



State of New Hampshire  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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Town of Milford	*	
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Petitioner	*	
	*	
and	*	Case No. A-0480-21
	*	
AFSCME Local 3657, Milford Police Employees	*	Decision No. 2006-046
	*	
Respondent	*	Petition for Declaratory Ruling
	*	

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APPEARANCES

Representing Town of Milford:

Warren Atlas, Esquire  
Atlas & Atlas

Representing AFSCME Local 3657, Milford Police Employees:

Erin L. Goodwin, Esquire  
Associate General Counsel

BACKGROUND

The Town of Milford (hereinafter "Town") filed a Petition for Declaratory Ruling with the Public Employee Labor Relations Board ("PELRB" or "Board") on December 30, 2004. The Town's petition seeks a declaratory ruling from the Board regarding the rights of the parties as to the composition of the bargaining unit currently represented by AFSCME Council 93, Local 3657 ("Union"). Giving rise to the Town's petition is the fact that while the Board certification expressly excludes sergeants from the bargaining unit, the recognition clause in the current CBA expressly includes them. Additionally, the Town asserts here that the duties and responsibilities now being performed by the sergeants demonstrate that they are supervisors within the meaning of RSA 273-A:8, II and therefore may not belong in the same bargaining unit as the patrol officers they supervise. Since the Board's certification already expressly excludes sergeants from the bargaining unit, the Town submits that the filing of a modification petition would be inappropriate under the circumstances. The Town requests that the Board issue a declaratory

ruling deciding, as a matter of fact and law that (1) sergeants are excluded from the existing bargaining unit because the Board's certification prevails over a conflicting recognition clause, and (2) RSA 273-A:8, II applies to exclude sergeants from the bargaining unit based on the supervisory nature of their duties and responsibilities.

The Union filed exceptions to the District's petition on January 12, 2005 raising two grounds upon which it contends that the Town's petition should be dismissed. The Union asserts that the action is not ripe for review since the parties are engaged in collective bargaining for a successor contract and one of the issues on the table concerns the exclusion of sergeants from the contract's recognition clause. Secondly, the Union submits that the Town's petition seeks to have the Board intervene in the on-going negotiations between the parties and thereby alter the relationship between the parties' at the table. Based upon the foregoing, the Union states that the Town's petition must be dismissed.

A pre-hearing conference was held at PELRB offices on March 15, 2005 and, in accordance with the Pre-hearing Memorandum and Order issued on March 22, 2005 (PELRB Decision No. 2005-043), an evidentiary hearing was scheduled for May 10, 2005. On May 9, 2005 the parties filed a "Joint Motion to Continue" which was granted by the Board. Pursuant to an order issued on June 9, 2005 (PELRB Decision No. 2005-077), the matter was continued on the PELRB's docket until August 1, 2005, at which time the matter would be administratively dismissed unless either party requested further proceedings on or before said date. In a letter dated July 28, 2005, Town counsel notified the Board of the Town's request for further proceedings. An adjudicative hearing on the merits of the Town's petition was thereafter conducted on November 3, 2005 before the undersigned hearing officer, at the offices of the Board in Concord, New Hampshire. Both parties were represented by counsel and had the opportunity to present witnesses for examination, to undertake cross-examination, and to offer exhibits into evidence. The parties' counsel executed a stipulation of facts that was accepted into the record and is incorporated below as Findings of Fact 1 through 16. At the conclusion of the hearing, the record was closed subject to the filing of post-hearing briefs by the parties, which were received by the Board on December 19, 2005. Upon review of all filings submitted by the parties and a consideration of all relevant evidence, the hearing officer determines as follows:

#### FINDINGS OF FACT

1. The Town and the Union are parties to a collective bargaining agreement which expired on March 31, 2005. (See Joint Exhibit 2).
2. The amended certification of the Board establishing the scope of the bargaining unit of police officers in the Town, dated February 20, 1985 (Case No. A-0480), expressly excludes Sergeants from the bargaining unit. (See Joint Exhibit 1).
3. The recognition clause set forth in the collective bargaining agreements between the parties likewise expressly excluded Sergeants from the bargaining unit until the 1988-1990 collective bargaining agreement, which for the first time included Sergeants in the bargaining unit. (Joint Exhibit 3, C).

