



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

GOFFSTOWN SUPERVISORS' ASSOCIATION

PETITIONER

and

TOWN OF GOFFSTOWN

CASE NO. G-0129-1

DECISION NO. 2010-052

RESPONDENT

APPEARANCES

Representing: Goffstown Supervisors' Association
Kevin E. Buck, Esq., Nolan Perroni Harrington, LLP
Lowell, Massachusetts

Representing: Town of Goffstown
Paul T. Fitzgerald, Esq., Wescott, Dyer, Fitzgerald & Nichols, PA
Laconia, New Hampshire

BACKGROUND

Goffstown Supervisors' Association (Association) filed a written majority authorization petition (WMA) for certification on December 3, 2009. The Association seeks to represent a bargaining unit consisting of the following positions within the Goffstown Police Department: Captain, Lieutenant, Sergeant, Communication Supervisor, Detective Sergeant, and Prosecutor.

Town of Goffstown (Town) filed an objection to the petition on December 17, 2009 and a revised objection on January 4, 2010. The Town requests that the Public Employee Labor Relations Board (PELRB) deny the Association's petition on the grounds that the positions in the proposed unit do not share a community of interest, that some positions have supervisory responsibilities over others, that some positions have a confidential relationship with

management, and that, with the exclusion of supervisory and confidential positions, the proposed bargaining unit fails to satisfy the ten-employee minimum required under RSA 273-A:8, I.

The undersigned hearing officer conducted a hearing on January 11, 2010 at the PELRB offices in Concord. The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. At the parties' request, the record was held open until February 9, 2010 to allow the parties to file post-hearing briefs. Both parties filed their briefs on February 9, 2010 at which time the record was closed.

FINDINGS OF FACT

1. The Town of Goffstown is a public employer as that term is defined in RSA 273-A:1, IX.
2. The Goffstown Supervisors' Association is an employee organization seeking to be certified as the exclusive representative of a bargaining unit through written majority authorization pursuant to RSA 273-A:10, IX.
3. The proposed bargaining unit contains the following ten employees of the Goffstown Police Department: one Captain, one Prosecutor with the rank of Captain, two Lieutenants, four Sergeants, one Communication Supervisor, and one Detective Sergeant.
4. The Goffstown Police Department currently has a bargaining unit which includes all positions in the Police Department below the rank of Sergeant. The positions of Sergeant, Lieutenant, Captain, and Chief of Police are specifically excluded from the existing bargaining unit.
5. Kerry P. Steckowych has been the Prosecutor at the Goffstown Police Department since December of 1992. He is an attorney licensed to practice law in New Hampshire. When he began working as the Prosecutor for the Police Department, he had no rank. Later, he was

assigned the rank of Lieutenant and in 1999 he was assigned the rank of Captain, which he currently carries. His office is at the Police station.

6. The qualifications required for the position of the Prosecutor include “minimum of a Bachelors Degree and a Degree from an Accredited Law School.” See Town Exhibit B.

7. The Prosecutor is responsible for the preparation and presentation of cases on the District and Superior Court levels. As the Department’s liaison with the court, the Prosecutor coordinates the scheduling of cases and witnesses. He handles felony cases in the Superior Court and presents the Department’s cases to the Grand Jury as required. He keeps track of open cases until final disposition and submits any required reports to the proper authority. He reviews cases for proper charges, prepares arrest affidavits and warrants, conducts research for officers and cases, and handles internal affairs investigations.

8. The Prosecutor reports to the Chief of Police.

9. The Job Description for the position of the Prosecutor provides in relevant part:

It is the duty and responsibility of the Police Prosecutor to . . .
Serve as legal advisor for the department.

See Town Exhibit B.

10. The Prosecutor is a legal advisor for the Goffstown Police Department. In this capacity, he reviews current case law to provide legal support for policy changes when necessary. The Chief of Police seeks the Prosecutor’s advice regarding discipline and labor issues. The Prosecutor gives legal advice on such issues as management rights, bargaining terms, and discipline. The Chief of Police usually consults the Prosecutor, and not outside legal counsel, on labor relations matters.

11. The Chief of Police believes that his one-on-one conversations with the Prosecutor regarding legal issues constitute confidential attorney-client communications.

