



**State of New Hampshire**

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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Hudson Police, Fire & Town	*	
Supervisors' Association (HPFTSA)	*	Case No's. M-0637-1
	*	M-0637-2
Complainant	*	
	*	(Formerly Case No's. M-0623-5
v.	*	M-0623-6)
	*	
Town of Hudson	*	Decision No. 2003-045
	*	
Respondent	*	(Modification Petitions)
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APPEARANCES

Hudson Police, Fire & Town Supervisors' Association

Ray Mello, Esquire

Town of Hudson

Mark Broth, Esquire  
William Bagley, Esquire

BACKGROUND

The Hudson Police, Fire and Town Supervisors' Association (HPFTSA) filed two modification petitions on January 14, 2003, for the positions of Highway Department Supervisor and Assistant Fire Chief, respectively, seeking to have them included in the bargaining unit for which it is the certified bargaining agent. The Town filed its objections to the inclusion of each of these positions in the bargaining unit on February 5, 2003. Thereafter, both cases were consolidated for hearing before the undersigned hearing officer on April 9, 2003, at the PELRB's offices in Concord, New Hampshire.

At the commencement of the foregoing proceedings, the hearing officer advised the parties that there were multiple discrepancies between the bargaining unit certification on file with the PELRB (Case No. M-0637 most recently amended August 9, 2000) and the recognition clause of the CBA referenced in and appended to the Modification Petition. These discrepancies existed both as to inclusions and exclusions. (See CBA for the period July 1, 2002 to June 30,

2005.) In order to correct this inconsistency, and to be able to proceed with this hearing, the parties stipulated to the hearing officer that they would agree upon and submit a jointly agreed-to modification petition on or before the submission of their respective post-hearing briefs due to be filed on April 18, 2003. The stipulated modification and the HPFTSA's brief were filed on April 17, 2003. The Town's brief was filed with requisite copies on April 22, 2003.

In furtherance of proceeding with the hearing on the two petitions under consideration, the parties marked and asked to be admitted, without objection, the following exhibits:

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| 1. Job Summary, Highway Department Supervisor   | Jt. Ex. 1   |
| 2. Assistant Fire Chief Job Description, effective 3/15/01  | Jt. Ex. 2   |
| 3. Packet of 3 performance evaluations by Shawn Murray dated 10/02/02, 12/19/02, and 2/11/03 respectively | Jt. Ex. 3   |
| 4. Deputy Fire Chief Job Description, effective 12/15/97  | Assn. Ex. 1 |
| 5. Town-generated organizational chart of fire department   | Assn. Ex. 2 |
| 6. Organizational chart of Hudson Police Organization, 10/02  | Assn. Ex. 3 |
| 7. Police Captain Job Description, 3 pages  | Assn. Ex. 4 |
| 8. Letter, Shawn Murray to HPFTSA, dated Nov. 13, 2002  | Assn. Ex. 5 |
| 9. Extract, p. 2 from HPFTSA current CBA, Arts IV, V and VI.  | Assn. Ex. 6 |
| 10. Extract, p. 18 from HPFTSA current CBA, Art XXVI  | Assn. Ex. 7 |
| 11. Responsibilities sheet for Asst. Chief, Deputy Chief and Fire Marshal, Hudson Fire Dept., 1999        | Town. Ex. 1 |
| 12. Chain of Command General Order, ADMIN 41 5/01/02  | Town. Ex. 2 |
| 13. Chief Officer Incident General Order, ADMIN 42 7/14/02  | Town. Ex. 3 |

#### FINDINGS OF FACT

1. The Town of Hudson employs personnel in managerial and/or supervisory capacities below the level of department head in the various departments of that municipality and, as such, is a "public employer" within the meaning of RSA 273-A: 1 X.

