

NH Supreme Court affirmed in part; reversed in part; and remanded this decision on 10-16-2012, Slip Opinion No. 2011-538. (NH Supreme Court Case No. 2011-538)



**STATE OF NEW HAMPSHIRE**  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**NEPBA, Moultonborough Police Association**

**and**

**Town of Moultonborough**

**Case No. G-0144-1**

**Decision No. 2011-039**

**Appearances:**

Kevin E. Buck, Esq., Nolan Perroni Harrington, LLP, Lowell, Massachusetts for the NEPBA, Moultonborough Police Association

Anne M. Rice, Esq., Rice Law Office, PLLC, Laconia, New Hampshire for the Town of Moultonborough

**Background:**

The NEPBA, Moultonborough Police Association (Association) filed a written majority authorization (WMA) petition for certification on June 10, 2010 proposing a bargaining unit consisting of the following positions within the Moultonborough Police Department: Sergeant, Corporal, Master Patrol Officer, Patrolman, Executive Assistant, Communication Specialist/Dispatcher, and Prosecutor. The Town of Moultonborough (Town) objects to the petition claiming that the proposed bargaining unit does not contain a minimum of ten employees as required under RSA 273-A:8, I, includes employees exercising supervisory authority involving significant exercise of discretion contrary to RSA 273-A:8, II, includes confidential

and probationary employees contrary to RSA 273-A:1, IX (c) and (d), and lacks a community of interest as required under RSA 273-A:8, I.

After the petition was filed, the Town requested and obtained an extension of time to file an answer and filed its answer on July 19, 2010. An adjudicatory hearing was subsequently scheduled for August 2, 2010 but, at the parties' requests, had been continued four times and was finally rescheduled for October 29, 2010. The undersigned hearing officer conducted a hearing on October 29, 2010 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.<sup>1</sup>

### **Findings of Fact**

1. The Town is a public employer within the meaning of RSA 273-A:1, IX.
2. The Association is an employee organization seeking to be certified as the exclusive representative of a bargaining unit consisting of certain employees of the Moultonborough Police Department through written majority authorization pursuant to RSA 273-A:10, IX.
3. At the time the petition was filed, the proposed bargaining unit contained fifteen employees in the following positions: Prosecutor (1), Executive Assistant (1), Sergeant (3), Corporal (1), Master Patrol Officer (3), Patrolman (4, including a probationary Patrolman), and Communication Specialist/Dispatcher (2).

---

<sup>1</sup> The Town attached a copy of the PELRB Decision No. 2008-165 and an affidavit of Chief Thomas Dawson to its post-hearing brief as attachments A and B. Parties are free to cite prior PELRB decisions, like Decision No. 2008-165, to support their positions in contested proceedings. The affidavit of Chief Dawson is not admitted into the record. Pub 203.06 (a) provides that "[a]fter the conclusion of the hearing, the record shall be closed and no other evidence shall be received into the record, except as allowed by paragraphs (b) and (c) of this section." As no request to have the record open for the submission of additional evidence was made, Pub 203.06 (b) and (c) do not apply. The parties were granted leave to file post-hearing briefs but they neither requested nor were granted leave to file any additional evidence after the conclusion of the hearing.

4. With the exception of the Prosecutor, all employees in the proposed bargaining unit are covered by the Town Personnel Policy and by the Police Department Rules and Regulations. See Joint Exhibits C & I.

5. The subjects covered by the Personnel Policy include the following: appointments and probationary period, physicals and other examinations, residency, personnel files, personal appearance-office décor, internet access and email use, cellular telephone and pager usage, attendance, compensation rates, payroll period, overtime, in-house promotions, benefits, health insurance, vacations, holidays, sick days and leaves of absence, performance reviews, resignation, disciplinary procedures, complaints regarding the performance of a town employee, and grievance procedure. See Joint Exhibit C.

6. The Police Department is located at the Public Safety Building which also contains the Fire Department and the Emergency Medical Services. With the exception of the Prosecutor, all employees in the proposed bargaining unit work at the Public Safety building and interact with each other on a regular basis.

7. The Prosecutor is an employee of the Town of Sandwich and the Town of Moultonborough. The Prosecutor has no set work hours. He sets his own schedule, maintains a home office, and often works from home. The Prosecutor is the only salaried employee in the proposed unit and the only employee who receives a mileage and expenses stipend, the amount of which is fixed regardless of the amount of miles traveled. The stipend is built into the Prosecutor's salary. The Prosecutor is not paid overtime.

