



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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Gilford Professional Firefighters,		*
IAFF Local 3517		*
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	Petitioner	*
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v.		*
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Gilford Fire-Rescue Board of Fire Engineers		*
		*
	Respondent	*
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Case No: F-0148

Decision No. 2004-089

Certification Petition

APPEARANCES

Representing the Gilford Professional Firefighters, IAFF Local 3517

John S. Krupski, Esq.

Representing the Gilford Fire-Rescue Board of Fire Engineers:

Mark T. Broth, Esq.

Also Appearing as Witnesses:

Captain John Beland, Gilford Fire Department
Firefighter/Paramedic Richard Andrews, Gilford Fire Department
Fire Chief Michael Mooney, Gilford Fire Department

BACKGROUND

The Gilford Professional Firefighters, IAFF Local 3517 (hereinafter "Local 3517") filed a Certification Petition with the Public Employee Labor Relations Board (PELRB) on December 4, 2004 seeking to establish a bargaining unit consisting of all full-time Captains, Lieutenants and Firefighters employed by the Gilford Fire-Rescue Board of Fire Engineers (hereinafter "the Board of Engineers"), and excluding the Fire Chief and Deputy Chief. The petition also initially sought the inclusion of the position of Executive Secretary, but Local 3517 withdrew this request prior to hearing.

The Board of Engineers filed its answer to the petition on December 19, 2004 in which it raised objections. The Board of Engineers alleges that the positions of Captain and Lieutenant should be excluded from the bargaining unit because they are supervisory employees within the meaning of RSA 273-A:8 II. Moreover, based upon the exclusion of the Captain and Lieutenant positions, the Board of Engineers asserts that the petition must be dismissed in that there would be an insufficient number of employees to establish a bargaining unit under RSA 273-A:8 I(d). In a supplemental exception to the petition, filed on January 2, 2004, the Board of Engineers sought the specific exclusion of Firefighters Brian Blanchette and Shawn Croteau based upon their status as probationary employees. The Board of Engineers subsequently withdrew this objection with the stipulation that while these two probationary firefighters may be counted to satisfy the ten (10) employee minimum requirement, in accordance with RSA 273-A:8 I(d), they shall not be eligible to vote in an election to certify the employee organization as the exclusive representative if the election is held less than one year from their date of hire.

A hearing on the merits of Local 3517's petition was conducted on January 28, 2004 before the undersigned Hearing Officer at the offices of the PELRB in Concord, New Hampshire. Both parties were represented by counsel at the 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 by February 20, 2004. At the request of Local 3517's counsel, and without objection from the Board of Engineers, the filing deadline for the Local 3517's post-hearing brief was extended to February 23, 2004. All post-hearing briefs having been filed by the parties' counsel, the record was officially closed on February 23, 2004. Upon review of all filings submitted by the parties and consideration of all relevant evidence, the Hearing Officer determines the following:

FINDINGS OF FACT

1. The Gilford Fire-Rescue Board of Engineers ("the Board of Engineers") employs firefighters and other personnel in the operation of the Gilford Fire-Rescue Department ("GFD") and therefore constitutes a public employer within the meaning of RSA 273-A:1, X.
2. The Gilford Professional Firefighters, IAFF Local 3517 ("Local 3517") has petitioned to become the exclusive bargaining representative of a proposed bargaining unit consisting of all full-time Captains, Lieutenants and Firefighters employed by the Board of Engineers.
3. Included among the duties and responsibilities of the Board of Engineers is the duty "to appoint or remove (with just cause) the fire chief, permanent firefighters/EMT's, and volunteer firefighters...[to]...approve a budget submitted by the fire chief to be considered by the budget committee and presented to the citizens of Gilford at the annual town meeting...[and]...to supervise the expenditures of the department and have general supervision and control over the operation and make all rules governing the department..." (Union Exhibit No. 4). According to the narrative supplement for

the staff organizational chart, the Board of Engineers is "responsible for the final approval of all department policies. They are also responsible for the hiring and separation of all employees." (Union Exhibit No. 3).

