



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**TEAMSTERS LOCAL 633/PLAISTOW TOWN
EMPLOYEES**

PETITIONER

CASE NO. G-0061-2

and

DECISION NO. 2010-062

TOWN OF PLAISTOW

RESPONDENT

APPEARANCES

Representing: Teamsters Local 633 of New Hampshire/Plaistow Town Employees
Kevin Foley, Business Agent, Teamsters Local 633
Manchester, New Hampshire

Representing: Town of Plaistow
Mark T. Broth, Esq., Devine, Millimet & Branch, PA
Manchester, New Hampshire

BACKGROUND

Teamsters Local 633 of New Hampshire (Union) filed a written majority authorization (WMA) petition for certification on January 12, 2010. The Union seeks to represent a bargaining unit consisting of the following positions:

Assessor, Health Officer, Maintenance, Highway Laborer, Highway Working Foreman, Highway Working Supervisor, Recreation, Building Maintenance, Maintenance Working Supervisor, Building Inspector/Code Enforcement Officer, Health Inspector, Welfare Director, Recreation Director, Deputy Tax Collector, Deputy Town Clerk, Assistant Town Clerk, Crossing Guards, Working Supervisor Secretary, Animal Control Officer, Deputy Police Chief, and Deputy Fire Chief.

Town of Plaistow (Town) filed an exception to the petition on January 27, 2010. The Town contends that the petition should be dismissed for the following reasons: (1) the proposed bargaining unit lacks a community of interest; (2) the petition includes vacant and nonexistent positions; (3) the Executive Secretary to the Police Chief is a confidential employee; (4) the Animal Control Officer is an on call employee; (5) the Crossing Guards are seasonal employees; and (6) the Highway Supervisor exercises supervisory authority over the Highway Foreman and Highway Laborers. The Town also claims that it has the position titled "Assessing Clerk" but does not have the position titled "Assessor"; that it does not have positions titled "Assistant Town Clerk", "Recreation", and "Health Inspector"; that "Deputy Town Clerk" and "Deputy Tax Collector" are not separate positions but is a shared position filled by one employee; and that it has the position titled "Executive Secretary to the Police Chief" but does not have position titled "Working Supervisor Secretary".

The undersigned hearing officer conducted a hearing on February 19, 2010 at the PELRB offices in Concord. Upon completion of the Union's presentation of its case, the Town moved to dismiss the Union's petition on the ground that the Union failed to meet its burden of proof. The hearing officer took the Town's motion under advisement and the hearing proceeded. The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses.

FINDINGS OF FACT

1. The Town of Plaistow is a public employer as that term is defined in RSA 273-A:1, IX.

2. The Teamsters Local 633 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 Union seeks to represent a bargaining unit consisting of the following positions:

Assessor, Health Officer, Maintenance, Highway Laborer, Highway Working Foreman, Highway Working Supervisor, Recreation, Building Maintenance, Maintenance Working Supervisor, Building Inspector/Code Enforcement Officer, Health Inspector, Welfare Director, Recreation Director, Deputy Tax Collector, Deputy Town Clerk, Assistant Town Clerk, Crossing Guards, Working Supervisor Secretary, Animal Control Officer, Deputy Police Chief, and Deputy Fire Chief.

4. On November 22, 1991 the PELRB issued a Certification of Representative and Order to Negotiate certifying the AFSCME Council #93 as the exclusive representative of the bargaining unit consisting of the following employees of the Town of Plaistow:

Highway Working Supervisor, Laborers I, II, III, Maintenance Working Foreman, Maintenance Laborer, Building Inspector, Code Enforcement Officer, Inspectors, Zoning, Electrical & Plumbing, Building Secretary, Deputy Town Clerk, Assistant Town Clerk, Deputy Tax Collector, Assessor, Health Officer, Health Inspector, Planning Administrative Assistant, Welfare Director and Bookkeeper.

Excluded: Town Manager and Chief of Police.
Confidential: Selectmen's Secretary.

See *AFSCME Council #93 and Town of Plaistow*, PELRB Case No. A-0562.