8. Patrolman James Quinlan is a probationary employee.

9. The Executive Assistant's duties set forth in the job description include the following:

1. Coordinates the daily general administration and clerical functions of the Police Department.

\* \* \*

3. Prepares Federal and State statistical information to include:

Maintains Case Number Files.

Maintains Central Name Files.

Maintains Field Interview Files.

Maintains Arrest File Cards.

Maintains permanent Files. (sic)

5 (sic). Responsible for all computer related phases of data system.

6. Coordinates purchase of office supplies and maintenance needs.

7. Tracks expenses incurred in the daily operation of the department.

8. Maintains all files for the Police Chief, *except for confidential files*.

9. Maintains records of personnel sick and vacation days; placing into officers' files records of the leaves.

10. Maintains a current record of personnel names, addresses, and telephone numbers.

11. Maintains a telephone directory of all companies and persons who have hired police officers for paid details.

12. Maintains record of accounts payable, assigns accounts numbers and submits statements to Administrative Assistant for payment.

13. Receives public and professional inquiries (sic) and provides appropriate replies or refers inquiries (sic) to proper personnel.

14. Maintains general correspondence and document files.

15. Prepares copies of police reports for insurance companies, upon request.

Joint Exhibit B, pages 10-11 (emphasis added).

10. Personnel files are kept in a locked cabinet in the Chief's office. The Chief is the only person with the key to that cabinet. Any employee who wants to access a personnel file, must request the Chief's permission.

11. Virginia Welch is the Executive Assistant. The Executive Assistant's office is next to the Dispatch office. Like a Communication Specialist/Dispatcher, she answers all phone calls, not only the phone calls directed to the Chief. The Executive Assistant enters payroll information into computer system, conducts billing, handles worker's compensation reports, files arrest and accident reports, and sends bills to the finance department for payments. Payroll and benefits information is not placed in the personnel files. Ms. Welch does not file anything into

the personnel files and has no access to the locked cabinet containing personnel files without the Chief's permission. She opens departmental mail unless it is marked "confidential." The Executive Assistant does not attend non-public meetings between the Chief and the Board of Selectmen.

12. The Communication Specialists/Dispatchers greet people who come into the Public Safety Building, answer phone calls directed to both the Fire and Police Departments, and run criminal background and license checks. The Communication Specialists/Dispatchers' office is located near the front entrance to the Public Safety Building. The Police Chief receives their time sheets; they are paid out of the Police Department's budget; and the Police Chief has authority to discipline them.

13. The Police Department has one full-time Communication Specialist/Dispatcher, Emily Hanson, who is currently on military leave and who was a probationary employee when she went on military leave, and two part-time Communication Specialists/Dispatchers: Linda Eldridge and Cathy Lord. Ms. Eldridge works 32 hours a week. Ms. Lord works 27 hours a week. The Communication Specialists/Dispatchers' schedule is prepared in advance by Sgt. Beede. The Department also employs Sandy Brackett as an on call Communication Specialist/Dispatcher to fill in when needed.

14. The Disciplinary Procedures section of the Town of Moultonborough Personnel Policy provides that "the Board of Selectmen and supervisors will normally initiate discipline in the following manner: 1. Verbal Warning, 2. Written Warning, 3. Suspension, 4. Termination"

1. VERBAL WARNING – The immediate supervisor shall issue a verbal warning within five (5) days of knowledge of any infraction. The supervisor or department head shall notify the employee of the nature of the infraction and will offer remedial suggestions. With the department head's approval, the Town Administrator shall place the memorandum outlining the nature of the offense in the employee's personnel file.

2. WRITTEN WARNING – the department head shall issue a written warning within ten (10) days of knowledge of any infraction. The warning will outline the nature of the infraction and will offer remedial suggestions. The department head shall provide a copy of the warning to the Town Administrator for inclusion in the employee's personnel file.

3. SUSPENSION – the department head shall recommend to the Board of Selectmen that they suspend the employee, with or without pay. The department heads shall make the recommendation in writing, with a copy forwarded to the employee and to the employee's personnel file within (15) days of knowledge of any infraction. Upon receiving notification, the Board of Selectmen will meet with the employee and the department head within fifteen (15) days following the notification. The Board of Selectmen will render their decision within fifteen (15) days.

NOTE: If warranted, a department head may immediately suspend an employee with pay. The department head shall notify the Town Administrator who will in turn notify the Board of Selectmen within twenty-four (24) hours of the suspension taking effect. Upon notification, the Board of Selectmen shall meet, within ten (10) days, with the employee, the Town Administrator and the department head, and shall make any decision relative to the employee's status within fifteen (15) days.

