



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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Lebanon Permanent Firefighters Association		*
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	Petitioner	*
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v.		*
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City of Lebanon		*
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	Respondent	*
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Case No: F-0125-18

Decision No. 2004-060

Modification Petition

APPEARANCES

Representing the Lebanon Permanent Firefighters Association

John S. Krupski, Esq.

Representing the City of Lebanon:

Everett J. Marder, Esq.

Also Appearing as Witnesses:

- Andrew White, City of Lebanon - Firefighter/EMT
- John Hamilton, City of Lebanon - Firefighter (Retired)
- George Sykes, City of Lebanon - Deputy Chief of Fire Prevention
- John Sterling, Captain, City of Lebanon Fire Department
- Leonard Jarvi, City of Lebanon, Treasurer/Finance Director
- Mitzi Baron, Human Resources Consultant for City of Lebanon
- Stephen Allen, Fire Chief, City of Lebanon

BACKGROUND

The Lebanon Permanent Firefighters Association (hereinafter "the Association") filed a Modification Petition with the Public Employee Labor Relations Board (PELRB) on October 6, 2004 seeking to add the position of fire inspector to the existing certified bargaining unit. In its petition, the Association alleged that the public employer, namely the City of Lebanon

(hereinafter "the City") created the position of fire inspector since the execution of the current collective bargaining agreement between the parties. Thus, as alleged by the Association, the circumstances surrounding the formation of the existing bargaining unit have changed to a degree requiring modification.

The City filed its response on October 20, 2003 in which it raised several grounds upon which it objected to the Association's petition. First of all, the City alleges that the position of fire inspector lacks a "community of interest" with the members of the existing bargaining unit, including facts that it performs no fire fighting function, it has no association or contact with the other members of the fire department, it has an entirely different work environment, hours of work, and mission, and it is not trained or performing as a firefighter. Moreover, the City asserts that the position has been created on a trial basis and is temporary in nature. The City states, among other things, that a temporary position created on a trial basis, which is neither permanent nor a firefighter, is not compatible with the definition and certification of the unit.

A hearing on the merits of the Association's petition was conducted on November 21, 2003 before the undersigned Hearings Officer at the offices of the Public Employee Labor Relations Board in Concord, New Hampshire. Both parties were represented by counsel at hearing, and had the opportunity to present witnesses for examination, to undertake cross-examination, and to offer exhibits into evidence. At the conclusion of the hearing, the record was closed subject to the filing of post-hearing briefs, both of which were filed in a timely manner, postmarked to the PELRB by January 9, 2004. Subsequently, the City filed a Motion to Strike on January 26, 2004, to which the Association filed an objection on February 2, 2004. Upon review of all filings submitted by the parties and consideration of all relevant evidence, the Hearings Officer determines the following:

FINDINGS OF FACT

1. The City of Lebanon employs firefighters and other personnel in the operation of its city government and therefore constitutes a public employer within the meaning of RSA 273-A:1, X.
2. The Lebanon Permanent Firefighters Association is the duly certified exclusive bargaining representative of a bargaining unit comprised of certain employees employed by the City's fire department, namely permanent employees in the following classes: Captains, Firefighters, Firefighter/Mechanic. (Joint Exhibit No. 18)
3. The City and the Association are parties to a collective bargaining agreement (CBA), for the period January 1, 2001 – December 31, 2005, wherein the City recognizes the Association "as the exclusive representative for collective bargaining" of the certified bargaining unit. (Article 2; Joint Exhibit No. 1, p. 4).
4. The parties have agreed that "[t]he composition of the bargaining unit may be changed from time to time by procedures provided for in RSA 273-A." (Article 3.1; Joint Exhibit No. 1, p. 4).