5. The AFSCME Council #93 represented the above mentioned bargaining unit in collective negotiations with the Town of Plaistow for nearly six years.

6. The Town of Plaistow and the AFSCME Council #93 were parties to a collective bargaining agreement which covered such terms and conditions of employment as seniority,

wages, hours of work and overtime, longevity, holidays, vacation, sick leave, leave of absence, insurance, retirement, discipline, and grievance procedure.

7. On August 7, 1997 the AFSCME Local voluntarily surrendered the certification as the bargaining agent for the Town of Plaistow bargaining unit. See Order Withdrawing Certification, PELRB Decision No. 97-079.

8. The Personnel Plan for Employees of the Town of Plaistow (Personnel Plan) provides in relevant part of Section A, entitled Applicability, that

[i]n regards to wages and benefits, these rules and regulations will apply to all full-time and part-time non-represented employees, excluding elected officials, on-call employees (e.g. call fire fighters) and library personnel. . . . In regards to workplace conditions, and specifically as covered by State or Federal law, these rules and regulations apply to all non-represented personnel, elected officials, volunteers, consumers and others as they relate to the employee or employer.

9. The Personnel Plan covers, among other things, the following subjects: employee evaluation, pay plan, merit and COLA pay increases, overtime compensation, call back, benefits, longevity, layoffs, demotions, resignations, holidays, vacation, sick leave, sick leave pool, leave of absence, personal leave, FMLA, and disciplinary actions and appeals procedure.

10. The same Personnel Plan applies to all employees of the Town.

11. All Town employees, except for the part-time employees who do not get health insurance benefits, pay 10% for health insurance, the rest (90%) being paid by the Town.

12. All hourly employees are paid overtime after 40 hours. All employees in the proposed bargaining unit except the Deputy Police Chief and the Building Inspector get paid an hourly rate.

13. The Town holds a Town-wide event annually. It is a whole-day event. Some Town employees get paid to participate, some do not. The Town-wide annual event is a long-standing tradition. All Town employees are expected to attend.

14. The Town currently has one bargaining unit consisting of the employees of the Plaistow Police Department. The existing Police Department bargaining unit does not include positions of the Deputy Police Chief, Executive Secretary to the Police Chief, or Crossing Guard.

15. The Town Manager is the Chief Operating Officer responsible for overall administration of the Town. The Town Manager reports to five-member Board of Selectmen. The legislative body of the Town of Plaistow is the Town Meeting. The Town Manager supervises the personnel, negotiates and administers collective bargaining agreements, organizes, maintains and administers the personnel policies and procedures of the Town, recruits and hires qualified personnel to fill vacant or newly created positions, supervises, coordinates, and directs, through department heads and Town boards and commission, the activities of various departments, and makes periodic reports on same to the Board of Selectmen.

16. The Town Manager's disciplinary decisions can be appealed to the Board of Selectmen.

17. The Town employs forty six employees, including sixteen full-time police officers who are the members of an existing Police Department bargaining unit.

18. The Town has the position titled "Assessing Clerk", not "Assessor". The Town contracts with a private firm to perform the actual assessing of the properties. The Assessing Clerk provides administrative supports to the assessing firm and answers questions from the public.

19. The Town currently has the shared position of Deputy Town Clerk/Deputy Tax Collector filled by the same employee.

20. The Town has the position of Maintenance Worker/Custodian. This position is the same as positions titled "Building Maintenance" and "Maintenance" on the current certification petition. The Town does not have separate "Building Maintenance" and "Maintenance" positions.

21. The Town has two part-time Maintenance Worker/Custodian positions. One Maintenance Worker/Custodian position is currently filled by a temporary employee. The second Maintenance Worker/Custodian position is currently unfilled and the Town is interviewing the candidates to fill this position.

22. The Town has only one Recreation Department position - the Recreation Director. The Town does not have the position titled "Recreation".

23. The Town has the position of Health Officer but does not have the position titled "Health Inspector".

24. The Town has the position of Welfare Director. This position has been vacant for eighteen months. The Town Manager's Administrative Assistant, the Finance Director, and the Town Manager have been sharing responsibility of performing the Welfare Director's duties.