4. TERMINATION – the department head shall recommend to the Board of Selectmen that they terminate the employee. The department head shall make the recommendation in writing, with a copy forwarded to the employee and the employee's personnel file, within fifteen (15) days of knowledge of the infraction. The Board of Selectmen will meet with the employee, the Town Administrator and the department head within fifteen (15) days after receiving recommendation and shall render a decision within fifteen (15) days after said meeting.

Joint Exhibit C, page 35.

15. The Police Department Rules and Regulations include the following disciplinary penalties: 1) oral reprimand/counseling and training; 2) written reprimand; 3) demotion or suspension without pay; and 4) dismissal from the department. See Joint Exhibit I, pages 222-223.

16. The words "counseling" and "reprimand" are used interchangeably in the Department. "Counseling" is a first level of disciplinary procedure at the Department and is an informal discipline. After the oral "counseling", the "Counselor" is required to memorialize it. The counseled employee is required to acknowledge the record and has a right to file a statement

in his personnel file setting forth his or her contrary position. The oral counseling may involve remedial training. The counseling memorandum is placed into the employee's personnel file. The record of counseling is expunged from the employee's personnel file after one year if the employee has behaved in accordance with departmental rules and regulations. Accumulation of three oral reprimands in one year results in a written reprimand or suspension. See Joint Exhibit I, pages 223-224.

17. The counseling memorandum contains a summary of reasons for counseling, a summary of employee's responses, and the Counselor's suggestions for improvement. It does not contain recommendations to the Chief regarding any further disciplinary action. See Joint Exhibit G.

18. A written reprimand is issued by the Chief of Police and becomes a permanent part of the employee's personnel record. An employee may appeal a written reprimand to the Chief. If the Chief sustains a second or subsequent reprimand in a given year, "the employee may appeal the second and any subsequent reprimands to the appointing authority, who shall be the final arbiter." See Joint Exhibit I, page 224. The appointing authority is the Board of Selectmen.

19. If the Chief determines that the situation warrants it, he may suspend an employee without pay for fifteen days. The employee is entitled to a hearing before the Chief, subsequent to which the Chief informs the employee in writing of the charges and disciplinary action taken. A copy of this document is forwarded to the appointing authority. The employee can appeal the suspension by directing written request for appeal to the Chief and the Board of Selectmen specifying whether the employee desires a public hearing or a non-public session. At the

conclusion of a hearing, the Board of Selectmen may affirm, amend or reverse the decision of the Chief. The decision of the Board of Selectmen is final. See Joint Exhibit I, page 225.

20. The Chief may recommend to the Board of Selectmen to demote an employee. The Board of Selectmen, after a hearing, may affirm, modify or reverse the demotion. See Joint Exhibit I, page 226.

21. The Chief may recommend to the Board of Selectmen to dismiss an employee. Whenever dismissal has been determined to be appropriate by the Chief, the employee is placed on a relief from duty status and within 48 hours, the Chief must notify the employee in writing of the charges alleged that led to the decision. A copy of the notification must be provided to the Board of Selectmen. After the hearing, if such is requested, the Board of Selectmen may affirm the Chief's recommendations, take other disciplinary actions it deems appropriate, or determine that cause does not exist. If the employee fails to request a hearing within ten days of notification, the employee "shall be dismissed from the employment" by the Board of Selectmen." See Joint Exhibit I, page 227.

22. Complaints regarding law enforcement operations are "handled through the chain of command. Complaints involving how police service is provided or a failure to provide service or improper attitudes or behavior will normally be investigated and handled by the investigator or by the Chief of Police. The Chief of Police may ask an investigator from another agency or the Department of State Police to undertake the investigation." Joint Exhibit I, page 235.

23. The Police Department Rules and Regulations regarding discipline define "relief from duty" as an "administrative action by a superior, whereby a subordinate officer is temporarily relieved from performing his or her duties, without loss of pay or benefits. (Also



known as Administrative Leave.)” Joint Exhibit I, page 220. “Relieve from duty (administrative leave)

shall be imposed whenever a supervisor, whether the Chief of Police, Sergeant, *or senior police officer*, questions an employee’s physical or psychological fitness for duty. An internal affairs investigation may follow. There shall be no loss of pay or benefits during a relief from duty period.

1. The Sergeant *or senior police officer* has authority to relieve an employee from duty, but shall immediately report such action to the Chief of Police, or his/her designee, accompanied by a written report setting forth details and circumstances.

