



State of New Hampshire
Public Employee Labor Relations Board

Town of Gilford

and

AFSCME Council 93, Local 534, Gilford Public Works Employees

Case No. G-0224-1
Decision No. 2015-196

Appearances:

Eric A. Maher, Esq., and Robert D. Ciandella, Esq., Donahue, Tucker, & Ciandella, PLLC, for the Town of Gilford

Anna R. Shapell, Esq., Associate General Counsel, AFSCME Council 93, Boston, Massachusetts, for the AFSCME Council 93, Local 534, Gilford Public Works Employees

Background:

On March 30, 2015, the Town of Gilford (Town) filed a modification petition seeking to remove the position of Head Mechanic from the existing bargaining unit represented by the AFSCME Council 93, Local 534, Gilford Public Works Employees (Union). The Town asserts that the Head Mechanic is a newly-created position and that it is supervisory within the meaning of RSA 273-A:8.

The Union objects to the petition on the grounds that the position of Head Mechanic/Shop Supervisor was previously included in the bargaining unit and that there has been no change in circumstances because the current position's duties do not materially differ from the duties performed by the former Head Mechanic/Shop Supervisor.

On June 5, 2015, the Town filed a motion to amend its modification petition in which it sought to add the position of Shop Supervisor to the positions to be removed from the bargaining unit. The Town argues that the Shop Supervisor position is supervisory within the meaning of

RSA 273-A:8. The Union assented to the Town's motion to amend its petition. The Town's assented to motion to amend its modification petition is granted.

The adjudicatory hearing was conducted on June 12, 2015 at the Public Employee Labor Relations Board (PELRB) offices in Concord. The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. The parties filed post-hearing briefs on July 15, 2015. The parties' factual stipulations are incorporated into the Findings of Facts below; and the decision is as follows.

Findings of Fact

1. The Town is a public employer within the meaning of RSA 273-A:I, X.
2. The Union is the exclusive representative for the following bargaining unit: "All Non-Probationary Public Works Employees, exclusive of the Public Works Director, Highway Superintendent, Executive Secretary, and all other confidential and supervisory employees." See PELRB Certification of Representative and Order to Negotiate, Case No. A-0583 (March 16, 1998). The position of Shop Supervisor/Foreman¹ is within the bargaining unit. The bargaining unit has not been previously modified.
3. The Union and the Town were parties to a collective bargaining agreement (CBA) effective from April 1, 2013 through March 31, 2015. Appendix C of this CBA, containing an employee classification and wage schedule, includes the position of Shop Foreman.
4. The Union and the Town are parties to a CBA effective from April 1, 2015 through March 31, 2018. This CBA was approved by the Town Meeting and was signed by the Town representative on March 11, 2015. Article I of this CBA, titled Recognition, contains new subsection 1.3 stating as follows:

The following Town employees are excluded from the bargaining unit and are therefore not subject to the terms of this Agreement: Public Works Director,

¹ The position titles of Shop Supervisor and Shop Foreman are used interchangeably in the record and refer to the same position.

Operations Manager, Highway Superintendent, Executive Secretary and Clerical Assistant/Receptionist.

See Joint Exhibit 7. Appendix C of this CBA, Employee Classification Schedule, includes the position of Shop Supervisor.

5. On March 4, 2015, the Shop Supervisor retired. See Joint Statement of Stipulated Facts at 4.

6. On March 11, 2015, the Town Board of Selectmen voted to create a new position of Head Mechanic. See Joint Statement of Stipulated Facts at 5.

7. Scott Dunn is the Town Administrator. He created a job description for the Head Mechanic position upon resignation of the Shop Supervisor. Mr. Dunn routinely reviews and revises job descriptions upon employee resignations and before filling a vacancy. The Town Administrator intended to replace the Shop Supervisor position with the Head Mechanic position because he wanted this position to have a broader supervisory authority and to be outside the bargaining unit.

