive and does not make it apparent whether or not this person or that other bargaining unit's representation rights under RSA-273-A were unlawfully abridged in any way by a separate arrangement or contract. In fact, the Town's job description for this position, expressly provides for salary and benefits to be covered "by Town's Personnel and Compensation Policy *or* appropriate bargaining unit". (emphasis added) (Petitioner's Exhibit #3). However, while the instant decision finds that the Assistant Director position is not appropriate for inclusion in the proposed unit, it is suggested that the parties review the decision or agreement that allegedly lead to its exclusion from membership in any other existing bargaining unit.

The Town raises objections to the positions of Family Mediation Coordinator, Recreation Director and Elderly Affairs Coordinator on the basis that they are casual, irregular or on-call employees. The operative statute, RSA 273-A:1, IX(d), in relevant part, provides for the disqualification of certain employees from inclusion in a bargaining unit because they are not considered a "public employee." This disqualification and consequent exclusion from a bargaining unit attaches to employees who are "employed seasonally, irregularly or on call." None of these three positions fall into those categories for the reasons that follow.

There is no evidence that either the Family Mediation Coordinator or the Elderly Affairs Coordinator work only during any designated "season" whatever period of days, weeks or months that term may include. There was evidence that the present Family Mediation Coordinator is a year round position. (Finding of Fact #8). While the Recreation Director's duties are more intensive in the summer than at other times of the year, the evidence is that he works throughout the year. (See Finding of Fact #9). To the extent that the Elderly Affairs Coordinator position is yet to be filled by an individual, there is no contrary testimony in the record or other evidence offered by the Town to indicate that this employee would not have responsibilities throughout the year.

The term "irregular" has been defined as "lacking continuity or regularity of occurrences, activity or function" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1196 (unabridged ed. 1961) and "on call means ready to respond to a summons or command" *Id* at 318. (Cited in Appeal of Town of Stratham (1999) 144 N.H. 429,431. There is no credible evidence to establish that either of these terms apply to the three subject positions.

The Family Mediation Coordinator position has been in existence for twelve years and over those years there have only been two persons who have held the position. Each person held the position for approximately six years. Although less than a full time position, among the duties this employee performs is the continual identification and recruitment of service volunteers and the maintenance of a network of those volunteers, the arrangement of training for volunteers, the coordination with the courts, the police department and probation workers, and the formulation and presentation of a departmental budget. (Finding of Fact #8). Evidence that this employee works from home and does not maintain an office or set office hours within the Town Hall is not sufficiently persuasive to establish that employment within this position is either irregular or that the employee is on call as defined above.

The same person has held the part time position of Recreation Director for eighteen years. There are responsibilities attached to that position throughout the year as this employee has the duty of supervising all of the athletic activities within the Town of Londonderry. (Finding of Fact #9). The level of activity varies throughout the year. The record indicates that the Recreation Director works an average of fifteen hours weekly and prepares and administers his own budget. (Finding of Fact #9). Evidence that this employee works out of his home and does not operate out of an office within Town Hall and performs his work sometimes on weekends, sometimes after school hours and in some seasons more often than in others is also insufficiently persuasive to establish that the employment within this position is either irregular or that the employee is on call as defined above. Likewise, testimony that there may be some changes in the responsibilities, duties or hours of this position in the future may prove cause for a later modification petition but does not alter the appropriateness of this position for inclusion into the bargaining unit at this time. (Finding of Fact #9).

The same future consideration may apply to the position of Elderly Affairs Coordinator because there is testimony that specific duties and hours have not been set for this position and no one has been hired as of the time of the hearing. However, this new position has been created by the Town, presented to the Town Meeting and the funding has been approved by its citizens at the time of hearing. (Finding of Fact #11). The Town has the responsibility and the burden in the present case to prove that it is to be a seasonal, irregular or an on call position. Lacking such evidence, the position is included in the bargaining unit. In the future the Town may reorganize its delivery of senior services or amend the job duties from what constituted the position put before the Town Meeting, or combine its duties with those of another position. At that time the Elderly Affairs Coordinator may be employed only seasonally, or assigned duties in a manner that would have this position available only on call to its senior citizens. Then, in

that future event, there may be cause for a later modification petition but it does not prevent the inclusion of this position into the proposed bargaining unit at this time.