2. If the necessity to relieve from duty is not immediate, the behavior or action of the employee shall be deemed a matter of internal affairs. In an internal affairs investigation, only the Chief of Police or, in his/her absence, the second in command may relieve an employee from duty.

3. An officer who refuses to obey a direct order issued in conformity with the department's rules, regulations, and orders may be relieved from duty forthwith by the Sergeant *or senior police officer*, who may recommend suspension to the Chief of Police. The Chief may then suspend the officer without pay.

(Emphasis added.) Joint Exhibit I, page 222.

24. The Police Department does not have a separate Internal Affairs department. Supervisors handle the internal affairs investigations. They meet with the Officer against whom a complaint is filed, investigate the complaint, and report to the Chief as to whether the complaint is unfounded. For the purposes of the Internal Affairs investigations, any senior officer is considered a supervisor. If Sergeants or a Corporal are not present, a Master Patrol Officer could take the complaint but he would not go through all the steps of the procedure like a Corporal or a Sergeant would. The results of investigation are reported to the Chief and the Chief decides whether to take an action and what action to take.

25. Letters of praise/commendation are placed into personnel files and are taken into consideration when promotional, disciplinary, or pay increase decisions are made. Anyone can

write a letter of praise/commendation. For example, a Patrol Officer can write a letter of praise for a Sergeant.

26. The job description for the position of Sergeant provides in Job Summary section:

A Sergeant occupies both the first and intermediate levels of supervision within the Department. The primary responsibility of a Sergeant is exacting the proper performance of subordinate police officers of all ranks within the Department. The Sergeant also serves as a shift commander with responsibility for those officers assigned to the Sergeant's tour of duty.

The Sergeant is charged with ensuring compliance with the Department's policies and regulations. The Sergeant shall be so thoroughly knowledgeable of Departmental policies as to be able to assume the responsibility of Chief, in the Chief's absence. The Sergeant handles all infractions and *reports all violations* directly to the Chief of Police. The Sergeant is responsible for the proficiency, discipline, conduct, appearance and strict attention to duty of all subordinate police officers.

(Emphasis added.) Joint Exhibit B, page 4.

27. The Sergeant's duties and responsibilities include the following:

1. Supervision of patrol officers assigned to his command.

\* \* \*

3. Performance of departmental officers, reviewing their performance on a regular basis to determine their ability to properly, effectively and consistently carry out police duties.

4. Training of all department personnel.

5. Ensure that when the police performance of an officer under his command is unsatisfactory, measures are taken through *encouragement, explanation, referral to his superior officer* or other means consistent with departmental policy to see that the officer's future conduct is up to standard.

6. *Submit a written report* to the Chief regarding any member of the department, and informal corrective measures prove inadequate (sic). Include in such report the complete details of the misconduct and of those corrective measures attempted. . . .

7. Be accountable for the actions or omissions of officers under his supervision which are contrary to departmental regulations or policy.

8. Respond to emergencies, incidents, or dispatches as required. Take command of the situation until relieved by an officer of superior rank. . . . (sic).

(Emphasis added.) Joint Exhibit B, pages 4-5.

28. The job description for the position of Corporal provides in Job Summary section:

A Corporal occupies the first level of supervision in the Moultonborough Police Department. The Corporal's primary responsibility is exacting the proper performance from police officers supervised. . . . The Corporal is charged to *report all infractions or violations* observed to superiors within the Department. . . . The Corporal shall be responsible for proficiency, discipline conduct, appearance and strict attention to duty and detail for self and all officers supervised.

(Emphasis added.) Joint Exhibit B, page 7.

29. The duties and responsibilities of a Corporal include the following:

1. Supervise patrol officers assigned to his or her command.

\* \* \*

3. Review the performance of officers supervised on a regular basis to determine that they are properly, effectively and consistently carrying out their duties.

4. Ensure that when the police performance of an officer supervised is unsatisfactory, measures are taken to see that the future conduct is up to standard. Measures taken *may include encouragement, explanation, and referral to superior officers* or other means consistent with departmental policy.

5. *Submit a written report* through the Sergeant to the Chief regarding any Department member's serious *inappropriate action or misconduct*. The Corporal will include in the report the complete details of misconduct and corrective measures attempted.

\* \* \*

7. Be accountable for the actions or omissions of officers supervised that are contrary to departmental regulations or policy.

8. Respond to emergencies, incidents, or dispatches as required. Take on-scene command of situations, remaining in control until properly relieved. . . .  
(sic)

(Emphasis added.) Joint Exhibit B, pages 7-8.