2. The Hudson, Police, Fire & Town Supervisors Association is the certified bargaining agent for the following positions per the parties' stipulation of April 16, 2003 and subsequent amended certification submitted as the result of these proceedings: Town Planner, Administrative Assistant to the Director of Public Works, Town Engineer, Civil Engineer, Fire Captain, Fire Marshall, Police Lieutenants, Police Chief's Secretary, Police Animal Control Division Supervisor, Town Accountant, Data Processing Manager, Town Attorney's Secretary, Associate Planner, Deputy Fire Chief, Fire Chief's Secretary, Police Captains, Police Records Manager, Assistant Assessor, Zoning Administrator, Fire Prevention Officer, Computer Systems Operator, Support Services Manager, Assessment Technician  
EXCLUDES: Fire Chief, Town Clerk, Director of Public Works, Police Chief, Finance Director, Road Agent, Town Attorney, Recreation Director, All Library Employees.
3. The job description for the Highway Supervisor (Jt. Ex. 1) explains the scope of his duties, supervision for which he is responsible and a job summary, to wit:

#### EXAMPLES OF DUTIES

1. Plans, assigns, inspects the work of a number of crews in the construction, repair, alterations and maintenance of the drainage and sanitary sewer systems. Responsible for sanitary sewer inspections.
2. Interprets work orders, specifications or other instructions, and explains required procedures as needed and continuously inspects work in progress for conformance to plans and instructions; checks for employee safety.
3. Supervises workers and coordinates activities at various locations, performing duties relative to the construction, maintenance, and repair of the drainage and sanitary sewer systems. Instructs and trains subordinates in the safe operations and practices in trench shoring of excavations, equipment and tools used.
4. Reviews and investigates complaints of residents and dispatches crews as warranted.
5. Maintains and prepares reports on completed work; schedules and approves leave request; evaluates performance of subordinates.

6. Participates in the preparation of the annual departmental budget through the complete preparation of some materials for the departmental review and other related activities as directed by the Road Agent.
7. Keeps the Road Agent advised of unusual problems or delays; works with the Road Agent in planning work priorities and developing details for carrying out projects and reviews completed projects.

Performs other related duties as required.

#### SUPERVISION EXERCISED

Directs division employees performing both skilled and unskilled manual labor and operating motor equipment. Reviews work of subordinates in progress and on completion as to conformance with instructions, timeliness, and technical adequacy. In the absence of the Road Agent supervises all department employees to include two division foremen and a moderately large workforce of personnel.

#### JOB SUMMARY

Supervises and coordinates activities of a number of work crews engaged in a variety of public works projects involving the construction, maintenance, and repairs of the drainage and sanitary sewer systems.

4. The Highway Supervisor position is a new one. According to the attachment to Joint Ex. 1, a memo from Road Agent Burns to then Town Administrator Paul Sharon, dated July 8, 2002, Burns sought to reorganize the department and create the Highway Supervisor position. That proposal was inclusive of suggesting that it be a non-union position, noting that the "rate of pay should be in or near the same general range as the 2<sup>nd</sup> in command in the other operating departments," some of whom (e.g., senior police captain) are in this bargaining unit.
5. The Highway Supervisor position was created and filled without consultation with the HPFTSA as contemplated at Article IV § 2 of the CBA, notably, "The inclusion or exclusion in the bargaining unit of a new personnel classification established by the Town subsequent to the effective date of this agreement [July 1, 2002] shall be preceded by discussion with the Association. Any impasse in this area shall be submitted to the Public

Employee Labor Relations Board for resolution.” There is credible and un rebutted testimony from Ray Mello that such discussion did not occur.