5. All employees are subject to the internal procedures of the Lebanon Fire Department ("the Department"), including "In Service Inspections," "Origin and Cause Investigation," "School Fire Drills," and "Fire Drills – Non Schools." (Testimony of White, Testimony of Allen; Joint Exhibit No. 7).
6. Fire prevention and prevention activities are part of the formal administrative structure of the Lebanon Fire Department. (Testimony of White, Joint Exhibit Nos. 7, p. 17, and 12, p. 4).
7. Firefighters work a schedule of two (2) ten hour days, two (2) ten (10) hour nights, followed by four (4) days off. The Fire Inspector is regularly scheduled to work a five-day workweek, Monday to Friday, from 7:00 AM to 3:00 PM. Firefighters and the Fire Inspector are both paid on an hourly basis. (Testimony of White and Sykes).
8. The department operates in a decentralized team environment, to include the fire inspector position. Firefighter Andrew White, President of the Union, testified that he personally had a self-felt community of interest with the fire inspector and indicated that they work closely together. He testified that the fire inspector does, on occasion, go to the scene of an emergency. However, the fire inspector does not participate in fire suppression activities. Firefighters sometimes perform fire prevention and investigation duties, such as assisting the Deputy Chief for Fire Prevention, George Sykes ("Deputy Chief Sykes") in photographing a fire scene and documenting what is found, taking evidence samples, inspecting oil tanks and wood stoves. (See Joint Exhibit No. 7, p. 17; Testimony of White).
9. Prior to the creation of the fire inspector position, Deputy Chief Sykes performed fire inspector functions. However, during the period 1989 to 1994, Firefighter John Hamilton ("Hamilton") also carried out such duties after suffering an injury and being assigned to light duty. (Testimony of Hamilton, Sykes and Allen).
10. Hamilton testified that during the years that he worked as a fire inspector, his hours were a regular Monday through Friday schedule, 7:00 AM to 3:00 PM. Hamilton stated that he served as a fire inspector until his retirement in 1994. He also expressed his understanding that since he retired from the department, Deputy Chief Sykes has utilized firefighters for fire inspections. (Testimony of Hamilton).
11. City Finance Director Len Jarvi ("Jarvi") testified that over the course of prior years Fire Chief Stephen Allen ("Chief Allen") had raised the issue of fire inspections and the need to relieve Deputy Chief Sykes of some of his workload. Jarvi stated that Chief Allen brought up the subject of a fire inspector with the City Council as a temporary position, directly related to the construction at Dartmouth Hitchcock Medical Center (DHMC) and that there would be no tax impact because of the funding available. As Jarvi recalled, the instructions were that the need for the position would be reevaluated, as related to the construction progress at the medical

center. However, he stated that he did not specifically know when the position would be re-evaluated, answering "three years, five years, I don't know."

12. On cross-examination, Jarvi agreed that the position was "sold" to the City Council through the use of the funding possibilities. He acknowledged that it was the intention of City to provide employee benefits for the position. Later on in his testimony he expressed that he did not believe the "benefits or not" issue was specifically discussed amongst the City Council, but instead the temporary nature and how it would be subject to reevaluation at some particular time. He did confirm that there is no date determined for the position's abolishment and could not disagree with the employee's expectation that he would be employed for at least four (4), five (5) or six (6) years. (Testimony of Jarvi).

13. The Fire Department's 2003 Budget Addendum reads, in pertinent part, that...

The Department cannot keep up with the activities for both what is needed to maintain inspections for the City and what is needed for the DHMC project. The Fire Department would like to propose that we hire a full time additional inspector to handle the day-to-day fire inspection and plan review needs. This inspector should be paid at a Lieutenant's Wage. This would be a \$37,350 Annual cost to come out of the DHMC construction funds.

(Union Exhibit No. 1).

14. Human Resources Consultant Mitzi Baron ("Baron") testified that she found the temporary nature of the position to be "confusing." She questioned as to how benefits could be included if the position was supposed to be temporary, noting that the City's personnel plan provides no benefits for temporary personnel. She stated that she was advised by the City's labor counsel to make sure that the employee hired was told that the position was temporary, subject to review and elimination. Baron testified on cross-examination to her understanding that the position was temporary because it was subject to reevaluation. She acknowledged that there is no date certain for the position to be reevaluated. (Testimony of Baron).
15. The principal duties and responsibilities of the fire inspector position include "conducting fire inspections and investigations, fire code enforcement, fire prevention education to the general public, and review of building plans and specifications." (Testimony of Baron; Joint Exhibit Nos. 10 and 13).
16. Chief Allen testified that Deputy Chief Sykes had been very busy, that he needed help and that he received help from firefighters on those tasks that they were able to perform with respect to fire inspection duties. He testified that it is his intent to keep the position for as long as possible and stated that there will always be a lot of work for fire prevention. He testified that trends show that there is still construction going on in the community and that there has been an increased number of fire inspections. He indicated that it was explained to him that the city council was very vocal about

the position coming back for review after completion of the DHMC construction and that the position was described as temporary so that the council would not have concerns. (Testimony of Allen).