4. The certification of the Board was not amended so as to have the Sergeants included within the bargaining unit.
5. The parties are currently at impasse in their efforts to reach agreement on a successor collective bargaining agreement. Mediation, pursuant to RSA 273-A, has concluded without agreement on a new labor contract.
6. During the current round of negotiations, the Town advised the Union of the conflict between the Board certification and the recognition clause and proposed removing the position of Sergeant from the recognition clause in the successor collective bargaining agreement, based on the Town's position that the Sergeants are supervisors within the meaning of RSA 541-A:8, II.
7. The Department is organized into two divisions: the Patrol Division and the Support Division. The Department currently employs three Sergeants in the Patrol Division reporting to Captain Richard Fortin. A job description for the Sergeants working in the Patrol Division is attached hereto as Exhibit C. While there currently are no Sergeants employed in the Support Division, the Department's organizational structure anticipates the employment of Sergeants in the future. A job description for the Support Division Sergeants is attached hereto as Exhibit D. The duties actually performed by the Department's Sergeants are consistent with the duties and responsibilities expressed in the job descriptions.
8. The Sergeants (both Patrol Sergeants and Support Division Sergeants) also have the independent authority to relieve from duty officers under their supervision for the remainder of a tour of duty (1) for the purposes of correcting deficiencies, (2) to issue disciplinary warnings and (3) to counsel employees to improve their performance when warranted.
9. The Sergeants attend confidential command staff meetings with the Chief of the Department and the two Captains. At these meetings, the Sergeants initiate and participate in discussions on strategic, personnel, operational and administrative policies.
10. With respect to the evaluation of Department personnel, each of the Sergeants (both Patrol Sergeants and Support Division Sergeants) is responsible for providing quarterly reports on the activities of the members of his squad to the Captain. These reports are discussed with the Chief and Captains of the Department at the staff meetings. These reports may lead to counseling of an under-performing officer or may be used for strategic or operational purposes. Since the Department has not conducted formal evaluations of its officers in some time, these quarterly reports serve as the principal barometer of the effectiveness and performance of the Department and its officers.
11. The Sergeant in charge of the Department's Field Training Program also supervises the physical fitness testing for new hires and those officers required to undergo periodic physical fitness testing pursuant to New Hampshire law.

12. In addition to the responsibilities discussed above, two of the three (3) Sergeants each are individually responsible for a specific Departmental function. One Sergeant is responsible for the Field Training Program discussed above. A second Sergeant is responsible for Technical Accident Reconstruction.
13. For example, each Sergeant in the Patrol Division is directly responsible for the direction of his own squad of patrol officers, which patrol officers may or may not be on same shift as the Sergeant. Further, the Sergeants, while on duty, are in charge of their respective shifts, which may include patrol officers not in their squad. Neither the Department's two Captains nor the Chief customarily engage in the regular, day-to-day direct supervision of the Department's Patrol Officers. However the Chief and Captains occasionally perform the functions of the senior officer on duty. The Sergeants are thus each singularly responsible for the supervision of between four (4) and six (6) Patrol Officers. Similarly, the Sergeants to be employed in the Support Division will exercise similar functions in the day-to-day direct supervision of Patrol Officers and Detectives assigned to the Support Division.
14. The Sergeants (both Patrol Sergeants and Support Division Sergeants) are directly responsible for initially interpreting policies, procedures and laws for their subordinates; instructing subordinates with respect to Departmental policy; aiding subordinates in carrying out their responsibilities; ensuring adequate supplies and equipment for subordinates; inspecting (at least quarterly) members under their command to assure they are properly uniformed and equipped and otherwise fit for duty; assisting officers under their supervision with writing reports and reviewing such reports for accuracy, legibility and completeness; accounting for the actions or omissions of officers under their supervision; and otherwise aiding subordinates in the performance of their duties as necessary. See Exhibit C and Exhibit D. Due to budgetary and contractual restraints there is no Sergeant assigned to the third shift. As a result the senior officer on duty on third shift performs similarly to the Sergeants.
15. The Patrol Sergeant on duty is directly responsible for assigning each Patrol Officer on his shift to a patrol sector and to his or her cruiser. Likewise, the Support Division Sergeant will be responsible for distributing work assignments to each Patrol Officer under his/her supervision. If a shift requires extra manpower, Sergeants have the authority to call in extra personnel, even if this results in overtime. Due to budgetary and construal restraints there is no Sergeant assigned to the third shift. As a result the senior officer on duty on third shift performs similarly to the Sergeants.
16. The Sergeants are responsible for conducting internal investigations into possible employee misconduct although the ranking officer on duty may intake the initial complaint. This responsibility includes gathering evidence, making factual findings and recommendations concerning discipline to the Chief. The Sergeants' internal investigation reports when appropriate additionally include recommendations for discipline, which are submitted though the chain of command to the Chief of the Department. Likewise, the Support Division Sergeants will be expected to conduct such internal investigations along with the Patrol Sergeants.