6. It is undisputed that the Highway Supervisor is the “number two” position and may act in a leadership role in the absence of the Road Agent, who is the equivalent of a department head (testimony of Ray Mello and Kevin Burns). Likewise, there is no evidence that the Highway Supervisor’s role, either regularly or in the absence of the Road Agent, involves the “significant exercise of discretion” over other employees in the *current bargaining unit* under examination in these proceedings. (Emphasis added) RSA 273-A: 8 II.
7. The structure of the current bargaining unit, from the outset and implicitly, involved the co-mingling of supervisory personnel from various operating departments within the Town so that the “base line organizational unit” within the meaning of RSA 273-A: 8 I (d) is town-wide rather than department-wide.
8. The incumbent Highway Supervisor did not testify in these proceedings. The Town offered testimony that this was because he opposed inclusion. Mello, testifying on behalf of HPFTSA, attributed the incumbent’s absence to his ambivalence about being, or not being, included in the bargaining unit vis-à-vis the self-felt community of interest referenced in PUB 302.02 (g).
9. The position of Assistant Chief at the Fire Department is newly created after having been approved by the Town selectmen on November 14, 2000 and implemented on March 15, 2001. (Jt. Ex. 2.) There is credible and un rebutted testimony that the contractually provided for discussions, referenced in CBA Article IV, § 2, did not occur.
10. When the Assistant Chief’s position was created, its “General Statement of Duties” and “Example of Duties” taken from Jt. Ex. 2, were, respectively:

GENERAL STATEMENT OF DUTIES:

Performs highly responsible administrative and supervisory work assisting the Fire Chief in planning, organizing and directing the Fire Departments Operations Division.

Works under the general supervision of the Fire Chief who outlines broad departmental policy and procedures. Work is carried out independently on a day-to-day basis once general policy has been established by the Fire Chief. Coordination is maintained with Fire Chief in order to assure departmental goals and objectives are accomplished.

Supervision exercised-general supervision over subordinates; evaluates and recommends selection, performance and discipline of assigned personnel.

This position is the second ranking position within the Department.

EXAMPLE OF DUTIES: (the following does not include all duties which may be assigned to this position)

1. Plans, organizes and directs the overall day-to-day operations of the Fire Department. Shall assume command of all multiple alarm incidents.
2. Supervises and assists, through subordinates, all personnel personnel assigned. Provides necessary guidance or instruction to accomplish a given task and review work on a periodic basis to ensure desired results.
3. Participates in department policy making, with the Fire Chief; develops and implements procedures. Prepares and presents reports of all division activities, new equipment, methods and procedures to Chief of Department for evaluation.
4. Assists in preparation of budget; develops staffing for assigned subordinates; recommends changes to obtain the most effective results.
5. Evaluates performance, disciplines, and participates in selection of personnel assigned to the Department; ensures that all personnel have received adequate training to accomplish their tasks and recommends specific individual training as needed.
6. Coordinates call force activities with full time personnel.
7. Shall assume full responsibility of the Department during the absence of the Fire Chief.
8. Performs other related duties as required or assigned by Chief.
9. Supervises and coordinates all maintenance and testing of all Department apparatus, hose, SCBA's, ladders and small equipment.

10. Supervises and coordinates the Departmen[t's] Physical Fitness Program.
11. Is the Departmen[t's] liaison concerning Hazardous Materials.
11. The Deputy Fire Chief, a bargaining unit position of long duration and uncontested in these proceedings, operates under a job description with an effective date of December 15, 1997. (Assn. Ex. 1.) With the exception of a reference to the Operations Division in Jt. Ex. 2., the language of the "General Statement of Duties," for the Deputy Chief, is the functional equivalent of that which describes the Assistant Chief's position. Likewise, the first eight of the "Examples of Duties" of the Assistant Chief (Jt. Ex. 2) are identical with the Deputy Chief except that the latter "may assume full responsibility ... during absence of the Fire Chief" instead of "shall assume...." for the Assistant Chief and a reference to "division" for the Deputy which refers to "Department" for the Assistant Chief. "Examples of Duties" numbered 9, 10 and 11 are new and exclusive to the Assistant Chief on Jt. Ex. 2, but cite neither exclusionary (RSA 273-A:I IX) nor supervisory (RSA 273-A:8) criteria.
12. The Assistant Chief is parallel in structure in the organization with both the Fire Marshall and the Deputy Chief, both of which are bargaining unit positions. (Assn. Ex. 2) In the chain of command, the Assistant Chief is second, the Deputy Chief is third and the Fire Marshal is fourth. (Town Ex. 2) The functions of each of these jobs are compared in Town Ex's. 1 and 3.
13. The Assistant Chief's job involves operational elements of the department, namely, fire suppression and EMT's. The incumbent, Shawn Murray, said he directly supervises four (4) shift captains and 3 call, part-time lieutenants. Murray evaluates the shift captains. (Jt. Ex. 3). His work product is forwarded to the Chief for review, narrative commentary and sign-off authority, as shown in each instance addressed in Jt. Ex. 3. Under Article XXVI of the CBA, satisfactory performance reviews are a prerequisite for step increases. The CBA provides that members may appeal performance reviews to "the Town Administrator as well as to the Board of Selectmen." Assn. Ex 7. As for the consequences of Murray's doing performance evaluations, he testified he does not know if the personnel he rates receive step increases. He stated he is not the final authority for raises or discipline and that the Chief follows his recommendations about "50-50."
14. Both the Fire Marshall and the Assistant Chief forward the performance evaluations which they have done to the Chief for final disposition.