17. In a memorandum dated March 25, 2003 to City Manager James A. McSweeney ("McSweeney"), referencing the new position of Fire Inspector, Chief Allen wrote, in part, that:

[D]uring the 2003 budgetary process the Lebanon Fire Department requested the above referenced position to assist the Fire Prevention Deputy Chief with the increased number of fire inspections specifically over the next four (4) years. In general, the primary impact will be the building additions at DHMC and the increased demands of the community...

With the addition of this newly created position, the Lebanon Fire Department will be better able to meet the various code/fire activities and to maintain fire inspections and compliance for the City.

(Joint Exhibit No. 19).

18. The memorandum also noted that the classification and compensation status of the position had been completed, including its determination as being a Grade 8, non-exempt (under FLSA), non-union position. The memorandum does not describe the position as being "temporary." (Joint Exhibit No. 19).

19. In a letter dated April 17, 2003 to McSweeney, Andrew White ("White"), President of the Association, wrote in part that:

Many of the tasks described in the draft copy of the [Fire Inspector] Job Description have traditionally been performed by members of this bargaining unit (Fire Prevention Officer and have held the rank of both Lieutenant and Captain).

It should also be mentioned that many of the described tasks are currently being performed capably by the Firefighters, Lieutenants and Captains under the general supervision of the Fire Prevention Deputy Chief.

(Joint Exhibit No. 20).

20. The Lebanon City Council officially created the position of Fire Inspector on May 7, 2003. The City's salary plan for non-bargaining unit employees, Ordinance #18, was amended on that date to include the position of Fire Inspector and its placement at the Grade 8 salary level was approved. Ordinance #18 does not describe the fire inspector position as being "temporary." (Joint Exhibit Nos. 3 and 4).

21. The position of Fire Inspector was posted as a regular, full time position. The job posting described its duties as being responsible for conducting fire inspections and

investigations, code enforcement, fire prevention education to the general public, and review of building plans and specifications. (Joint Exhibit No. 10).

22. Human Resources Consultant Baron testified that a posting describing the position as temporary was intended to still go out, but applications had already been received. Thus, in speaking with counsel, the plan was to make sure that the employee hired was told that the position was temporary, subject to review and elimination. (Testimony of Baron).
23. In a letter dated June 10, 2003 to White, on behalf of the City Manager, Human Resources Consultant Baron confirmed that the City Council had approved and ratified the position of fire inspector in accordance with the process set forth in the City Charter. She also indicated that the City Council had made "specific appropriations to fund [the] position not as a regular full time position but rather a 'temporary' support position." (Joint Exhibit No. 21).
24. In a letter dated September 10, 2003, Chief Allen issued an "Offer of Temporary Employment" to Duane Egner ("Egner") for the position of fire inspector. The letter reads, in part, that Egner has:

been appointed to the temporary position of a Lebanon City Fire Inspector. The position was created to fill a temporary need due to the increased fire inspection activity resulting from major construction in Lebanon. As you were advised when you applied for the position, it is an at will employment that can be terminated by either party at any time for any reason. The City Council has approved the establishment of the position on a trial basis to continue until such time as it is reevaluated and determined that the position is no longer necessary...

The letter also described the salary for the position to be \$17.20 per hour and the benefits to include health insurance, life insurance, short-term disability, vacation and sick days, personal days and holidays. (City Exhibit No. 2).
25. Egner signed the offer of temporary employment on September 15, 2003. (City Exhibit No. 2). At that time, Egner was employed as a dispatcher at the City's police department. (Testimony of Baron, Allen). Egner's appointment to the fire inspector position was effective October 14, 2003. (City Exhibit No. 1).
26. Egner is not certified as either an EMT or firefighter. He holds an associate's degree in fire protection and fire investigation, and a bachelor's degree in arson investigation. (Testimony of Allen; City Exhibit No. 3).
27. Egner, as fire inspector, is included in Group I of the New Hampshire State Retirement System. Chief Allen testified that the fire inspector position is not included in Group II, along with firefighters, because it does not engage in fire suppression duties. (Testimony of Allen).