The last position requiring further examination for inclusion or exclusion from the proposed bargaining unit is that of the Police Prosecutor. The Town's basis for its request that this position be excluded is that he is the immediate subordinate of the Police Chief and that he maintains a confidential relationship with the Town and the Police Chief. The relevant language in the statute directs examination to whether or not the supervisory relationship between two positions proposed for inclusion in the same unit is characterized by "supervisory authority involving the significant exercise of discretion" (RSA 273-A:8 II) as stated earlier in this decision. The Police Prosecutor is not a sworn police officer but a licensed attorney who testified that he is subject to the direction of the Attorney General and the County Attorney in the prosecution of his cases. (Finding of Fact #13). While he may consult with the Police Chief regarding certain cases, the Police Chief does not supervise nor direct his prosecution of cases procedurally or substantively. (Finding of Fact #12). The Police Chief does not have hiring and firing authority over this position. (Finding of Fact #13). While the Police Chief conducts performance evaluations of the Police Prosecutor, the Police Chief testified that he performs an oversight function and that he considered the prosecutor self-directed in his work. The Police Chief testified that the performance evaluation he conducts is in consultation with officers that testify at court and, if he feels it necessary, with the judges, the County Attorney and the Attorney General as those individuals are in a better position to evaluate what it is that the Police Prosecutor does. (Finding of Fact #12). The Police Chief can make recommendations to the Town Manager regarding a wage increase for this position, but does not have the authority to grant any increase. The testimony of the Police Chief depicts loose supervision over the Police Prosecutor and does not rise to the level of significance contemplated in the statutory language nor under the circumstances presented in either Appeal of E. Derry Fire Precinct, 137 N. H. 607 (1993); Appeal of Town of Newport, 140 N. H. 343 (1995); or In re Town of Stratham, 144 N. H. 429 (1999).

Additionally, unlike the supervisory relationship existing in the Department of Public Works & Engineering discussed earlier in this opinion, here the responsibilities of the Police Prosecutor do not include the express responsibility to assist in the management of the department. The potential for conflict developing between the two positions that may affect the delivery of services is minimal. Also, the technical requirements of the Assistant Director's job places the Director in almost an exclusive position within the managerial hierarchy to evaluate job performance and attaches a weight to the Director's recommendations to the Town Manager as to employment, termination or discipline. By his own testimony and that of the Police Prosecutor, no such evaluative exclusivity or consequent weight is believed to attach to the Police Chief's recommendation for a wage increase for the Police Prosecutor.

The Town's objection to inclusion of the Police Prosecutor based upon the existence of a confidential relationship is not supported by any credible evidence. The Town did not present any witnesses as part of its case and did not otherwise sufficiently meet its burden to establish that the Police Prosecutor was a "confidential" employee

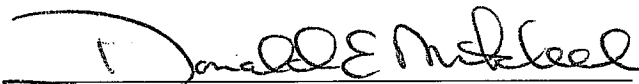
under the terms of RSA 273-A:1, IX(c). Therefore the Police Prosecutor is included in the proposed bargaining unit.

The bargaining unit to be submitted for certification shall consist of the following thirteen (13) positions:

Chief of Police	Public Works Director
Fire Chief	Prosecutor-Police
Administrative Services Director	Director of Planning & Economic
Building Inspector	Development
Town Assessor	Elderly Affairs Coordinator
Director of Cable Services	Family Mediation Coordinator
Finance Director	Recreation Director

So Ordered.

Signed this 20<sup>th</sup> day of November, 2001.

  
Donald E. Mitchell, Esq., Hearing Officer