25. The Town does not currently have the position titled "Assistant Town Clerk".

26. The Town has two part-time Crossing Guard positions. Crossing Guards report to the Shift Commander, the Police Lieutenant or the Police Chief. They work in front of the school buildings ensuring the safety of the pedestrians.

27. Crossing Guards work during the school year. They do not work in the summer or during the school vacation breaks. Crossing Guards have regular work schedule for the duration

of the school year. They work four hours per day at the beginning and the end of the school during school working hours. See Town Exhibit 3.

28. The Town does not have the position titled “Working Supervisor Secretary”. The Town has a secretarial position titled “Executive Secretary to the Police Chief”.

29. The Executive Secretary to the Police Chief works at the office next to the Chief’s office in the Safety Complex, which houses the Police and Fire Departments. She types the Chief’s correspondence, handles emails and phone calls, and responds to the Chief’s mail. She types letters and memos, including disciplinary decision letters. The Executive Secretary has access to personnel files.

30. The Job Description for the position of the Executive Secretary to the Police Chief provides that the Executive Secretary performs “responsible work associated with the management and supervision of the clerical staff and functions of a police department.” The duties and responsibilities of the Executive Secretary include the following: supervises and coordinates activities of the police department clerical staff; prepares correspondence, requests, permits, and court documents; establishes and maintains personnel records of the department; prepares and maintains schedules, payroll, attendance, earned time, accounts receivable and payable for department personnel and activities; responds to the queries from the public, other departments, the courts, insurance companies, and lawyers; and maintains confidentiality and security of department information, equipment, and facilities. See Town Exhibit 3.

31. The Town has an on call Animal Control Officer. David Sargent has been the Animal Control Officer for over a year. He has a full-time job at a private company. The Animal Control Officer works on an as needed basis. He works when the Police Chief calls him. He does not have an office but works out of the Safety Complex.

32. Deputy Police Chief reports to the Police Chief. She is responsible for the day-to-day administration of the Police Department. She replaces the Chief when he is on leave. The Deputy Police Chief has no authority to hire or fire Police Department employees. She evaluates members of the Police bargaining unit but her evaluations are not used for pay raises.

33. The Deputy Police Chief has no supervisory responsibilities with regards to the members of the proposed bargaining unit.

34. The Town has three full-time Fire Department positions: the Chief and two Firefighters. The rest of the Firefighters are on call per diem employees. One of the two full-time Firefighters is also a Deputy Fire Chief. The employee filling the position of the Deputy Fire Chief resigned on January 30, 2010. The position of Firefighter/Deputy Fire Chief is currently vacant. The Town is now advertising to fill the position of the full-time Firefighter/Deputy Fire Chief.

35. The Highway Laborers and Highway Foreman report to the Highway Supervisor. The Highway Supervisor has authority to take disciplinary actions. The Town Manager's approval is necessary for some disciplinary actions. Supervisor can recommend an employee for promotion. He also makes recommendations regarding hiring and firing.

36. The Job Description for the Highway Supervisor provides in relevant part:

Responsible for planning, directing, conducting and administering all functions of the Town Highway Department. . . . Reports to Town Manager. . . . [O]rganize[s], direct[s] and control[s] all resources of the department; . . . maintain[s] equipment and personnel at a level consistent with budget, develop[s], present[s] and administer[s], after approval, departmental budget; organize[s], maintain[s], and administer[s] the personnel policies and procedures of the town and the department

See Town Exhibit 3.

37. Dan Garlington is the Highway Supervisor. As part of his duties he conducts performance evaluations. In 2006, Mr. Garlington recommended the Highway Laborer, Dana Rabito, for promotion to the position of Highway Foreman and asked the Town Manager to raise Mr. Rabito's rate of pay. Pursuant to the Highway Supervisor's recommendation, Mr. Rabito was promoted to the position of the Highway Foreman. The promotion carried a pay raise.