Likewise, they both forward disciplinary matters to him for approval or determination of corrective measures to be taken. Before there was an Assistant Chief position, the Deputy Chief performed the evaluations now done by the Assistant Chief. The Deputy would then forward his work product to the Chief for review, commentary and sign-off authority.

15. Chief Carpentino testified that the creation of the Assistant Chief's position, about 4 years ago, resulted from the needs of a growing department, better management of discipline and corrective measures, and an increased emphasis on budget, planning and policy development issues. He emphasized that the Assistant Chief does not set or make policy but may assess current policies to determine if they conform with the requirements and goals of the department after which he may make an appropriate recommendation to the Chief. The Chief said the Assistant Chief can involve himself in counseling, oral reprimands, emergency suspensions and a letter of meeting, also known as a "memo for record." Notwithstanding this, the Chief said he (his office) is the final step in the evaluation process, regardless of the grade of the individual who was evaluated.
16. One or more of the events which prompted the Assistant Chief to seek inclusion in the HPFTSA bargaining unit occurred after the inception of the current CBA on July 1, 2002, because that/those event(s) were related to criticisms from an elected official, who is/was also an on-call firefighter, about the Assistant Chief's unavailability to greet a visiting congressional candidate. This manifested itself in the Assistant Chief's letter of November 13, 2002 to HPFTSA. (Assn. Ex. 5)
17. There is no evidence that the parties engaged in "negotiations" relating to the composition of the bargaining unit within the meaning of PUB 302.05 (b) (2). In fact, the absence of contractually contemplated discussions about the placement of the two, relatively, newly created jobs under consideration herein suggests to the contrary. See Finding No's. 5 and 9, above.

#### DECISION AND ORDER

The Highway Supervisor position is appropriate for inclusion in the bargaining unit. The supervisory functions of the position do not trigger the "exercising supervisory authority" exception of RSA 273-A:8, II because the persons supervised are not in the same bargaining unit. There is no evidence that the Highway Supervisor supervises any other employee in this bargaining unit or, if he did so, that the supervision involved the requisite "significant exercise of discretion." Finding No. 6, above.



The Town's arguments relating to the lack of community of interest (brief, p. 9) are not persuasive. While community of interest standards have a role in determining whether a given position is, or is not, appropriate for inclusion in a bargaining unit, in the context of this case those standards must be applied against a town-wide supervisory unit which, implicitly, consists of a broader diversification of employees than might ordinarily be the case for a departmental bargaining unit. In these circumstances, the geographical proximity standard (PUB 302.02, for example) would apply across the work spectrum of supervisors generally in the Town, not just in the police station, town hall, fire station or public works garage. The weighting of "employees in the same historic craft or profession" (RSA 273-A:8, I) is, thus, minimized and the "organizational unit" becomes the Town, not one of its departments. RSA 273-A: 8 I (d). Under these conditions in the existing bargaining unit, standards such as geographical proximity, same craft or profession (although the profession could be generically categorized as "supervisory personnel" to be consistent with the name of the bargaining unit) and conditions of employment in an environmental sense, cannot be used as a basis for exclusion of the Highway Supervisor.