30. The Police Department has three Sergeants: Peter Beede, Scott Fulton, and Joseph Canfield. Jason Boucher is the only Corporal in the Department. Corporal Boucher works night shift. During the 2:00 to 7:00 A.M. shift, only one Patrol Officer is on duty and he is his own shift commander. Other Officers are on call.

31. The Sergeants and the Corporal patrol streets along with Patrol Officers.

32. If an officer is unfit for duty, a Sergeant, a Corporal or any senior officer present, including, for example, a senior Patrol Officer, has authority to relieve that officer from duty with pay. Neither Sergeants nor Corporal have authority to suspend an employee without pay. The Chief has authority to suspend an employee for up to fifteen days without pay. For a suspension for a longer period or more serious discipline, the approval of the Board of Selectmen is required.

33. Written evaluations are conducted annually using an evaluation form. See Exhibit H. The performance evaluations of the newly hired and newly promoted employees are conducted every three months for the first year until the employee is released from probation. As part of the evaluation process, the Sergeants meet and come to an agreement on specific scores for each employee. After they complete evaluation forms, they meet with employees to go over the forms. Employees have an opportunity to comment on the form, after which they sign it. If unsatisfied with the evaluation, an employee can appeal to the Chief of Police. The Chief signs each evaluation and has authority to overrule evaluations. Copies of evaluations are sent to the Town Administrator and the Board of Selectmen. A copy of the evaluation is placed into the evaluated employee's personnel file.

34. The Town Administrator consults employees' personnel files, containing performance evaluations, when he prepares a roster of employees he believes are qualified for a step pay raise. His recommendations must be approved by the Board of Selectmen. Step pay raises are awarded every two years and are staggered. Annual performance evaluations are taken into consideration when disciplinary, promotional or termination decisions are made.

35. The Chief prepares the budget for the Department and submits it to the Town Administrator who, in turn, submits it to the Board of Selectmen. Either Sgt. Fulton or Sgt. Canfield assists the Chief with the budget preparation by helping him to confirm whether the numbers are correct and by determining the amount of ammunition and firearms necessary. The Executive Assistant and the Corporal also provide the Chief with some numbers for the budget. Some of the Patrol Officers submit to the Chief their so called "wish list." The Chief meet with Selectmen in non-public session to discuss the budget. No one else from the Police Department attends the non-public budgetary meeting with the Selectmen.

36. Sgt. Fulton has responsibilities in the area of the administrative and support services, the exact nature of which was not addressed in detail at the hearing. He also completes written evaluations of the Master Patrol Officer/Detective and the Master Patrol Officer/School Resource Officer. Sgt. Fulton also conducts background checks of the candidates applying to fill open positions in the Department.

37. Sgt. Canfield is in charge of the Patrol Division and oversees use of force procedures. Use of force must be reported to the supervisors and the Chief using an appropriate form. Patrol Officers fill out Use of Force forms. The Sergeants or the Corporal review them and send them to the Chief. The Chief places them into the personnel files.

38. Sgt. Beede is responsible for scheduling and for processing leave requests. The Chief has overturned Sgt. Beede's decision regarding leave request once. Sgt. Beede completes written evaluations of, and has authority to issue oral counseling to, the Communication Specialists/Dispatchers.

39. Patrol Sergeants complete written evaluations of a Corporal, Master Patrol Officers, and Patrol Officers. The Corporal has authority to complete written evaluations of, and to issue oral counseling to, the Dispatchers, Master Patrol Officers, and Patrol Officers.

40. The Chief evaluates the Prosecutor, the Sergeants, and the Executive Assistant.

41. The Sergeants and the Corporal divide responsibilities for completing written evaluations. Neither Sergeants nor Corporal have authority to recommend pay increases, promotions, demotions, hiring, termination, or continued employment with the Department. See Joint Exhibit G.

42. The Sergeants and the Corporal hold "NCO" meetings every two months to discuss personnel matters. These meetings are not open to other employees. The Department meetings for all employees are conducted every few months.

43. If the Chief is absent, one of three Sergeants acts as a Chief. The Department has a rotation on call system. The Chief was absent for up to seven days at least once. When the Chief is absent, a Sergeant can relieve an employee from duty with pay, if necessary, until the Chief returns. If the Chief, the Sergeants, and the Corporal are absent, the most senior officer present is in charge of the Department and also has authority to relieve an employee from duty with pay. In the Chief's absence, nobody within the Police Department has authority to suspend any employee without pay.