DECISION

DECISION SUMMARY

The Town's motion to dismiss is denied as the Union proved the existence of a sufficient community of interest between the members of the proposed unit. The Union's petition for certification is granted. The positions titled in the petition as "Recreation", "Health Inspector", and "Assistant Town Clerk" are excluded from the bargaining unit because the Union failed to offer sufficient evidence to prove that these positions currently exist. The position of Executive Secretary to the Police Chief, titled in the petition as "Working Supervisor Secretary", is excluded from the bargaining unit because the Executive Secretary is a confidential position. The position of the Animal Control Officer is excluded from the bargaining unit because the Animal Control Officer is an on call position. The position of Highway Supervisor is excluded from the bargaining unit because the Highway Supervisor is a supervisory position.

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 moves to dismiss the Union's petition on the ground that the Union failed to meet its

burden of proof as to the existence of a community of interest between the members of the proposed bargaining unit.

“In establishing the PELRB, the legislature recognized the ‘right of public employees to organize and to be represented for the purpose of bargaining collectively with the state or any political subdivision thereof’ Laws 1975, 490:1.” *Appeal of International Brotherhood of Police Officers*, 148 N.H. 194, 196 (2002). RSA 273-A:8, I vests the PELRB with the authority to determine the appropriate bargaining unit and certify the exclusive representative thereof. “The principal consideration in determining an appropriate bargaining unit is whether there exists a community of interest in working conditions such that it is reasonable for the employees to negotiate jointly.” *Appeal of Town of Newport*, 140 N.H. 343, 352 (1995) (quoting *Appeal of the University System of New Hampshire*, 120 N.H. 853, 855 (1980)). RSA 273-A:8, I provides that

the community of interest may be exhibited by one or more of the following criteria, although it is not limited to such:

- (a) Employees with the same conditions of employment;
- (b) Employees with a history of workable and acceptable collective negotiations;
- (c) Employees in the same historic craft or profession;
- (d) Employees functioning within the same organizational unit.

The PELRB rules provide additional criteria for determining whether the community of interest exists:

- (1) A common geographic location of the proposed unit;
- (2) The presence of:
 - a. Common work rules and personnel practices; and
 - b. Common salary and fringe benefit structures; and
- (3) The self-felt community of interest among employees.

Pub 302.02 (b). In addition to considering the principle of community of interest, the PELRB also takes into account the effect of forming any particular bargaining unit on the efficiency of government operations and the potential for employees within the proposed bargaining unit to experience a division of loyalties between the public employer and the employees' exclusive representative. See Pub 302.02 (c) (1) and (2). "[T]he statutory framework which guides PELRB decisions is flexible, and gives much discretion to the PELRB's expertise. The statute and regulation require only that certain factors may be considered in determining whether a community of interest exists." *Appeal of University System of New Hampshire*, 131 N.H. 368, 374 (1988). Under the statute and regulations, "the PELRB need not find each criterion satisfied in order to find that a community of interest exists." *Appeal of Town of Newport*, 140 N.H. 343, 352 (1995).

In the present case, there is a sufficient community of interest between the members of the proposed bargaining unit. Many of the positions in the proposed bargaining unit were within the bargaining unit formed in 1991. The 1991 bargaining unit represented by AFSCME negotiated collectively for nearly six years and was a party to the collective bargaining agreement with the Town. These facts demonstrate the existence of a history of workable and acceptable collective negotiations. In addition, the Town personnel rules, policies, and procedures, including the Personnel Plan disciplinary procedure, apply to all employees in the proposed bargaining unit. The employees in the proposed bargaining unit function within the same organizational unit and share common work rules, personnel practices, and fringe benefits structure. The evidence demonstrates that it is reasonable for the members of the proposed unit to negotiate jointly. In addition, the employees in the proposed bargaining unit participate in town-wide events and share a common geographic location, as, in this case, the relevant geographic

location is the Town of Plaistow and not a particular municipal department. Nothing in RSA 273-A prevents the PELRB from certifying town-wide bargaining units, all other statutory requirements being satisfied. Furthermore, the Town's evidence is insufficient to prove that the formation of this bargaining unit will have a negative effect on the efficiency of government operations. Similarly, the evidence is insufficient to prove that the employees within the proposed bargaining unit will likely experience a division of loyalties between the public employer and the exclusive representative. Accordingly, the Union satisfied its burden of proving the existence of a sufficient community of interest and the Town's motion to dismiss the Union's petition is denied.

