



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

BEDFORD PROFESSIONAL FIREFIGHTERS :
ASSOCIATION, IAFF, LOCAL 3639 :
Complainant :
v. : CASE NO. F-0146
TOWN OF BEDFORD : (Certification)
Respondent : DECISION NO. 2000-024

APPEARANCES

Representing Bedford Professional Firefighters Association:

John Krupski, Esq.

Representing Town of Bedford:

Barton Mayer, Esq.

Also appearing:

- Catherine S. Debo, Town of Bedford
- Joseph M Clow, Chief, Bedford Fire Department
- Marc Beaulieu, Town of Bedford
- John Leary, Local 3639
- Keith Mulholland, Local 3639
- Wayne Richardson, Local 3639
- James Squires, Local 3639
- John Van Gelder, Professional Firefighters
- John Anderson, Bedford Fire Department
- Mark Shatney, Local 3639
- Jon Strung, Local 3639

BACKGROUND

The Bedford Professional Firefighters Association, I.A.F.F., Local 3639 (Union) filed a Petition for Certification on November 2, 1999 seeking to establish a bargaining unit consisting of nine firefighters, four lieutenants, one building/health code official and one building/health code inspector. The Town of Bedford (Town) filed exceptions to that petition on November 15, 1999 saying: (1) that the 4 lieutenants should be excluded as supervisory, (2) that both building health code positions did not share a community of interest with firefighters and that these two positions are appointed to their positions by the "chief executor office of the public employer," (3) that the building/health code official is a supervisory position over the building/health code inspector, and (4) that the building/health code position are professional in nature and would be required to vote separately in any certification election. After a continuance sought by and granted to the parties, this matter was heard by the PELRB on January 18 and February 15, 2000. The record was closed upon receipt of post-hearing briefs from the parties on March 6, 2000.

FINDINGS OF FACT

1. The Town of Bedford, as a consequence of operating a fire department and employing personnel in the furtherance of the operation of that department, is a "public employer" within the meaning of RSA 273-A:1 X. As defined in both of the organization charts of the fire department, whether the version approved by the Town Council on July 24, 1996 (Union Exhibit No. 1) or the version dated November 17, 1999, some fifteen days after the filing of the Petition for Certification and without evidence of having been approved by the Town Council (Town Exhibit No. 2), the chief of the fire department is responsible for both the operation of the fire suppression and training functions of the "fire department" and the operation of the building "department," as described on Town Exhibit No. 2 and shown as a "building code/health official" function in Union Exhibit No. 1. The budget for building inspections is contained in the fire department's budget, along with two other sub-areas of administration and operations (1998 Town Report, page 26; Town Exhibit No. 4), yet the

narratives appear separately with the chief authoring the fire department report (page 21) and the former building code "official" having authored the inspection report (page 28 and testimony from Chief Clow).

2. There is no objection to the inclusion of the nine permanent full-time firefighter positions in the proposed bargaining unit. Their job functions are more fully explained in the Firefighter/Emergency Medical Technician" job description (Joint Exhibit No. 2). These personnel are responsible for operating "under the direct supervision of a shift officer, who may be a Captain, Lieutenant or senior Firefighter/EMT."

3. The building/health code official operates "under the general direction of the Fire Chief" and "supervises, directs and evaluates the work of the Building/Health Code Inspector," according to his job description (Joint Exhibit No. 3). He is at an equivalent organizational level with Captains in the fire department with whom he may interact daily. (See Town Exhibit No. 2 and Union Exhibit No. 1) The incumbent health code official testified that he is under the direct control of the fire chief and that his budget is contained in the budget of the fire department. His benefit package is controlled by the Town's Employee Compensation Policy which covers all unorganized, full time employees of the Town. (Joint Exhibit No. 5.) The incumbent building code official, Wayne Richardson, was promoted to that position from building/health code inspector, more specifically described in Joint Exhibit No. 4. Richardson testified that as the "official" he does not believe himself eligible for inclusion in the proposed bargaining unit because of his supervisory role over the "inspectors." Notwithstanding this, Richardson does believe that "inspectors" should be eligible for inclusion in the firefighter's proposed unit because of daily contact in the workplace, same conditions of employment, i.e. benefits, (with the exception of hours of work and Group II retirement) as controlled by Joint Exhibit No. 5, the town grievance procedure found at Joint Exhibit No. 6, the personnel policies found at Joint Exhibit No. 7