44. The Sergeants participate in the hiring process in that they review the submitted resumes, conduct background checks of the candidates (Sgt. Fulton), administer physical agility tests, and conduct interviews as members of oral boards. The Sergeants report the results to the Chief. The Master Patrol Officers also participate in oral boards and administer physical agility tests.

45. At step one of the hiring process utilized by the Police Department, the candidates submit resumes and letters of interest. The Chief has discretion to decide which candidates meet the basic qualifications to move to the next level.

46. Step two of the hiring process is the physical agility test. Anyone can conduct this test.

47. Step three of the hiring process is an oral board which consists of three people. Composition of the board depends on a position to be filled. For example, to fill a position of Patrol Officer the oral board usually consists of some combination of a Sergeant or a Corporal, a Prosecutor, and a Master Patrol Officer. Sometimes the oral board is made up of Sergeants and a Corporal. The Chief often observes oral boards from the back of the room. Oral board members interview and rank the candidates and submit the ranking scores to the Chief. The Chief makes changes to ranking, if necessary, and sends the materials regarding the highest ranked candidates to the Board of Selectmen. The Board of Selectmen sees only the highest ranked candidates. The Chief has final authority as to which candidate gets presented to the Board of Selectmen and to make recommendations on hiring. The Board of Selectmen makes the final decisions on hiring.

## **Decision and Order**

### **Decision Summary**

The position of Prosecutor is excluded from the proposed bargaining unit because it lacks a community of interest with the other employees in the unit. The other positions in the proposed bargaining unit have a requisite community of interest. The Executive Assistant is not a confidential employee within the meaning of RSA 273-A:1, IX (c) and is, therefore, included in the bargaining unit. The Sergeants and the Corporal do not exercise supervisory authority

involving the significant exercise of discretion within the meaning of RSA 273-A:8, II and are, therefore, included in the bargaining unit. Accordingly, the petition for certification is granted.

### **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 New Hampshire legislature has 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.” See *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)).

The Town claims, among other things, that the members of the proposed bargaining unit lack a community of interest. 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.

(Emphasis added).



The PELRB rules provide additional criteria for determining whether a 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). “[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) (emphasis in original). 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). Furthermore, the clear and unambiguous statutory language indicates that satisfaction of just one of the criteria listed in RSA 273-A:8, I may be sufficient to establish a requisite community of interest.

In the present case, with the exception of the position of Prosecutor, there is a sufficient community of interest between the members of the proposed bargaining unit. Contrary to other employees in the proposed unit, the Prosecutor is an employee of the Town of Sandwich and the Town of Moultonborough. He sets his own schedule, often works from home, and is the only salaried employee in the proposed unit. The Prosecutor does not share a common geographic location or common salary and fringe benefits structure with other employee in the proposed unit. In addition, the Association has offered no evidence of a self-felt community of interests between the Prosecutor and other members of the proposed unit. The Association’s evidence that the Prosecutor has a community of interest with other employees in the proposed bargaining unit

is insufficient. Accordingly, the position of Prosecutor is excluded from the proposed bargaining unit.

All other employees in the proposed bargaining unit function within the same organizational unit and share a community of interest. They work for the same department in the field of law enforcement, work at the same building, and are covered by the same personnel rules, policies, and evaluation and grievance procedures. The members of the proposed unit interact with each other on regular basis. The Town's argument that Officer Quinlan should be excluded from the bargaining unit because, as a probationary employee, he lacks a community of interest with other employees is without merit. RSA 273-A:8, I clearly and unambiguously mandates that "probationary employees shall be counted to satisfy the employee minimum number requirement" although they may not vote in any election to certify an employee organization as the exclusive representative of a bargaining unit or sign authorization cards. In addition, the "PELRB determines the composition of, and certifies, bargaining units consisting of positions or classifications and not of individual employees." *Rochester Municipal Managers Group and City of Rochester*, PELRB Decision No. 2009-182.

The fact that, under RSA 273-A, a probationary employee is not a public employee and can neither sign a WMA card nor vote in representation election does not prohibit a union from including a position for which the probationary employee was hired in a proposed bargaining unit assuming other applicable criteria are satisfied. For example, a proposed bargaining unit may include 50 employees in only 12 positions. In that case, the PELRB would issue a Certification of Representative covering 12 positions without reference to how many employees are actually filling these positions. A position in such a unit will be covered by the certification even when it is temporarily unfilled. Hence, a particular employee's probationary status is irrelevant to a union's ability to include a position or classification, for which that employee was hired, in a proposed bargaining unit.