8. The Town does not intend to fill the position of Shop Supervisor/Foreman in the foreseeable future. The Shop Supervisor/Foreman position does not currently exist.

9. The job description for the position of Shop Supervisor provides in part as follows:

JOB SUMMARY

Performs highly responsible administrative and supervisory work of a technical nature in the scheduling, control and expediting of automotive and other public works equipment service maintenance and purchasing; supervises Public Works Garage.

SUPERVISION RECEIVED

Works under the general supervision of the Director of Public Works and Operations Manager who provides general policy and guidelines. Work is performed independently, requiring considerable judgment and resourcefulness in planning work for various units and in ordering parts and equipment.

SUPERVISION EXERCISED

Exercises general supervision over mechanics, and any personnel assigned to units; assigns work; provides any necessary training or instruction and reviews work performed.

EXAMPLES OF DUTIES PERFORMED

...

1. Plans and supervises the maintenance and repair of automotive equipment...
2. Prepares and maintains personnel schedules, equipment, operation and preventive maintenance records.
3. Inspects and makes decisions as to the fitness for use of department equipment, subject only to reversal by the Superintendent.
4. Trains and instructs personnel in equipment maintenance practices and procedures; establishes operating policies and procedures.
5. Orders, records and stocks all necessary repair parts, accessories and equipment; performs or supervises clerical work necessary to the proper charging of maintenance costs, inventory records, etc...

Performs other duties as required ...

See Joint Exhibit 4. This job description was approved in 2006.

10. The job description for the position of Head Mechanic provides in part as follows:

JOB SUMMARY

Serves as the head of the Vehicle Maintenance Division of the Department of Public Works. Performs highly responsible administrative, technical and supervisory work in the maintenance, safety and operation of vehicles, machinery and other municipal equipment as assigned; serves as a working foreman responsible for delegating staff assignments, responsible for purchasing, budget preparation and administration ... Works with supervisors to establish and oversee long-term initiatives to optimize divisional performance ... performs supervisory duties in accordance with the Town's Personnel Policies and Union contractual obligations; maintains appropriate records and prepares reports; ... and regularly performs general mechanic duties.

SUPERVISION RECEIVED

Works under the general supervision of the Director of Public Works and the direct supervision of the DPW Operations Manager who provide oversight on Town-wide and departmental policies and procedures; work is performed independently, requiring considerable initiative, judgment and resourcefulness in coordination of multiple, concurrent priorities and determining proper methods to

accomplish the various missions of the Vehicle Maintenance Division of the DPW.

SUPERVISION EXERCISED

Exercises direct supervision over mechanical staff and any other personnel assigned to the Vehicle Maintenance Division; issues daily work assignments; ensures staff is adequately trained; provides guidance and oversight as necessary; ... serves as key contributor on employee job performance evaluations, discipline and hiring decisions; also responsible for coordinating schedules and duties with other Town Officials as may be necessary.

EXAMPLES OF DUTIES PERFORMED

...

1. Responsible to assist the DPW Director and Operations Manager with the development of the annual department budget; is required to acquire price quotes and estimates as they relate to budget planning and administration; is also responsible for issuance of purchase orders within the Vehicle Maintenance Division.

...

3. Prepares and maintains personnel schedules, equipment, operating and preventive maintenance records.

...

5. Trains and instructs personnel in maintenance practices and procedures; arranges for outside professional development of assigned staff; establishes divisional operating policies and procedures.

...

10. Prepares employee work performance evaluations on subordinates, recommends disciplinary action or praise as may be appropriate, assists in the hiring of Division employees, holds assigned staff accountable for work performance.

See Joint Exhibit 3.

11. The Town's personnel evaluation procedure, set for in Personnel Policies, contains the following steps:

- Step 1: Employee Self-Evaluation
- Step 2: Supervisor Review/Evaluation
- Step 3: Department Manager Review/Evaluation
- Step 4: Town Administrator Review
- Step 4a: Board of Selectmen Review (Applicable for Dept. Managers Only)
- Step 5: Employee & Supervisor Consultation
- Step 6: Employee Acknowledgment
- Step 7: Original Returned to Town Administrator for Personnel File
- Step 8: Board of Selectmen Approval of Change of Status Form

See Joint Exhibit 7, Appendix D.