and the need for building code inspectors to coordinate their vacation schedules through the fire department chain of command. Even though Richardson thought it strange to have the fire department and building inspector functions located when he was first employed by the Town, he has since found this to be very functional since it permits and enhances frequent and accurate exchanges of information. While the Town has chosen to appoint both of the current incumbents in the "official" and "inspector" positions as health officials under RSA 128:1, qualifying for and being appointed to either of those positions (Town Exhibit No. 5) is not a prerequisite of their respective job descriptions. (Joint Exhibit Nos. 3 and 4).

4. According to the job description for the building/health code inspector, that position works under the direct supervision of the building/health code official. (Joint Exhibit No. 4.) One of the "typical duties" listed thereon is "may be required to participate in fire department and/or emergency management activities involving safety assessment, hazard abatement, and protection of life, safety, and property." The job description for the Building/Health Code Inspector appears under a header entitled "Bedford Fire Department, Town of Bedford." The inspector does not work a rotating schedule because he needs to interact with clientele in the local community during normal business hours, notwithstanding that Richardson, when an inspector, tried a firefighter's 4 and 2 schedule and found it limited the amount of work which could be accomplished in a work week. Likewise, the inspector is not eligible for and does not participate in the NHRS Group II retirement program. The position is not one of a "professional employee" as contemplated by RSA 273-A:1 VIII inasmuch as the job description does not require "knowledge in a discipline customarily acquired in a formal program of advanced study." The job description states minimum qualifications to be satisfied by "any equivalent combination of education and experience which demonstrates possession of the required knowledge, skills and abilities." The annual salary range for the

building/health code inspector is \$24,150 to \$37,400: the annual salary range for a firefighter/EMT, for a 42 hour work week, is \$23,980 to \$34,135 per Joint Exhibit No. 13. The only testimony relating to the hiring practices for the "inspector" position was Richardson's statement pertaining to his originally being hired by the Town, namely that he was interviewed and hired for the inspector's position by the Chief.

5. The job description for Fire Lieutenant (Town Exhibit No. 3) consists of three pages of "typical duties," "specifications", "minimum qualifications" and "other." It is accompanied by an attachment of four (4) pages, one for each lieutenant, delineating the specific specialist duties assigned to each lieutenant, e.g. "Training Coordinator," "EMS Coordinator," "Emergency/Fire Prevention Coordinator" and "Equipment and Facilities Maintenance Coordinator." The job description, at item 14, provides that lieutenants are "responsible for submitting required performance evaluations for all personnel under his command." This requirement is in furtherance of the Town's Employee Compensation Policy (Joint Exhibit No. 5) which conditions wage adjustments on performance evaluations. It also provides that lieutenants "shall take corrective measures in hazardous or unsafe conditions and report incidents outside their control to the appropriate authority." (According to testimony offered at the hearing, these duties are not unique to lieutenants and extend to Firefighters/EMT personnel, too, when faced with the need to do so.) Each of the four individualized job descriptions, appearing as a supplement to the generic job description, contains language which says, "Disciplinary authority: includes verbal and written warnings and up to a one day suspension as necessary and appropriate; further authority as approved by Captain." This provision conflicts with Sections 323.1, 323.2 and 323.3 of the Town's Administrative Code (Joint Exhibit No. 7) which provides that verbal warnings must be approved by the department head before being placed in the employee's personnel file, that written warnings must be signed by the department

head and that suspensions must be recommended by the department head and directed by the Town Manager. Section 303.3 of the same Administrative Code provides that "department heads may adopt additional policies *not inconsistent* with the rules contained herein with *prior approval* of the Town Council." (Emphasis added.) While there appears to be an inconsistency between the addenda to Town Exhibit No. 3 and Code provisions 323.1, 323.2 and 323.3, no evidence was offered that the Town Council had sanctioned either the job description portion of Town Exhibit No. 3 or the four addenda thereto, by prior approval or otherwise. The Chief testified that the current lieutenant job description (Town Exhibit No. 3) was adopted after the petition was filed on November 2, 1999. The lieutenant job description and addenda thereto are in question based on their not being known to both parties, published or disseminated until after the Petition for Certification was filed.