Finally, reliance on a difference in the policies and procedures in the Highway Department compared to other departments already represented by a supervisory presence in the bargaining unit is, likewise, not a basis for excluding the Highway Supervisor position. (Town brief, p. 10.) The policies and procedures referenced by the Town are those which apply to "line employees" in the Highway Department and are understandably different than policies and procedures which might apply to line personnel in the fire or police departments, by way of example. The applicable "policies and procedures" discrepancy, if there were one, would have to be integral to the members of this bargaining unit. The Town has failed to show that to be the case if the Highway Supervisor position is added to the current bargaining unit.

The position of Assistant Fire Chief is one, at first blush, which suggests it to be appropriate for exclusion from this bargaining unit, especially because of the responsibilities for evaluating subordinates, placement in the command structure and what the job description calls "highly responsible and supervisory work." (Jt. Ex. No. 2.) The presumptions associated with the job title wane, however, under further scrutiny.

The Assistant Chief's job description (Jt. Ex. No. 2), with an effective date of 3/15/01, follows an earlier version, not in evidence, dated 5/30/00. The most current version has a striking resemblance, although not identical, to the job description for Deputy Fire Chief, a bargaining unit position of considerable longevity since 1991. The effective date of the Deputy Chief's job description is 12/15/97. As noted in Finding No. 11, the first eight (8) examples of duties on the job descriptions for both positions are almost identical except for the breadth of authority for the Assistant (department-wide) and his unequivocal requirement to assume responsibility for the department in the absence of the chief. The Assistant Chief's job description has three additional "examples" which do not appear on the Deputy's job description. They are: "(9) supervises and coordinates all maintenance and testing of all Department apparatus, hose, SCBA's, ladders and small equipment, (10) supervises and coordinates department's physical fitness program and (11) is the department's liaison concerning hazardous materials." None of these added examples of duties is grounds to exclude the Assistant Chief from the bargaining unit.

Within the Hudson Fire Department, the Assistant Chief, Deputy Chief (Administration) and Fire Marshal are all on the same line/level of the organizational chart, showing each with a direct line of responsibility to the Chief. Both the Deputy Chief and the Fire Marshal are already bargaining unit positions such as to satisfy all four elements of RSA 273-A: 8 I (a)(b)(c) and (d). There is no evidence that the Assistant Chief, if included, would be treated any differently or in a manner to cause these conditions to cease to prevail. In the context of the larger bargaining unit, the Assistant Chief is the "number two" position in the department. Putting him in the bargaining unit would place him alongside other "number two" positions, e.g., police department and highway/public works department.

Example No. 5 of the Assistant Chief's job description provides that he "evaluates performance, disciplines and participates in selection of personnel assigned to the department." If the Assistant Chief performs these duties such that he is exercising "the significant exercise of discretion" when he does so, this may be cause for him to be excluded from any bargaining unit which also contains employees whom he supervises, as noted by the Town in its brief, p. 4, placing reliance on Appeal of Town of Stratham, 144 N.H. 429 (1999).

Crucial in determining the applicability of RSA 273-A:8, II to the Assistant Chief's position is the issue of whether his supervisory authority involves the "significant exercise of discretion." In Appeal of Town of Stratham, *supra*, the New Hampshire Supreme Court said, "In determining whether an employer exercises supervisory authority sufficient to exclude an employee from a bargaining unit, we consider several factors, including the employee's authority to evaluate other employees, the employee's supervisory role and the employee's disciplinary authority." The application of these standards to the Assistant Chief's position would suggest that it is not appropriate for inclusion in the bargaining unit. There are two considerations, however, which impact the application of these standards.