28. Chief Allen testified that he told Egner that the need for the position would be reviewed, but that in the meantime he should document everything and know that the "goal is to keep the position." (Testimony of Allen).
29. Article IV, Section 4.3.1, of the City's personnel policy provides, in pertinent part, that "[a] permanent appointment indicates an employee is to work for the City in either a full or part-time capacity on a regular and continuing basis...." Article IV, Section 4.3.2, of the City's personnel policy provides, in pertinent part, that "[w]hen a position is limited in duration, such as for special projects, or requires irregular, intermittent or seasonal work, a temporary appointment shall be made. Persons hired on a temporary basis shall not be eligible for any benefits offered by the City." (Joint Exhibit No. 9).

DECISION AND ORDER

JURISDICTION

The New Hampshire Public Employee Labor Relations Board is the administrative agency charged with determining the composition of public employee collective bargaining units. RSA 273-A:8. The composition of each bargaining unit is evaluated on its own circumstances on a case-by-case basis. *Appeal of Town of Newport*, 140 N.H. 343, 352 (1995). Inherent in that authority is the discretion necessary to consider modification petitions. "Ultimately, the question is whether there exists a mutuality of interest in working conditions such that it is reasonable for the employees to negotiate jointly." *University System v. State of New Hampshire*, 117 N.H. 96, 100 (1997), see also *Appeal of the University System of New Hampshire*, 120 N.H. 853, 855 (1980).

Modification of a bargaining unit may be accomplished pursuant to the PELRB's administrative rule Pub. 302.05. Pub. 302.05 (a) provides, in pertinent part, that:

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...may file a petition for modification of bargaining unit.

N.H. CODE ADMIN. R. PUB. 302.05 (a). Pub. 302.05 (b) further provides that:

A [modification] 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, actually changed prior to negotiations on the collective bargaining agreement presently in force.

N.H. CODE ADMIN. R. PUB. 302.05 (b). As there is no dispute that the position of fire inspector was newly created during the term of the parties' current CBA, and, moreover, given that there has been no claim or allegation that this matter is amenable for resolution through an election, the PELRB's consideration of the Association's petition is appropriate under the circumstances.

SUMMARY OF DECISION

The Association's petition is granted. Based upon the evidence presented, the person holding the position of fire inspector is not in a temporary status, within the meaning of RSA 273-A:1, IX (d), such that he is excluded from the definition of public employee. Furthermore, a sufficient community of interest exists between the current bargaining unit of firefighters and the position of fire inspector in order to permit their inclusion within said bargaining unit.

DISCUSSION

The instant modification petition filed by the Association seeks to add the newly created position of fire inspector to its certified bargaining unit. In objecting to the Association's petition, the City raises two principle arguments upon which it claims, as a matter of law, the position must be excluded from the bargaining unit. It contends that the position is temporary and also lacks a community of interest with the existing bargaining unit. While I find no evidence of ill motive or bad faith on the part of the City in its characterization of the position as being temporary, the City's intent, and indeed stated desire, to maintain the position for as long as possible is nevertheless apparent from the record. The evidence also supports the conclusion that the fire inspector's functions and working conditions are such that it is appropriately included in the bargaining unit.

RSA 273-A:1 IX(d) specifically defines "public employee," in relevant part, as "...any person employed by a public employer except...(d) [p]ersons in a probationary or temporary status, or employed seasonally, irregularly or on call." The New Hampshire Supreme Court has previously addressed the question of what constitutes "temporary status" under RSA 273-A:1 IX(d), most notably in the case of *Keene State College Education Association, NHEA/NEA v. The State of New Hampshire*, 119 N.H. 1 (1979). In *Keene State*, the Court affirmed an earlier ruling by the PELRB that applied "a standard for distinguishing 'temporary' from 'permanent' status based upon whether the employees have a 'reasonable expectation' of continued employment." *Keene State College Education Association, NHEA/NEA v. The State of New Hampshire*, 119 N.H. 1, 3 (1979). The Court more recently declined to abandon or modify this "reasonable expectation of continued employment" standard in the case of *University System of New Hampshire Board of Trustees*, 147 N.H. 626 (2002). Thus, if the individual holding the position of fire inspector has a reasonable expectation of continued employment, it follows that he is not in a "temporary status" and otherwise excluded from coverage under RSA 273-A.