6. Notwithstanding the procedures referenced in Town Exhibit No. 3, the exercise of the authority conveyed on lieutenants thereby was inconsistent with testimony presented to the PELRB. Lt. John Leary, a six year veteran of the department, was unaware of any discipline, suspensions or terminations imposed by a lieutenant. He was not told of his authority to suspend a subordinate until after the certification petition was filed. Now that that petition has been filed, Firefighter/EMTs ask the lieutenant for a day off and the lieutenant forwards the request to the captain. Previously, the Firefighter/EMT requested time off directly from the captain. Leary said lieutenants do not play a role in the resolution of grievances. Under Section 206 of the Administrative Code (Joint Exhibit No. 6) grievances are filed, in writing, with the department head at Step 1. After the certification petition was filed, Leary, a registered nurse, was assigned to be Emergency Medical Services Coordinator as his specialist responsibility. (Town Exhibit No. 3, addendum No. 2) Chief Clow testified Leary knew his responsibilities would increase as of the time of his promotion to lieutenant in June of 1999.

7. James Squires has been a full-time Firefighter/EMT in Bedford for two years. He explained that an officer in charge can be a captain, a lieutenant or a senior firefighter. (Joint Exhibit No. 12, page 2.) During his employment, he has had two performance evaluations, both by captains. He has no knowledge of a lieutenant having suspended, disciplined or fired a subordinate. He testified that Firefighter/EMTs and lieutenants are fungible, i.e., lieutenants have filled Firefighters/EMT vacancies and lieutenant-qualified but not-yet-promoted Firefighter/EMTs have filled lieutenant vacancies. Lieutenants and Firefighter/EMTs both work the same shifts, provide 24 hour coverage, accrue the same vacation, receive the same retirement and insurance benefits, and accumulate the same sick leave and holiday leave, as is more particularly set forth in the Town's Employee Compensation Policy (Joint Exhibit No. 5). When contrasted to captains, lieutenants work a 4 and 2 schedule, provide service around the clock and earn overtime pay for excess hours of work. Captains do not receive these benefits or working conditions. Squires works on the shift with Lt. Jim Clark. After the filing of the certification petition in November, 1999, Clark was assigned new and expanded duties in conjunction with his fire prevention duties. (Town Exhibit No. 3., addendum No. 3.)
8. Fire Chief Joseph Clow testified how he has filled in for lieutenants when there have been no other officers available. He confirmed that captains' schedules differed from Firefighter/EMTs and lieutenants because they worked a forty hour (not 42 hour) week, Monday through Friday, and are salaried employees. If there were to be a complaint about Firefighter/EMT personnel in the department, the individual's lieutenant would be responsible for investigating the complaint under Section 14 of Joint Exhibit No. 12. There is, however, no evidence that a lieutenant has ever conducted such an investigation. Clow said that if lieutenants are placed in the bargaining unit, he would still invite them to monthly officer meetings in order to discuss departmental and operational matters; he would no

longer include them in discussions relating to personnel and compensation issues. Notwithstanding the new evaluative role of lieutenants referenced in the addenda to Town Exhibit No. 3 relating to the merit pay program, Clow said that the payroll or adjustment portion is subject to his review. The same is true if an employee were to appeal an evaluation under Section 144.2.4 of the Administrative Code (Joint Exhibit No. 5).

9. The community of interest between the Firefighter/ EMT and lieutenant positions is substantiated by numerous characteristics. Indicia of that community of interest include, but are not limited to, having the same conditions of employment (inclusive of work hours, work location, basic educational requirements and certifications for fire standards and EMT proficiency), similarity in benefits inclusive of sick leave, vacation leave, holidays, health and dental insurance, reimbursement entitlements, and overtime eligibility, serving as first responders to fire and emergency situations, being assigned to the same geographical location, rendering the same basic public service (exclusive of the extra or specialty duties assigned to lieutenants in Town Exhibit No. 3 which may or may not have been duly promulgated), belonging to the same historic profession and functioning within the same organizational unit, i.e., the fire department. RSA 273-A:8.