The first is the degree to which the Assistant Chief engages in the cited activities, a quantitative assessment which appears to tip back towards inclusion of the Assistant Chief's position when his job duties, job description, and actual job performance are compared to the Deputy Chief and the Fire Marshal, both included and undisputed bargaining unit positions. The similarity to the Deputy Chief is compelling, as noted in Finding Nos. 11, 12 and 14, above. In a similar vein, a closely scrutinized assessment of the Assistant Chief's functions fails to indicate the "significant exercise of discretion" since his actions are more ministerial than discretionary. They are recommendatory and lack final authority. He functions as a conduit of information, not as a final or necessarily conclusive decision maker. "Some employees performing supervisory functions in accordance with professional norms will not be vested with the 'supervisory authority involving the significant exercise of discretion' described in RSA 273-A:8 II." Appeal of East Derry Fire Precinct, 137 N.H. 607, 611 (1993). The Assistant "works under the general supervision of the Fire Chief...and coordination is maintained with the Fire Chief..." Finding No. 10, "General Statement of Duties." See also Finding Nos. 13, 14 and 15 as to the Chief's following the Assistant's recommendations "about 50-50," the Chief's being the final reviewer of both performance evaluations and disciplinary matters, and the Chief's saying that the Assistant does not set or make policy because his (the Chief's) office is the final step in the evaluation or assessment process. Even though it is clear that the Assistant Chief evaluates four captains, already in the bargaining unit, the Town has failed in its attempt to show, under the

specific circumstances of this case, that the consequences of this process rise to the level of being the "significant exercise of discretion" because of the lack of finality and subsequent levels of review implicit in the organization of the department.

Second, Appeal of Town of Stratham emanates from a unit determination proceeding, not a unit modification proceeding which, inherently, does not begin with the proverbial clean slate. Statham standards impact the instant case by creating a divergence that is dysfunctional. It perpetuates both an inequity and an inequality for the Assistant Chief's position vis-à-vis the Deputy Chief and the Fire Marshal positions at the departmental level, both of which were agreed to be appropriate for inclusion in this bargaining unit as recently as April 16, 2003, as reflected in Decision No. 2003-038. At the Town-wide bargaining unit level, this difference creates a similar divergence between the Assistant Chief and other "number two" positions in the police and assessing departments which are included in the bargaining unit, also reaffirmed by the parties as recently as April 16, 2003. The Assistant Chief's position is entitled to the same protections, lack of inhibition, and freedom to make decisions without retribution as is accorded to other "number two" positions included in the bargaining unit without fear of political reprisal. Finding No. 16. Exclusion of the Assistant Chief's position results in disparate treatment which, in turn, flies directly in the face of Chapter 490:2, Laws of 1975, namely that "...it is the policy of the state to foster harmonious and cooperative relations between public employers and their employees..." and must be considered here in applying RSA 273-A:8 II. If, in fact, the strict dictates of Appeal of Town of Stratham are appropriate for unit modification proceedings, versus unit determination proceedings, without consideration as to the disruption that may cause, then the whole matter should be revisited judicially in the context of unit modification proceedings with the concomitant results of doing so coming under full and thorough consideration.

The record here is clear. The Assistant Chief is not "a" or "the" final authority for performance evaluations or discipline. That final authority rests with the Chief, by his own testimony. Finding No. 15. The recommendations of the Assistant Chief, followed by the Chief on a "50-50" basis, are not controlling. The results of and feedback from the evaluation process are sufficiently informal or non-existent that the Assistant Chief does not know if the employees whom he evaluated did or did not receive step increases. He is not the level at which the evaluated employee would raise an appeal. Finding No. 13. Finally, the Association, through Assn. Ex. No. 5, has satisfied the self-felt community of interest standards for the Assistant Chief under PUB 302.02 (b) (3).

Based on the foregoing, the current bargaining unit shall be modified to include the positions of Highway Department Supervisor and Assistant Fire Chief with an appropriate amended certification to issue from the PELRB at the conclusion of these proceedings.

So ordered.

Dated this 14th day of May, 2003



Parker Denaco  
Hearing Officer

Distribution: Ray Mello, Esquire  
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