4. According to the job description for the position of Fire Chief, the position "performs highly responsible supervisory and administrative work in the planning, organizing, budgeting, staffing and directing of the Fire-Rescue Service...The Fire Chief works under the broad supervision from the Board of Fire Engineers, following prescribed policies, goals and objectives set by the Board...The Fire Chief supervises either directly or through subordinates all employees of the Fire-Rescue Service and provides administrative direction to assure the delivery of effective fire prevention, fire suppression, and emergency medical service programs for the Town. This supervision includes the responsibility for the hire, separation and discipline of all department members." Among the listed examples of duties for the position, is that he/she "[e]valuates performance of subordinates and reviews probationary reports; personally or with subordinate officers deals with problems in assignments, discipline, morale, training or any other problems regarding department policy." (Union Exhibit No. 1, pp. 1, 2).
5. According to the job description for the position of Deputy Chief, the position "performs highly responsible administrative and supervisory work assisting the Fire Chief in planning, organizing and directing the Fire-Rescue Service...[and]...[e]xercises general supervision over subordinates; evaluates and recommends selection, performance and discipline of assigned personnel." Among the listed examples of duties for the position, is that he/she "[e]valuates performance, disciplines (subject to approval of the Fire Chief) and participates in the selection of personnel." (Union Exhibit No. 1, p. 3).
6. According to the job description for the position of Fire Captain, the position "[p]erforms responsible technical and supervisory work in the supervision and activities of personnel, both at the fire station and at the scene of a fire or other emergency [and is] responsible for the operation of the fire station and coordinating work assignments between shifts." Regarding supervision exercised, the Fire Captain "[p]rovides direct or general supervision to subordinate officers and firefighters involved in assigned duties and emergency activities; makes specific assignments and provides technical guidance as needed; exercises full supervisory responsibilities at the station and at the scene of an emergency in the absence of a superior officer..." Among the listed examples of duties for the position, is that he/she "[a]ssigns, supervises and checks work of personnel in the maintenance of equipment and station facilities, reviews and evaluates work performed...Conducts in-service training programs as assigned; instructs personnel in the operation of firefighting techniques, vehicles and related equipment...[and is r]esponsible for guidance and discipline of assigned personnel." (Union Exhibit No. 1, p. 8).
7. As described in the "Narrative Supplement for Staff Organizational Chart" (Union Exhibit No. 3), "[t]he Captain has dual roles within the staff organization. The

operation of the central fire station is the responsibility of the Captain. This includes the coordination of work assignment between shifts and the supervision of routine work assignment. As the Training Officer, he is responsible for the design, implementation of the training programs for both the career and paid call personnel. He is also responsible for all of the record keeping associated with training."

8. The Lieutenant position was created in 1981. According to the job description for the position, the Lieutenant "[p]erforms responsible technical and supervisory work in the supervision and activities of personnel, both at the fire station and at the scene of a fire or other emergency." Regarding supervision exercised, the Fire Lieutenant "[p]rovides direct or general supervision to firefighters involved in assigned duties and emergency activities; makes specific assignments and provides technical guidance as needed; exercises full supervisory responsibilities at the station and at the scene of an emergency in the absence of a superior officer..." Among the listed examples of duties for the position, is that he/she "[a]ssigns, supervises and checks work of personnel in the maintenance of equipment and station facilities, reviews and evaluates work performed...Conducts in-service training programs as assigned; instructs personnel in the operation of firefighting techniques, vehicles and related equipment...[and is r]esponsible for guidance and disciplines [sic] of assigned personnel." (Union Exhibit No. 1, p. 10).
9. The GFD has two organizational charts, one for "Suppression" and the other for "Staff Function." (Union Exhibit No. 2). Under "Suppression," the Fire Chief is at the top, followed by the Deputy Chief. The Captain and the three (3) Lieutenants are at the next level of authority, illustrating four (4) respective lines of command, with the rank of Firefighter being subordinate to each. The "Staff Function" organizational chart shows the Board of Fire Engineers at the top, followed by the Fire Chief and then the Deputy Chief. Three (3) "functions" thereafter flow from the position of Deputy Chief, namely "Fire Prevention," "Captain Training," and "Operations."
10. The Captain position serves as the GFD's training officer. Otherwise, the Captain position possesses and performs the same functions, duties and responsibilities as that of a Lieutenant. In other words, as testified to by Fire Chief Michael Mooney, the only difference between the Captain and Lieutenant positions is in the "training area." Since each shift officer (Captain and Lieutenants) works a separate shift, the Captain would typically not have occasion to work with a Lieutenant. Thus, although Captain is technically a higher rank than Lieutenant, the position generally has no more authority on a day-to-day basis.
11. The Fire Chief and Deputy Chief work a Monday to Friday, 8:00 AM to 5:00 PM schedule and provide weekend "on-call" coverage for the GFD on an alternating basis. (Union Exhibit No. 7). At least one shift officer, either the Captain or one of the three Lieutenants, and two firefighters are assigned to each of the GFD's twenty-four (24) hour shifts. The shift officer on duty determines whether or not circumstances warrant calling the Chief or Deputy Chief back to the station. The

shift rotation is as follows: 24 hours on duty, 24 hours off duty, 24 hours on duty, and then five days off.