The Town seeks to exclude the position of Highway Supervisor from the proposed bargaining unit claiming that the Highway Supervisor exercises supervisory authority over Highway Foreman and Highway Laborers. RSA 273-A:8, II provides that the "[p]ersons exercising supervisory authority involving the significant exercise of discretion may not belong to the same bargaining unit as the employees they supervise." In determining whether an employee exercises supervisory authority, important factors to consider include "the employee's authority to evaluate other employees, the employee's supervisory role, and the employee's disciplinary authority." *Appeal of Town of Stratham*, 144 N.H. 429, 432 (1999) (citing *Appeal of East Derry Fire Precinct*, 137 N.H. 607, 610 (1993)). See also *Jaffrey Rindge Support Staff Association, NEA-New Hampshire v. Jaffrey Rindge Cooperative School District*, PELRB Decision No. 2004-183. "Supervisory employees are separated from the employees they supervise 'to avoid conflicts between the two groups because of the differing duties and relationships which characterize each group.'" *Appeal of Town of Stratham*, 144 N.H. at 432 (citing *Appeal of University System of N.H.*, 131 N.H. 368, 375 (1988)).

In the present case, the evidence proves that the Highway Supervisor exercises supervisory authority involving the significant exercise of discretion over the Highway Foreman and Highway Laborers. The Highway Supervisor has authority to discipline and to recommend the employees of the Highway Department for promotion and pay raise. The Highway Supervisor makes recommendations regarding hiring and firing of Highway Department employees and conducts evaluations which carry the change in the rate of pay. Therefore, the Highway Supervisor is vested with, and exercises, the supervisory authority involving the significant exercise of discretion and cannot belong to the same bargaining unit as the employees he supervises. Accordingly, the position of Highway Supervisor is excluded from the bargaining unit.

The Town also seeks to exclude the position of Executive Secretary to the Police Chief claiming that the Executive Secretary 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 defined “confidential employees” as those employees who have “access to confidential information *with respect to labor relations*, negotiations, significant personnel decisions and the like.” *State of New Hampshire, Dept. of Rev. Administration v. State Employees’ Ass’n*, PELRB Decision No. 78001 (emphasis in original). See also *Teamsters Local 633 of NH/Newmarket Public Works Employees and Town of Newmarket*, PELRB Decision No. 2008-127.

In the present case, the evidence shows that the Executive Secretary to the Police Chief has access to personnel files. She types the Chief’s correspondence, handles emails and phone calls, and responds to the Chief’s mail. The Executive Secretary types memoranda and letters,

including the letters involving disciplinary decisions, and puts documents, including disciplinary letters, into personnel files. The evidence proves that the Executive Secretary to the Police Chief is an employee whose duties imply a confidential relationship to the public employer. Accordingly, the position of Executive Secretary to the Police Chief is excluded from the bargaining unit.

The Town seeks to exclude the Animal Control Officer position from the bargaining unit on the ground that the Animal Control Officer is an on call employee. RSA 273-A:1, IX (d) excludes persons who are employed seasonally, irregularly or on call from the definition of a “public employee.” The New Hampshire Supreme Court defined “on call” for the purposes of RSA 273-A:1 IX (d) as “ready to respond to a summons or command.” See *Appeal of Town of Stratham*, 144 N.H. 429, 431 (1999). See also *Brentwood Police Union, NEPBA v. Town of Brentwood*, PELRB Decision No. 2008-247. The Town’s uncontroverted evidence proves that the Animal Control Officer is presently an on call employee. The Animal Control Officer has a full-time job with the private firm and attends to his animal control duties in response to summons from the Police Chief. He works on an as needed basis. Accordingly, the position of Animal Control Officer is an on call position and is excluded from the bargaining unit.