12. The Prosecutor handles internal affairs investigations in the Police Department. The internal affairs investigations are based on the citizens' complaints and may result in disciplinary actions. Any employee of the Department can become the focus of the internal affairs investigation, including the Chief of Police.

13. All internal affairs investigation complaints go to the Prosecutor for determination whether the complaints are founded or unfounded. The Prosecutor usually assigns internal affairs investigation complaints to the immediate supervisors or to the Lieutenants. The results of the investigations come to the Prosecutor. He reviews the complaints, memoranda, reports, and written statements from the witnesses. Thereafter, the Prosecutor recommends what disciplinary action should be imposed or provides the list of possible disciplinary actions to the Chief of Police. The Chief decides which action to impose. The Chief usually informs an employee regarding the results of the investigation and the discipline imposed. The employee can appeal the decision to the Board of Selectmen.

14. The Prosecutor is the only person who issues internal affairs investigation recommendations to the Chief of Police unless someone else was designated to conduct the internal affairs investigation.

15. The Prosecutor believes that, if he were included in the bargaining unit proposed in the current petition, ethical issues involving attorney-client relationship could arise and, although he could continue to provide advice regarding the state of prevailing law, he would have to be more careful with the recommendations to the Chief of Police as the recommendations could be adverse to the interests of other members of the proposed unit.

DECISION

DECISION SUMMARY

The Prosecutor is an employee whose duties imply a confidential relationship to the

public employer. Therefore, he is not a public employee under RSA 273-A:1, IX (c) and is excluded from the bargaining unit. Consequently, the proposed unit fails to satisfy the ten-employee minimum required for certification of a bargaining unit under RSA 273-A:8, I. Accordingly, the Association's petition for certification is denied.

JURISDICTION

The PELRB has jurisdiction of all petitions to determine bargaining units and certify the exclusive representative of an approved bargaining unit through the process of written majority authorization pursuant to RSA 273-A:8, 273-A:10, IX, and Pub 301.05.

DISCUSSION

The Town seeks to exclude the position of the Prosecutor from the proposed bargaining unit claiming, among other things, that the Prosecutor is a confidential employee. RSA 273-A:1, IX (c) excludes confidential employees from the definition of a "public employee." Confidential employees are "[p]ersons whose duties imply a confidential relationship to the public employer." RSA 273-A:1, IX (c). The PELRB has previously limited the category of "confidential employees" to persons

. . . whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process, would make [their] membership in the [employee organization] incompatible with [their] official duties.

See *In re Nashua Association of School Principals*, 119 N.H. 90, 92 (1979), citing *Keen State College PAT Staff Assoc. v. Univ. of New Hampshire*, PELRB Decision No. 780007.

In the present case, the evidence demonstrates that the Prosecutor is the legal advisor to the Goffstown Police Department and the Chief of Police. He provides legal advice on such labor related issues as management rights, bargaining terms, and discipline. He is the Chief's advisor with regards to the labor law. Some of Prosecutor's communications with the public employer likely constitute confidential attorney-client communications. In addition, the Prosecutor is the


person in charge of internal affairs investigations and, as such, is privy to the confidential information concerning personnel matters. The inclusion of the Prosecutor in the proposed bargaining unit is incompatible with his official duties as the legal advisor to the Police Department. The evidence demonstrates that the inclusion of the position of the Prosecutor in the bargaining unit would likely create a conflict of interest and give rise to divided loyalties and ethical problems. Accordingly, the position of the Prosecutor is excluded from the bargaining unit.

RSA 273-A:8, I provides in relevant part that “in no case shall the board certify a bargaining unit of fewer than 10 employees with the same community of interest without the prior approval of the governing body of the public employer.” In the present case, after the exclusion of the position of the Prosecutor from the proposed bargaining unit, the unit contains nine employees. The Association offered no evidence that the Town’s governing body has approved the certification of a unit containing less than ten employees.

For the foregoing reasons, the Association’s written majority authorization petition for certification is denied. Since the Association’s petition is denied pursuant to RSA 273-A:1, IX (c) and RSA 273-A:8, I, it is unnecessary to address the other objections raised by the Town.

So ordered.

March 16, 2010


Karina A. Mozgovaya, Esq.
Staff Counsel/Hearing Officer

Distribution:
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