12. The Fire Chief determines all shift staffing levels. The shift officer, either the Captain or one of the three Lieutenants, is responsible for filling a shift upon receiving notification of a created vacancy. The shift officer is also required to notify the Fire Chief if a vacant shift needs to be filled on an overtime basis. The Fire Chief must be notified, as soon as possible, if a vacant shift is going to extend three or more days/nights. (Union Exhibit No. 11).
13. The shift officers and firefighters share in the performance of the GFD's daily work schedule and household duties. (see Union Exhibit No. 8).
14. In the absence of the Fire Chief and Deputy Chief, the shift officer on duty, either the Captain or a Lieutenant, is in charge of the fire station and otherwise responsible for the shift. This occurs approximately seventy-five percent (75%) of the time during the continuous operation of the fire department. Although certain tasks are pre-assigned (see Union Exhibit No. 8), the shift officer is responsible for keeping on duty staff engaged in work activity when those regular duties are completed and also addressing unexpected events.
15. At the scene of a fire call, the ranking officer present, usually the Captain or a Lieutenant, is in charge, although he/she may elect not to assume control if he/she determines that it is unnecessary to do so. A distinction arises on medical calls, where the person with the highest level of medical certification or licensure determines who has authority at the scene. In this regard, a Firefighter/EMT can be in charge at the scene of a medical call despite the presence of the Captain or a Lieutenant based upon their higher level of medical training.
16. The Captain and Lieutenants conduct annual performance evaluations of firefighters, utilizing a standard form, and have done so for many years. The evaluation form contains a rating system, with scoring from 1 to 3 for various criteria, and written comment sections. (Board of Engineers Exhibit F, pp. 1-4, 13-28, 37-44, 53-55). The shift officer completing the evaluation meets with the firefighter to review the results prior to its being forwarded to the Chief for his signature. The evaluation form itself does not specifically provide for any formal recommendation. It does state that employees have the right to challenge the ratings by requesting a review by the Chief of Department. On occasion, the Fire Chief and Deputy Chief have also completed performance appraisals, particularly when, because of work schedules, they are sufficiently familiar with a firefighter's level of performance. This occurred in 2002, during a period of time in which two firefighters were assigned to work a day shift, specifically a four (4) day on, four (4) day off schedule, and their shift officers were changing on a regular basis. (Union Exhibit Nos. 16 and 17).
17. The Fire Chief, or the Deputy Chief in the Fire Chief's absence, reviews all performance evaluations in order to become familiarized with the level of work

performance of the employees. The Fire Chief relies upon the information contained in the evaluations when recommending to the Board of Engineers the appropriate percentage increase in merit pay (zero to four percent) for employees.