*Id.* Based on the foregoing, the Association has met its burden of proving the existence of a sufficient community of interest so that it is reasonable for the members of the proposed bargaining unit to negotiate jointly.

The Town seeks to exclude the position of Executive Assistant from the proposed bargaining unit claiming that this position is confidential. 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. See also *Teamsters Local 633 of NH/Newmarket Public Works Employees and Town of Newmarket*, PELRB Decision No. 2008-127. In a case involving the Town of Pembroke, the public works secretary was included in the bargaining unit over the Town’s objection that she was a confidential employee. See *I.U.O.E. Local 08 v. Town of Pembroke*, Decision No. 2006-205. The evidence in *Pembroke* was insufficient to prove that the secretary was involved with personnel or other confidential labor relations matter in any meaningful way. *Id.* In contrast, in a case involving the Town of Hooksett Police Department, the executive secretary was excluded from the proposed bargaining unit because she maintained all personnel files and performance evaluations, took and typed the minutes of the Police Commission’s meetings, both public and non-public, typed the Chief’s letters, including budgetary and labor related letters, and was privy to the Chief’s ideas regarding collective bargaining negotiations with the exclusive representative of an existing bargaining unit. See

*Hooksett Police Supervisors, NEPBA Local 38 and Town of Hooksett*, PELRB Decision No. 2010-182.

In the present case, the evidence proves that the Executive Assistant is not a confidential employee within the meaning of RSA 273-A:1, IX (c). Unlike the secretary in *Hooksett*, the Executive Assistant does not have access to personnel files, as only the Chief has the key to the locked cabinet containing personnel files. The Chief, not the Executive Assistant, places the evaluations and disciplinary documentation in personnel files. The Executive Assistant does not attend non-public meetings between the Chief and the Board of Selectmen and does not open Department mail marked "confidential." There is no evidence that the Executive Assistant types or maintains Chief's confidential communications. Although the Executive Assistant has access to employees' salary and benefits information, this information is not confidential for the purposes of RSA 273-A:1, IX (c). Furthermore, the Executive Assistant's job description provides that she "[m]aintains all files for the Police Chief, *except for confidential files.*" Finding of Fact # 10. Similarly to the secretary in *Pembroke*, the Executive Assistant is not involved with personnel or other confidential labor relations matter in any meaningful way. Accordingly, the position of Executive Assistant is a not a confidential position and is included in the bargaining unit.

The Town also seeks to exclude the positions of Sergeant and Corporal from the bargaining unit claiming that they are supervisory employees within the meaning of RSA 271-A:8, II and, therefore, should not be included in the same unit with the employees they supervise. 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." Importantly, the mere exercise of supervisory authority alone is not enough to

exclude a position from a bargaining unit; only supervisory positions which also involve the *significant* exercise of discretion are excluded. The Supreme Court recognized that “[d]etermining where in the pyramid of administrative functions an employee becomes part of ‘management’ is not a simple task.” *In re Nashua Association of School Principals*, 119 N.H. 90, 93 (1979). A supervisory relationship 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.

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, Inc., Local 50 et al. v. State of New Hampshire, Department of Safety, DMV*, PELRB Decision No. 2006-169; *New England Police Benevolent Association, IUPA, AFL-CIO v. Town of Hillsborough*; PELRB Decision No. 2010-112. 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*, 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. The fact that an employee has some authority in the areas of discipline, evaluation, and hiring “is the start, and not the end, of the analysis because positions possessing some authority in these areas are not *per se* supervisors within the meaning of the statute.” *Tilton*

*Police Union, NEPBA Local 29 v. Town of Tilton*, PELRB Decision No. 2007-100. 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.” *Id.*

“[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. In a case involving the Town of Tilton Police Department, the position of sergeant was included in the bargaining unit along with patrol officers over the public employer’s objection that sergeants were supervisory employees. See *Tilton Police Union, NEPBA Local 29 v. Town of Tilton*, PELRB Decision No. 2007-100. Although the sergeants in *Tilton* had authority to conduct evaluations, the evaluations did not determine whether an employee would receive a salary increase, promotion, demotion, or be terminated. *Id.* In addition, the sergeants had authority to issue verbal warnings but did not have authority to recommend suspension, promotion, demotion, or termination. *Id.* See also *Hampstead Police Union, NEPBA local 37 and Town of Hampstead*, PELRB Decision No. 2008-071 (including sergeant position in same bargaining unit with police officers over employer’s objection); *American Federation of State, County and Municipal Employees, Council 93 v. Town of Litchfield, New Hampshire, Police Department*, PELRB Decision No. 90-91 (same); *American Federation of State, County and Municipal Employees, Council #68, AFL-CIO and Town of Hudson, New Hampshire, Police Department*, PELRB Decision No. 81-22 (same). In contrast, in *AFSCME Council 93, Belmont Town Employees and Town of Belmont*, PELRB Decision No.