12. The Town Personnel Policies, Article IX, Discipline, provides in part as follows:

IX.3 Types of Disciplinary Action

The Town reserves the right to impose the following types of discipline, in no particular order, to include any combination thereof: counseling, verbal warning, probation, suspension, demotion, discharge, prosecution. Whenever practical, Department Managers or Supervisors are encouraged (but not required) to utilize a written employee correction action notice to alert employees that a certain behavior needs to change in order to (a) avoid some of the more serious consequences associated with disciplinary action; (b) engage in a dialogue with employees about job performance expectations; and (c) provide documentation for personnel files.

...
IX.5 Implementation Procedures

...
B. Department Managers are authorized to discipline their subordinate employees as otherwise set forth in these Personnel Policies by means of counseling, verbal warning with no documentation; verbal warning with documentation, written warning, placing an employee on probation or extending an initial probationary period. In addition, Department Managers are authorized to suspend or discharge irregular employees, seasonal employees and employees who are serving an initial ... probationary period ...

C. Department Managers are authorized to suspend a regular full-time employee without pay for a specified time period depending upon the severity of the incident and/or frequency of the infraction upon written notice to be issued after providing the employee with an opportunity to explain their behavior and upon consent of the Town Administrator; however, a Department Manager may require an employee to immediately leave the workplace for disciplinary and/or safety reasons.

D. Other actions such as demotion, discharge or criminal prosecution shall only be administered (or authorized) by the Board of Selectmen upon the recommendation in writing by a Department Manager and/or the Town Administrator ... The decision of the Board of Selectmen shall be in writing and shall be final (not subject to any additional appeals under these Personnel Policies).

Consecutive performance evaluations with a numeric rating of "2.00" or less constitute a "conduct subject to discipline" under Personnel Policies Article IX.4. See Town Exhibit 5.

13. Former Shop Supervisor Timothy Wolf oversaw the work of two Vehicle

Maintenance Division/Garage employees: an Automotive Technician and a Mechanic. He supervised the work performed by these employees. The Shop Supervisor had no authority to, and did not in fact, discipline Vehicle Maintenance Division employees.

14. The evaluation forms completed by the Shop Supervisor provided a very perfunctory performance review and were insufficient to provide basis for the management's decision regarding employee promotions, demotions, pay raises, or discipline.

15. The Shop Supervisor was actively involved in hiring of Vehicle Maintenance Division employees, including participating in the interview process and recommending hiring.

16. The Head Mechanic has authority to evaluate Vehicle Maintenance Division employees' performance. The Head Mechanic's evaluations are placed in bargaining unit employees' personnel files and relied upon by the Town management when making decisions regarding pay raises, promotions, discipline, or termination.

17. The Head Mechanic has authority to discipline bargaining unit employees and to recommend suspension and termination.

18. The Head Mechanic is responsible for preparing a work schedule for Vehicle Maintenance Department employees.

19. The Head Mechanic plays a significant role in the hiring process: he has authority to interview candidates and recommend hiring; and his recommendations will be relied upon by the Town management when making hiring decisions.

20. The Head Mechanic's recommendations on discipline, termination, and hiring will carry significant weight.

Decision and Order

Decision Summary:

The Town's request to remove the position of the Head Mechanic from the bargaining unit is granted because there has been a sufficient change of circumstances to justify a

modification of the bargaining unit in this case; and the Head Mechanic is a supervisory employee within the meaning of RSA 273-A:8. The Town's request to remove the position of Shop Supervisor on the ground that it is a supervisory position is denied based upon the finding that this position no longer exists.