17. The Town is a public employer within the meaning of RSA 273-A:1, X.
18. The Union is the duly certified exclusive bargaining representative for certain employees employed in the Town's police department (Joint Exhibit 1).
19. The PELRB's certification of representative, as amended on February 20, 1985, describes the unit as follows:

Unit: All full-time patrolmen and Detectives and all part-time personnel working 20 hours or more on a permanent basis.

Excluded from the Unit: Chief, Sergeants, Administrative Assistant and all part-time personnel working less than 20 hours a week, including part-time special police officers, crossing aides and parking meter officers and other persons whose duties imply a confidential relationship to the public employer and persons in a probationary or temporary status, or employed seasonally, irregularly, or on call.

(Joint Exhibit 1).

20. The parties' CBA currently contains numerous provisions that specifically reference terms and conditions of employment for sergeants, including Article IV (Probationary Employees); Article VI (Wages); Article VII (Hours of Work); Article VIII (Seniority, Layoff and Recall); Article XI (Holidays); Article XIV (Uniform Allowance); Article XVII (Residency and Outside Employment); and Article XVIII (Military Service, Educational Incentive, Bulletin Board and Training Courses). (Joint Exhibit 2).

## DECISION AND ORDER

### JURISDICTION

Through the instant petition, the Town seeks a declaration from the Board that upon the expiration of the parties' CBA, the Town is required, or permitted, as a matter of law to refuse to recognize the sergeants as part of the bargaining unit based upon the Board's certification. The Town also seeks a declaration from the Board that upon the expiration of the parties' CBA, RSA 273-A:8, II applies so as to require or permit the Town to exclude sergeants from the bargaining unit based upon their supervisory status.

The Board exercises jurisdiction in declaratory ruling petitions pursuant to RSA 541-A and Pub 206.01, which allow for a party to petition the Board for a ruling regarding the applicability of any statute within the jurisdiction of the board to enforce. Here the parties are faced with an expired contract containing a recognition clause that expressly conflicts with the Board's certification. The Town's resulting petition essentially seeks a ruling as to its rights and obligations with respect to the parties' expired collective bargaining agreement and the bargaining unit certification issued by the Board. In other words, what are the rights of the parties with respect to the position of sergeant at the present time and would the Town be

committing an unfair labor practice if it refused to recognize sergeants as being included within the bargaining unit at the expiration of the parties' CBA. This question accordingly calls for an interpretation of provisions within RSA 273-A, including RSA 273-A:5, I (e) and (h) and RSA 273-A:8, as well as N.H. CODE ADMIN. R. PUB. 302.02 and Pub 302.05. Since a determination of the parties' rights and obligations is reasonably necessary in order for them to proceed in their ongoing contract negotiations, I find the instant declaratory ruling petition to present a case and controversy in which PELRB jurisdiction is appropriate.

## DISCUSSION

It is well-settled that "[t]he composition of a bargaining unit is limited by law to those positions identified in the recognition clause at the time the original unit is certified by the PELRB and by any subsequent modifications approved by the PELRB." *Appeal of the Somersworth School District*, 142 N.H. 837, 840 (1998), quoting *Appeal of Londonderry School District*, 142 N.H. at 680 (1998). Therefore, even though an exclusive representative and public employer may reach an agreement on the composition of a bargaining unit within their CBA (i.e., in the so-called "recognition clause"), it is not the *certified* bargaining unit until it is approved by the PELRB.

The instant fact pattern presents the rather unusual scenario in which the parties agreed approximately eighteen (18) years ago to *include* a position in their CBA's recognition clause that is specifically *excluded* from the Board's certification. As the record reflects, the most recent certification of the bargaining unit issued by the Board, dated February 20, 1985, specifically excludes sergeant positions, and yet since the parties' 1988-1990 CBA, it has been agreed that the Town "recognizes the Union as the exclusive bargaining representative pursuant to the provisions of New Hampshire RSA 273-A for all...full-time Sergeants [and] Detective Sergeants..." as provided in Article I, Recognition. (See Joint Exhibits 1 and 3C, Findings of Fact Nos. 2, 3 and 4). Consistent with this language, the parties' CBA currently contains numerous provisions that specifically reference terms and conditions of employment for sergeants, including Article IV (Probationary Employees); Article VI (Wages); Article VII (Hours of Work); Article VIII (Seniority, Layoff and Recall); Article XI (Holidays); Article XIV (Uniform Allowance); Article XVII (Residency and Outside Employment); and Article XVIII (Military Service, Educational Incentive, Bulletin Board and Training Courses). (Finding of Fact No. 20). As the Board stated in *State Employees Association of New Hampshire, Local 1984 v. Strafford County Commissioners*, PELRB Decision No. 2001-063, p. 5 (July 16, 2001), "[i]t is common for parties to discuss the inclusion or exclusion of job titles in a bargaining unit...[T]he administrative rules contemplate that modification issues be negotiated [see Pub 302.05(b)], although there is no requirement to reach agreement either under the rules or the statute, i.e., RSA 273-A:3." Therefore, even though parties are free to enter into such agreements, their failure here to petition the Board to modify the certification has resulted in the instant predicament in which their rights and obligations have become uncertain.