2008-165, the PELRB denied the union's petition to add a position of police sergeant to a police officers' unit finding that the sergeant lacked a self-felt community of interest with other employee in the unit and that he was a supervisory employee because he had authority to issue verbal discipline and written warnings, evaluated and rated other employees, made recommendations regarding discipline, and conducted internal affairs investigations. *Id.*

In the present case, the extent to which the Sergeants and the Corporal are involved in discipline, evaluation, and the hiring process, and the nature of their involvement do not rise to the level of the significant exercise of discretion that would warrant exclusion from the bargaining unit. For example, although the Sergeants and the Corporal complete annual evaluation forms for Patrol Officers and Communication Specialists/Dispatchers, there is insufficient evidence to prove that these forms are relied upon to determine pay increases, promotions, demotions, discipline or terminations. Only the Board of Selectmen has authority to hire, demote, suspend without pay for more than fifteen days, or terminate Police Department employees. Only the Chief has authority to recommend hiring, suspension without pay, demotion, and/or termination to the Board of Selectmen.

The Sergeants' and the Corporal's role in hiring is likewise relatively modest and is limited to the participation in oral boards and ranking candidates along with other employees, including Master Patrol Officers and the Prosecutor. There is insufficient evidence to show that the Sergeants and/or the Corporal have authority to recommend hiring or that their ranking scores constitute a significant factor in the Board of Selectmen's hiring decisions. Only the Chief has the authority to select the candidates to be presented to the Board of Selectmen; and the Board of Selectmen makes the final decisions on hiring. The same is true of the Sergeants' and the Corporal's involvement in disciplinary matters and the evaluation process. Unlike a police

sergeant in *Belmont*, neither the Sergeants nor the Corporal have authority to issue written warnings. The evidence demonstrates that, although the Sergeants and the Corporal evaluate the performance of subordinate employees and can report misconduct for a disciplinary determination, they, unlike a police sergeant in *Belmont*, have no authority to recommend suspension without pay, demotion, termination or any other significant disciplinary action. Any senior officer present, including a Master Patrol Officer and a Patrol Officer, has authority to relieve an employee from duty with pay, if necessary. Any senior officer, including a Master Patrol Officer and a Patrol Officer, can conduct an internal affairs investigation. Any employee in the Department has the authority to write a letter of praise or a report of misconduct that could be placed into an employee's personnel file. Similar to the supervisory authority exercised by the sergeants in *Tilton*, the supervisory authority exercised by the Sergeants and the Corporal of the Moultonborough Police Department is relatively limited and is in nature of an employee performing some supervisory functions in accordance with professional norms, akin to a "working foreman". The degree of supervisory authority exercised by the Sergeants and the Corporal is not likely to create conflict within the proposed bargaining unit because of differing duties and relationships.

For the foregoing reasons, the Sergeants and the Corporal are not supervisory employees within the meaning of RSA 273-A:8, II and are included in the proposed bargaining unit.

There is insufficient evidence to establish that Communication Specialist/Dispatcher Cathy Lord is an irregular, seasonal, on call, or temporary employee within the meaning of RSA 273-A:1, IX (d) or should otherwise be excluded from the bargaining unit. Therefore, the part-time Communication Specialist/Dispatcher position presently filled by Linda Eldridge and Cathy Lord is included in the approved bargaining unit. An on call Communication



Specialist/Dispatcher position presently filled by Sandy Brackett is excluded from the bargaining unit under RSA 273-A:1, IX (d) (“‘public employee’ means any person employed by a public employer except . . . persons . . . employed seasonally, irregularly or on call”).

Accordingly, the approved bargaining unit shall consist of the following positions: Sergeant, Corporal, Master Patrol Officer, Patrolman, Executive Assistant, and Communication Specialist/Dispatcher. As the number of the authorization cards is sufficient to establish a written majority authorization, the NEPBA’s petition for certification is granted. A Certification of Representative and Order to Negotiate shall issue in accordance with Pub 301.05 (m).

So ordered.

January 25, 2011

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

Distribution:  
Kevin E. Buck, Esq.  
Anne M. Rice, Esq.