The instant record supports a finding that a reasonable expectation of continued employment exists for the fire inspector. The evidence reflects that this position has no abolishment date, and that City officials expect it to be in existence for at least several years or longer. (Finding Nos. 12 and 14, above). Although the need for the position is supposed to be re-evaluated on a regular basis, Finance Director Jarvi testified on direct examination that he did

not specifically know when it would be re-evaluated, answering “three years, five years, I don’t know.” (Finding No. 11, above). Human Resources Consultant Mitzi Baron (“Baron”) was forthright and candid when she testified that she found the temporary nature of the position to be “confusing.” (Finding No. 14, above). Chief Allen himself stated that it is his intent to keep the position as long as possible and that there will always be a lot of work for fire prevention. (Finding No. 16, above). All of these statements, by the City’s own witnesses, contradict the claim that the position is temporary and to be of limited duration. It would seem that the temporary label was more the result of a means to gain initial approval of the position (i.e., to gain the proverbial “foot in the door”) rather than an actual objective.

There is no dispute that the City has been in need of a fire inspector for quite sometime. Deputy Chief Sykes, whose fire prevention and inspection workload continued to increase over the years, often sought the assistance of bargaining unit firefighters to perform various tasks, such as photographing a fire scene and documenting what is found, taking evidence samples, and inspecting oil tanks and wood stoves. (Finding Nos. 8 and 16, above). During the period 1989 to 1994, Firefighter Hamilton served as fire inspector after suffering an injury and being assigned to light duty. (Finding No. 9, above). Not only has there been a regular need for the position in the past, but also it appears that this need will continue well into the future, based upon the ongoing DHMC project. Although the funding and motivation for establishing the position is derived from the project, its responsibilities involve handling day-to-day fire inspection and plan review needs throughout the City. (See Union Exhibit No. 1, Finding No. 13; Joint Exhibit No. 17, Finding No. 19, above).

It is certainly true that Duane Egner signed an offer of temporary employment with the City on September 15, 2003. (See City Exhibit No. 2, Finding No. 25, above). However, the fact that he signed an agreement describing the position as temporary does not make it so under RSA 273-A:1, IX(d). A factual analysis must still be applied under the “reasonable expectation of continued employment” standard. In the *University System* case, above, the adjunct faculty members signed contracts of one semester in length. *Id.* at 632. The Court noted that even under such circumstances, “the fact that [employees] do not have a contractual right to renewal of their contracts does not necessarily diminish their reasonable expectation of continued employment.” *Id.* at 632. Similarly, if the need for a particular position is supposed to be re-evaluated on a regular basis, this would not necessarily diminish a reasonable expectation of continued employment for an incumbent to the position.

Here, despite the fact that Egner signed the offer of temporary employment and was told by Chief Allen that the need for position would be re-evaluated, Chief Allen also told him that the goal was to keep the position. (Finding No. 28, above). Consistent with the City’s personnel by-laws regarding permanent appointments (See Finding No. 29, above), Egner is working for the City in a full-time capacity on a regular and continuing basis. On the other hand, Article IV, Section 4.3.2, of the City’s personnel policy provides, in pertinent part, that “[w]hen a position is limited in duration, such as for special projects, or requires irregular, intermittent or seasonal work, a temporary appointment shall be made. Persons hired on a temporary basis shall not be eligible for any benefits offered by the City.” (See Joint Exhibit No. 9, Finding No. 29, above). It is a compelling fact that the fire inspector position, unlike a so-called temporary appointment under the City’s personnel policy, is eligible for benefits offered by the City. Although linked to

the DHMC project, its exact duration remains unspecified, and it cannot reasonably be described as consisting of irregular, intermittent or seasonal work. It is also significant that the City's salary plan for non-bargaining unit employees, Ordinance #18, which lists other permanent positions within the City, was amended to include the position of Fire Inspector. (Joint Exhibit Nos. 3 and 4). Moreover, Ordinance #18 does not describe the fire inspector position as being "temporary" or otherwise established on a "trial basis." (Joint Exhibit Nos. 3 and 4, Finding No. 20, above).