DECISION AND ORDER

The findings are intended to be sufficiently detailed to support our conclusions and will not be unnecessarily reiterated in the decision portion of this document. The nine permanent full-time firefighters are appropriate for inclusion in the proposed bargaining unit. Their viability as a unit, however, depends on establishing a unit with ten or more employees under RSA 273-A:8 I.

The building/health code official is not suitable for inclusion in the proposed bargaining unit because of his supervisory function over the building/health code inspector, as explained in RSA 273-A:8 II. Likewise, he is on an organizational supervisory level with fire captains who, had they been

petitioned for, would not be suitable for inclusion in a unit with Firefighter/EMTs.

The building/health code inspector, conversely, is suitable for inclusion in the proposed bargaining unit. While the indicia of community of interest between this position and the Firefighter/EMT position are not as numerous as the comparison between Firefighter/EMTs and lieutenants, they are more than sufficient to establish a community of interest. By the Town's own scheme, both line positions of the inspector and the Firefighter/EMTs are first responders to the field relative to their mandated public service missions within the same department. Both deal directly with that element of the public to which they are responsible for rendering service. Both are housed in the same facility, have daily contact with each other and share professional information. As was the case with all other non-organized employees of the Town, they share a commonality of benefits including sick leave, vacation leave, holidays, health and dental insurance, reimbursement entitlement, access to the grievance procedure and eligibility for wage adjustments under the merit pay program. While not required to perform under the authority of the same certifications or licenses, the inspector and the Firefighter/EMTs do function within the same organizational unit. The requirements of RSA 273-A:8 I (a) through (d), which are illustrative and not exclusive, are satisfied.

The issue of inclusion of the lieutenants is complex, unnecessarily so because of the disconnect between the job description (Town Exhibit No. 3) and the testimony offered. Because that job description was not published and disseminated until after the filing of the certification petition, it, in the best light, bears the double burden of either being self-serving or having the appearance of being self-serving. We recognize that job descriptions cannot be changed, or, having been set, announced after the filing of a certification petition for purposes of influencing or altering the outcome of that petition. This would create a "moving target" when trying to define and assess working conditions and would destroy the level playing field of administrative process. These circumstances compel us to be especially mindful of the testimony offered.

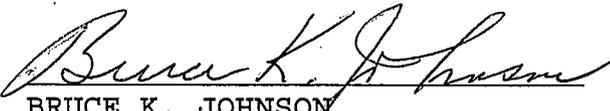
We believe the community of interest considered in Finding No. 9, above, is sufficient to satisfy the standards of RSA 273-A:8 I (a) through (d). The key issue, then, is whether the

lieutenants perform such other duties as to require them to be excluded under the "significant exercise of discretion" language of RSA 273-A:8 II. When we weigh all factors, we find the scale to tip in favor of inclusion, not exclusion. While some of the documentary evidence, especially Town Exhibit No. 3, pointed to a sophisticated and greatly increased level of responsibility for the lieutenants (e.g., evaluations, imposition of discipline and subordinate investigations), the scheme of things in actuality, and the timing of Town Exhibit No. 3 in particular, do not show the activities of the lieutenants to have risen to the levels of responsibility suggested by the Town. For example, when and if lieutenants start to perform merit pay evaluations, we find those evaluations to be ministerial, rather than discretionary, inasmuch as they are pursuant to a given procedure in the compensation plan, involve the assignment of numbers to a form and are subject to further review by or appeal to the Chief. This is not the "significant exercise of discretion" contemplated by the statute. Time and time again, the testimony referenced in Finding Nos. 6, 7 and 8 does not show the Lieutenants to have engaged in the evaluative, disciplinary or investigative functions envisioned by management. Additionally, to the extent these responsibilities are reflected by the contents of Town Exhibit No. 3, that document and its addenda did not exist until after the certification petition was filed. The lieutenants are suitable for inclusion in the proposed bargaining unit.

Based on the foregoing, a bargaining unit is hereby established consisting of nine permanent full-time firefighters, one building/health code inspector and four permanent full-time fire lieutenants.

So ordered.

Signed this 20th day of MARCH, 2000


 BRUCE K. JOHNSON
 Alternate Chairman

By unanimous vote. Alternate Chairman Bruce K. Johnson presiding. Members Seymour Osman and Daniel Brady present and voting.