18. When asked on direct examination if he approves merit increases, Captain John Beland answered, "No, I do not." When asked if he makes recommendations relative to merit increases, Captain Beland stated that he assumes that he does.
19. The Fire Chief or Deputy Chief evaluate the work performance of the Captain and Lieutenants. A "Fire Officer" performance appraisal form is used rather than the form used to evaluate firefighters. Among other things, the Captain and Lieutenants are evaluated and rated on their "Supervisor Abilities," including "Control," "Leadership," and "Evaluating Members Effectiveness." (Board of Engineers Exhibit E, pp. 6, 10, 30, 34, 46, 50,).
20. In the Spring of 2003, an issue arose with the Town of Gilford Board of Selectmen relative to the consistency of performance evaluations and the training provided, or lack thereof, to those employees who conduct them. The payment of merit increases was suspended pending discussions between the Board of Selectmen, the Board of Engineers, and the Fire Chief. As a result, the Fire Chief informed the employees of the GFD that the Captain and Lieutenants would not continue to conduct performance evaluations and that either he or the Deputy Chief would complete future performance evaluations. Thereafter, the Fire Chief and the Board of Engineers met with the Board of Selectmen, merit increases were eventually paid, and the Captain and at least one Lieutenant have resumed conducting performance evaluations.
21. The Captain and Lieutenants participate in mentoring and evaluating Firefighters during their probationary period, as well as offering recommendations to the Fire Chief and Board of Engineers on whether or not to remove Firefighters from such status. (Board of Engineers Exhibit G). The Fire Chief relies upon such recommendations when making his own recommendations to the Board of Engineers on whether or not a new hire should be retained.
22. The Captain and Lieutenants do not have the authority to formally suspend or terminate employees and there is no evidence of any formal discipline ever being imposed by either the Captain or a Lieutenant. If a disciplinary situation arises as to an employee's conduct or work performance, it is a shift officer's responsibility to bring the matter to the Fire Chief's attention for his review and consideration. In the context, the shift officer has the responsibility for determining a firefighter's fitness for duty. The Fire Chief relies upon the Captain and Lieutenants to inform him of disciplinary and performance issues. It is the Fire Chief who determines what action, if any, is appropriate. In this regard, the Board of Engineers and the Fire Chief hold formal disciplinary authority within the GFD. The GFD is a small department that utilizes a self-policing environment relative to day to day disciplinary issues that may arise, and the need for formal discipline has been rarely, if ever, exercised.

23. According to GFD written policy, approval of shift swaps is by either the Fire Chief or Deputy Chief. Firefighters may swap with Lieutenants and Lieutenants may swap with Firefighters, but the Captain may not swap with either Firefighters or Lieutenants. A "swap request form" must be completed and signed by both employees, and the shift officer of the employee seeking the swap must be notified. The form is then forwarded to the Fire Chief or Deputy Chief for approval. (Board of Engineers Exhibit E, p. 2). Fire Chief Michael Mooney testified that in reality the GFD does not follow the written departmental policy as to swaps and it is administered between the firefighters and shift officers. He indicated that the shift officer is responsible for approving the exchange of shifts so that he will know there is proper coverage and whom he is going to be working with on a particular shift.
24. Employees submit a Town of Gilford leave request form when requesting vacation, sick, compensatory, bereavement or non-paid leave. The form provides for approval signatures by the shift officer and the Fire Chief, as the department head. (Board of Engineers Exhibit E, p. 1), although the Fire Chief has signed in both capacities. (Union Exhibit No. 20). According to department policy, vacation leave requests are approved by either the Fire Chief or Deputy Chief, prior to the posting for coverage. (Union Exhibit No. 10, see also Union Exhibit No. 20).
25. There is no dispute between the parties that the positions of Captain and Lieutenant share a "community of interest," as referenced under RSA 273-A:8 I and Pub 302.02 (a), with the position of Firefighter/EMT by virtue of sharing the same profession, organizational unit, work rules and personnel practices, geographic location, and conditions of employment, including wage structure and hours of work.

DECISION AND ORDER

JURISDICTION

It is well-settled in New Hampshire that "the legislature has vested the PELRB with authority to define the terms of RSA 273-A and to fill in any gaps in the statute." *Appeal of University System of New Hampshire*, 131 N.H. 368, 370 (1988)(citation omitted). Moreover, "the PELRB is given broad subject matter jurisdiction to determine and certify bargaining units to enforce the provisions of that chapter." *Id.* at 370 (citation omitted). As the instant matter concerns a petition for certification, filed pursuant to RSA 273-A:10, and presents an issue of bargaining unit determination under RSA 273-A:8, PELRB jurisdiction is appropriate under the circumstances.

SUMMARY OF DECISION

The instant certification petition fails for lack of a sufficient number of employees to form a bargaining unit. Based upon the evidence presented, there is a sufficient basis to conclude that the Captain and Lieutenant's positions exercise supervisory authority involving "a significant exercise of discretion," and thus, as a matter of law, are prohibited from being

included within the same bargaining unit as the firefighters. As a result of their exclusion, the proposed bargaining unit consists of only eight (8) firefighters and thus falls short of the statutory minimum of ten (10) or more employees in order to be certified under RSA 273-A:8 I.

DISCUSSION

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). Here, as there is no dispute that there is a shared "community of interest" among the Captain, Lieutenant and Firefighter positions referenced in the certification petition, the critical issue remaining is what degree of supervisory authority, if any, is held by the Captain and Lieutenant positions. The record reflects that the Captain position basically operates as a Lieutenant's position but with added training responsibilities of an administrative nature. (Finding Nos. 7 & 10, above). It therefore reasonably follows that either both positions are appropriately included within the proposed bargaining unit or appropriately excluded dependent upon the extent of their supervisory authority.