Given that the duration of Egner's appointment is undetermined at this time, and may in fact continue on for many years, and is likewise eligible for benefits, including retirement, it is more in unison with being "permanent", rather than "temporary," under the City's own personnel policy. Even though the City can waive or otherwise make exceptions to its own policies, the balance of evidence still supports a conclusion that Egner, based upon the nature of the position to which he has been appointed, has a reasonable expectation of continued employment. I therefore find that the fire inspector position shall not be excluded from the bargaining unit on the basis of an alleged temporary status.

The City has also raised an objection to the Association's petition on the grounds that the fire inspector position does not share a community of interest with the existing bargaining unit. RSA 273-A:8 I and Pub 302.02 (b) provide direction as to appropriate criteria for determining whether or not a "community of interest" exists. Such an exercise in this case reveals that the fire inspector and the existing bargaining unit are employed by the City of Lebanon and perform their work within the same organizational unit within the City, namely that of the fire department. The fire inspector and the employees comprised in the existing bargaining unit are all subject to the internal procedures of the fire department, including such rules pertaining to "In Service Inspections," "Origin and Cause Investigation," "School Fire Drills," and "Fire Drills - Non Schools." (See Finding No. 5, above). Fire prevention and prevention activities are part of the formal administrative structure of the fire department (Finding No. 6, above), and thus are applicable to both the fire inspector and members of the existing bargaining unit. The department operates with "a decentralized management style set in a team environment" (Joint Exhibit No. 7, p. 17, Finding No. 8, above).

Although there is no history of workable and acceptable collective negotiations, there is a history of firefighters regularly performing fire inspector functions and, for a period of five (5) years, a firefighter actually served as fire inspector. As discussed earlier, firefighters often assisted Deputy Chief Sykes in fire prevention and inspection responsibilities due to his heavy workload, including photographing fire scenes and documenting what was found, taking evidence samples, and inspecting oil tanks and wood stoves. (Finding Nos. 8 and 16, above). Moreover, during the period 1989 to 1994, Firefighter John Hamilton was disabled from performing fire suppression duties and was assigned light duty, as fire inspector, until his retirement. (Finding Nos. 9 and 10, above). While certainly the current fire inspector may perform more technical fire inspection and prevention functions, such work is still consistent with the mission of the existing bargaining unit.

Hamilton testified that during the years he worked as a fire inspector, his hours were a regular Monday through Friday schedule, 7:00 AM to 3:00 PM. (Finding No. 10, above). This

is the same work schedule assigned to the current fire inspector. (Finding No. 7, above). The pay and benefit package of the fire inspector are comparable and consistent with those of the existing bargaining unit. The fire inspector is paid at a rate of \$17.20 per hour, which is between Step E and Step F of the pay grade for firefighters in the current CBA. (City Exhibit No. 2; Joint Exhibit No. 1). The fire inspector also receives health insurance, life insurance, short term disability, vacation and sick days, personal days and holidays, all of which are benefits enjoyed by the firefighter bargaining unit. (City Exhibit No. 2; Joint Exhibit No. 1).

This history indicates that the combining of fire suppression and fire prevention personnel within the same bargaining unit would not be problematic. In point of fact, fire prevention activities have long been an aspect of firefighter responsibilities, and, at least to certain extent, constituted a portion of established bargaining unit work. The current fire inspector is not certified as either an EMT or a firefighter, and neither certification is a requirement of the position. Its principal duties and responsibilities include "conducting fire inspections and investigations, fire code enforcement, fire prevention education to the general public, and review of building plans and specifications." (See Joint Exhibit Nos. 10 and 13). Therefore, while the fire inspector does not participate in the fire suppression duties performed by firefighters, the degree to which the position still shares in the overall mission of the department is significant and substantial enough to justify its inclusion in the same bargaining unit with firefighters.

Accordingly, the Association's Modification Petition is hereby granted.

So Ordered.

Signed this 26th day of April, 2004.



Peter C. Phillips, Esq.
Hearings Officer

Distribution:
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