Jurisdiction

The PELRB has jurisdiction of all petitions to determine and modify bargaining units pursuant to RSA 273-A:8 and Pub 302.05.

Discussion:

The Town argues that the allegedly newly-created position of Head Mechanic should be removed from the existing bargaining unit because this position is supervisory within the meaning of RSA 273-A:8, II.

The legislature has vested the PELRB with primary and exclusive authority to determine the composition of and certify bargaining units. See RSA 273-A:8, I.² See also *Prof. Fire Fighters of Wolfeboro v. Town of Wolfeboro*, 164 N.H. 18, 22 (2012); and *Appeal of the University System of N.H.*, 120 N.H. 853, 854 (1980). Modifications of existing bargaining units are governed by Pub 302.05, which provides in relevant part as follows:

(a) Where the circumstances surrounding the formation of an existing bargaining unit are alleged to have changed, or where a prior unit recognized under the provisions of RSA 273-A:1 is alleged to be incorrect to the degree of warranting modification in the composition of the bargaining unit, the public employer, or the exclusive representative, or other employee organization if the provisions of section (d) are met, may file a petition for modification of bargaining unit.

(b) A petition shall be denied if:

(1) The question is a matter amenable to settlement through the election process; or

(2) The petition attempts to modify the composition of a bargaining unit negotiated by the parties and the circumstances alleged to have changed,

² "The board or its designee shall determine the appropriate bargaining unit and shall certify the exclusive representative thereof when petitioned to do so under RSA 273-A:10..." RSA 273-A:8, I.

actually changed prior to negotiations on the collective bargaining agreement presently in force.

Pub 302.05. The language of Pub 302.05 leaves the PELRB discretion in deciding whether or not to grant petitions to modify. *Appeal of Bow School District*, supra, 134 N.H. at 73.

1. Pub 302.05 Change in Circumstances

In accordance with Pub 302.05, contested modification petitions must be supported by evidence demonstrating either that the circumstances have changed since the time of the prior bargaining unit proceedings or that “a prior unit recognized under the provisions of RSA 273-A:1” is incorrect to the extent that modification is required. See *Teamsters Local 633 of New Hampshire and Town of Hooksett*, PELRB Decision No. 2008-193 (September 25, 2008) (modification petition dismissed because there has been no change in circumstances since time of prior bargaining unit proceedings). See also *Salem Public Administrators’ Association and Town of Salem*, PELRB Decision No. 2009-171 (August 18, 2009) (union’s modification petition denied because there was “insufficient evidence that there has been a change in circumstances since the most recent proceedings involving this bargaining unit”); *Rochester Municipal Managers Group and City of Rochester*, PELRB Decision No. 2009-182 (September 3, 2009) (union’s modification petition denied because change in employment status from probationary to permanent is not material change in circumstances warranting modification). Creation of a new position or restructuring of an existing position is a change in circumstances that may warrant modification of an existing bargaining unit.

In this case, there has been a sufficient change in circumstances since the most recent representation proceedings to justify a modification of the bargaining unit. The record shows that the Town created a position of Head Mechanic after the Shop Supervisor had retired. The Town intended the new position to have more supervisory authority than the authority given to or exercised by the Shop Supervisor. The Head Mechanic is required to conduct annual

performance evaluations and has authority to discipline the Town Vehicle Maintenance Division employees. The Shop Supervisor did not have the authority to discipline these employees and conducted only perfunctory performance evaluations. It appears that the Shop Supervisor's responsibilities were akin to those of a working foreman and involved the supervision of work performed rather than the supervision of employees. Although some of the Head Mechanic's duties and responsibilities are the same as those performed by the Shop Supervisor, many of the Head Mechanic's duties are newly-created or modified, including such supervisory duties as conducting performance evaluations, establishing divisional operating policies and procedures, and issuing discipline. These changes occurred after the most recent representation proceeding affecting the subject bargaining unit (1998 certification) and they are material changes sufficient to satisfy the requirements of Pub 302.05. Therefore, the Town satisfied the threshold requirement of proving that there has been a sufficient change in circumstances since the time of the prior representation proceedings to justify a petition to modify the bargaining unit.