The record indicates that the parties' CBA, containing the recognition clause at issue, expired on March 31, 2005. (Finding of Fact No. 1). The Town therefore asks the Board to determine, consistent with the PELRB certification, that it is no longer obligated to recognize sergeants as included in the bargaining unit. However, "[a]fter expiration of the CBA and during

negotiations for a successor agreement, the parties' obligations to one another are governed by the doctrine of maintaining the status quo...Maintenance of the status quo demands that all terms and conditions of employment remain the same during collective bargaining after a CBA has expired." *Appeal of City of Nashua Board of Education*, 141 N.H. 768, 772 (1997)(citations omitted). Whether or not inclusion of sergeants in the recognition clause constitutes a mandatory or permissive subject of bargaining (in order to determine if the Town may make unilateral changes thereto) is beside the point now since the Town has already chosen to bargain over the topic, not only over the past eighteen years but during the current round of negotiations. (Findings of Fact Nos. 3 and 6). Such an election by the Town is not prohibited under the law, but in fact, as noted by the Board in *State Employees Association of New Hampshire, Local 1984 v. Strafford County Commissioners, infra*, is contemplated by applicable administrative rule.

Although evidence of supervisory functions being exercised by sergeants was presented at hearing, given the longstanding status the position holds within the parties' CBA, I am reluctant to disturb the parties' past agreements (most recently in the current CBA dated April 26, 2004) by applying the supervisory criteria set forth RSA 273-A:8, II to the instant dispute.<sup>1</sup> Stated alternatively, given the overall bargaining history of the parties on this issue, I am averse to do for the parties that which they should and can appropriately do for themselves. I therefore find under the circumstances that the status quo doctrine applies to the parties' recognition clause and that the Town is obligated to recognize sergeants under the CBA, despite the obvious conflict this creates, at present, with the Board's certification. It follows that the Town would be committing an unfair labor practice if it refused to so recognize the sergeants or otherwise unilaterally excluded sergeants from the parties' recognition clause.

Regardless of the motive, the fact is that the Town has agreed to bargain with the Union over the sergeant's position for many years. In accordance with the court's holding in *Appeal of the Somersworth School District*, 142 N.H. 837 (1998), as a matter of law sergeants are not included within the certified bargaining unit, and therefore the Town was not required to recognize them as if they were. But this is not to say that the sergeants excluded in 1985 are necessarily the same sergeants employed by the Town's police department today, or that the parties cannot otherwise negotiate modifications to the recognition clause (and, by extension, the Board's certification) on an ongoing basis. In point of fact, the Town specifically proposed during *current* negotiations that sergeants be removed from the recognition clause. (Finding of Fact No. 6). As it stands, if I were to grant the relief sought by the Town in its petition, it would be equivalent to nullifying upwards of eighteen years of collective bargaining history between the parties and numerous contract provisions. It would further serve to award to the Town that which it thus far has been unable to accomplish during current negotiations, namely reaching agreement with the Union on its proposal to remove sergeants from the recognition clause (and, effectively, the other portions of the parties' contract that reference terms and conditions of work for sergeants).

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<sup>1</sup> In *Appeal of City of Laconia*, the court held that excluding certain supervisory positions from a *certified* "bargaining unit after twenty-seven years, and disrupting a 'self-felt community of interest' would be inconsistent with the State's interest in fostering 'harmonious and cooperative relations between public employers and their employees.'" *Appeal of City of Laconia*, 150 N.H. 91, 95 (2003).

As the court stated in *Nashua*, above, the “terms and conditions of employment imposed as a result of the status quo doctrine do not become fixed forever; they only last during the process of good faith collective bargaining whose protection and advancement is the rationale for the status quo doctrine. *Appeal of City of Nashua Board of Education*, 141 N.H. 768, 777 (1997)(citation omitted). The parties are therefore directed to resume their efforts in reaching a settlement on a successor collective bargaining agreement and to file modification petitions with the Board, as necessary, in the future.<sup>2</sup>

It is so ordered.

Signed this 16<sup>th</sup> day of March, 2006.



Peter C. Phillips, Esq.  
Hearing Officer

Distribution:

Warren D. Atlas, Esquire

Erin L. Goodwin, Esquire

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<sup>2</sup> At the very least, it would appear that the Board’s certification should be updated to accurately reflect the current local # of the exclusive representative.