The Town also seeks to exclude the position of Crossing Guard on the ground that the Crossing Guards are seasonal employees. RSA 273-A:1, IX (d) excludes the persons employed seasonally from the definition of the “public employees”. RSA 273-A:1, IX (d) does not exclude regularly scheduled part-time employees. See *Teamsters Local 633 of New Hampshire v. Town of Bow Police Department*, PELRB Decision No. 94-33. In the present case, the Town’s evidence is insufficient to prove that the Crossing Guards are seasonal employees. The Crossing Guards, similarly to Teachers, work the entire school year. They work regularly four hours per

day during the school working hours. The position of Crossing Guard is regularly scheduled part-time position. Accordingly, Crossing Guard position is not a seasonal position and is included in the bargaining unit.

The positions titled in the petition as “Health Inspector”, “Recreation”, and “Assistant Town Clerk” are excluded from the bargaining unit as the Union failed to offer any evidence that these positions currently exist. The positions of Maintenance Worker/Custodian, Welfare Director, and Deputy Fire Chief are included in the bargaining unit as the evidence demonstrates that, although temporarily unfilled, these positions have not been eliminated by the Town. Although, the PELRB has previously determined that unfilled positions cannot be counted for purposes of determining whether the certification petition is supported by at least 30% of the employees in the proposed unit¹, the PELRB has consistently included the unfilled positions that otherwise satisfied the requirements of RSA 273-A in the bargaining units. See *Teamsters Local 633 of New Hampshire v. City of Rochester, Rochester Public Library*, PELRB Decision No. 2001-009 (unfilled librarian II position was included in bargaining unit); see also *Lebanon Professional, Administrative, and Salaried Employees v. City of Lebanon*, PELRB Decision No. 96-065 (unfilled position of airport manager was included in bargaining unit); and *International Brotherhood of Electrical Workers Local 1837 v. Littleton Water & Light Department*, PELRB Decision No. 94-03 (unfilled position of customer service representative was included in bargaining unit). The Town’s evidence is insufficient to prove that these positions are supervisory, confidential, seasonal, irregular, or on call positions or otherwise inappropriate for the inclusion in the bargaining unit. If any of these positions are eliminated, significantly changed, or become otherwise inappropriate for the inclusion in the bargaining unit, either party

¹ See *NH State Corrections Association v. SEA, SEIU Local 1984 and State of New Hampshire*, PELRB Decision No. 2006-198.

is free to file a petition for modification of the bargaining unit pursuant to Pub 302.05. Although the Maintenance Worker/Custodian position is included in the bargaining unit, the employee currently filling one of the Maintenance Worker/Custodian positions is not eligible to sign a written majority authorization card in support of this petition as the evidence demonstrates that he is a temporary employee. The temporary employees are excluded from the definition of a "public employee" under RSA 273-A:1, IX (d) and, therefore, cannot vote in representation elections or sign the authorization cards.

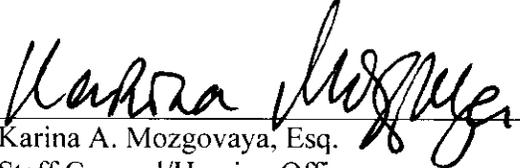
Based upon the evidence submitted into the record, the Union's petition to certify a bargaining unit of the Town of Plaistow employees is granted, with the appropriate bargaining unit being determined as follows:

Assessing Clerk, Health Officer, Recreation Director, Building Inspector/Code Enforcement Officer, Welfare Director, Deputy Tax Collector/Deputy Town Clerk, Deputy Police Chief, Deputy Fire Chief, Highway Foreman, Highway Laborer, Maintenance Supervisor, Maintenance Worker/Custodian, and Crossing Guard.

The bargaining unit currently consists of twelve employees eligible to sign authorization cards. Based upon the authorization cards on file, there is a written majority authorization for the Union to serve as the exclusive representative of the approved bargaining unit. A Certification of Representative and Order to Negotiate shall issue in accordance with Pub 301.05 (m).

So ordered.

March 31, 2010


Karina A. Mozgovaya, Esq.
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