2. RSA 273-A:8, II Supervisory Employees.

RSA 273-A:8, II provides that "[p]ersons exercising supervisory authority involving the significant exercise of discretion may not belong to the same bargaining unit as the employees they supervise." Statutory 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. 429, 432 (1999). See also *New England Police Benevolent Association, IUPA, AFL-CIO v. Town of Hillsborough*, PELRB Decision No. 2010-112.

A supervisory relationship within the meaning of RSA 273-A:8, II exists "when the supervisor is genuinely vested with significant supervisory authority that may be exerted or withheld depending on his or her discretion." *International Chemical Workers Union Council and Hillsborough County Nursing Home*, PELRB Decision No. 1999-079. In determining

whether an employee exercises supervisory authority involving the significant exercise of discretion, 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*, supra, 144 N.H. at 432. See also *NEPBA, Inc. Local 40/NH Fish & Game Conservation Officers et al. v. SEA/SEIU Local 1984*, PELRB Decision No. 2006-174; *Teamsters Local/Plaistow Town Employees v. Town of Plaistow*, PELRB Decision No. 2010-062. A proper assessment of whether a position is supervisory “requires consideration of matters such as the nature, extent, character and quality of [employee’s] authority and involvement in the areas of discipline, evaluations, and hiring.” *Tilton Police Union, NEPBA Local 29 v. Town of Tilton*, PELRB Decision No. 2007-100. “[S]ome employees performing supervisory functions in accordance with professional norms will not be vested with the ‘supervisory authority involving the significant exercise of discretion’ described by RSA 273-A:8, II.” *Appeal of East Derry Fire Precinct*, 137 N.H. 607, 611 (1993). See also *Hampstead Police Union, NEPBA Local 37 and Town of Hampstead*, PELRB Decision No. 2008-071.

Here, the record shows that the Head Mechanic has authority to evaluate the performance of Vehicle Maintenance Division employees. The evaluations are placed in bargaining unit employees’ personnel files and relied upon by the Town management when making decisions regarding promotion, demotion, or termination. In addition, the Head Mechanic has authority to discipline bargaining unit employees and to recommend suspension and termination. The Head Mechanic is responsible for establishing a work schedule and plays an important role in the hiring process: he has authority to interview candidates and recommend hiring; and the recommendations will be relied upon by the Town management when making hiring decisions. Moreover, the Head Mechanic’s recommendations on discipline, termination, and hiring will carry significant weight. All these factors indicate that keeping the Head Mechanic in the same bargaining unit with the employees he supervises and evaluates will likely create conflicts

between the two groups because of the differing duties and relationships which characterize each group.

For the foregoing reasons, the Town's petition for remove the position of Head Mechanic from the bargaining unit is granted.

The Town also seeks the removal of the Shop Supervisor position from the bargaining unit. This position had existed for a significant number of years and had always been included in the bargaining unit. The Town offered no evidence of a change in circumstances with respect to the Shop Supervisor position beyond the evidence that this position is vacant and that the Town does not intend to fill it in the foreseeable future. Furthermore, the evidence shows that the new Head Mechanic position has been created to permanently replace the Shop Supervisor position. For all intents and purposes, the Shop Supervisor/Foreman position no longer exists and, therefore, there is no basis upon which the determination can be made as to whether the Shop Supervisor exercises or will ever exercise "supervisory authority involving the significant exercise of discretion." Based on the foregoing, the Town's request to remove this position from the unit is moot and, therefore, denied.

Accordingly, the bargaining unit description is modified as follows:

Unit: All Non-Probationary Public Works Employees.

Excluded: Public Works Director, Highway Superintendent, Executive Secretary, Head Mechanic, and all other confidential and supervisory employees.

A Unit Modification order shall issue subsequently.

So ordered.

Date: 8-31-2015


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