As provided in RSA 273-A:8 II, "[p]ersons exercising supervisory authority involving the significant exercise of discretion may not belong to the same bargaining unit as the employees they supervise" and the instant petition must therefore be judged with this standard in mind. Certainly the fact that a fire officer (Captain or Lieutenant) is assigned to each shift is reflective of the fact that these positions perform a supervisory role – the question is whether this supervisory authority rises to the level of "significant exercise of discretion." "In determining whether an employee exercises supervisory authority sufficient to exclude the employee from a bargaining unit, [the New Hampshire Supreme Court] consider[s] several factors, including the employee's authority to evaluate other employees, the employee's supervisory role, and the employee's disciplinary authority." *Appeal of Town of Stratham*, 144 N.H. 429, 432 (1999)(citing *Appeal of East Derry Fire Precinct*, 137 N.H. 607, 610 (1993)). See also *Appeal of University System of New Hampshire*, 131 N.H. 368, 376 (1988). In applying these criteria to the case at hand, I find that the Captain and Lieutenants qualify as supervisors under the statute and therefore must be excluded from the bargaining unit.

The Captain and Lieutenants evaluate the performance of firefighters and have done so for many years. (Finding No. 16, above). Testimony of Captain Beland, Firefighter/Paramedic Richard Andrews, and Fire Chief Mooney established that shift officers, consistent with their job descriptions, have conducted performance appraisals of subordinate firefighters for at least the past eleven (11) years and longer. (Finding Nos. 6, 8 & 16, above). In fact, shift officers are themselves evaluated on their evaluation of firefighters. (Finding No. 19, above). It is also undisputed that the performance evaluations conducted by staff officers are a significant factor in the determining the merit increase, if any, that will be paid to firefighters. Given the relative amount of time shift officers have to observe the work performance of firefighters under their supervision, as compared to the Fire Chief, it is reasonable to conclude that (1) they are well qualified to make such assessments and (2) the Fire Chief would rely on such information, to a

significant extent, when determining what percentage increase the firefighter should receive in merit pay.

I am cognizant of the fact that in the Spring of 2003, as a result of certain issues raised by the Board of Selectmen, the Fire Chief announced that both he and the Deputy Chief would now be conducting performance evaluations. (Finding No. 20, above). However, this episode was related to the inconsistency of performance evaluations and the lack of training provided to the evaluators, not as to *who* was conducting the evaluations. It appears that the completion of performance evaluations by the Captain and Lieutenants was put on hiatus for a period of time pending discussions between the Fire Chief, the Board of Engineers, and the Board of Selectmen, as well as the arrangement of training. In any event, there was never any indication that at some point in time the Captain and Lieutenant's would not resume their responsibilities in this regard and the record reflects that such evaluations have since taken place.

The Captain and Lieutenants perform a supervisory role on a daily basis in the operation of the GFD. While in certain respects it would appear to be in the capacity of "working foremen," since the shift officers perform much of the same work as firefighters, the fact remains that in the absence of the Fire Chief or Deputy Chief, the Captain or a Lieutenant is in charge of the fire station. When one considers that the GFD is a twenty-four (24) hour, seven (7) day a week operation, and that for the majority of the time the Fire Chief and/or Deputy Chief are not on duty, the relative scope of the fire officers' supervisory authority comes into focus. Consistent with the duties set forth in their job descriptions, this authority includes the assignment of work, ensuring proper staffing levels and the filling open shifts, evaluation of probationary employees and recommended action on retention, and being in charge at fire scenes and other incidents. (See Finding Nos. 12, 14, 15, 21, 23 & 24, above). The work performance of shift officers is evaluated, in part, based upon their supervision of subordinate firefighters. (Finding No. 19, above).

Finally, the Captain and Lieutenants possess a definable level of disciplinary authority over the firefighters. This disciplinary authority, while not overwhelming, is in the form of overseeing the conduct and performance of firefighters and offering informal counseling/training when appropriate, assessing firefighters' fitness for duty, and serving as a conduit for communicating disciplinary or performance issues to the Fire Chief. (Finding No. 22, above). The record is reflective of the fact that firefighters of the GFD are rarely, if ever, subject to disciplinary action, let alone by a shift officer. Nonetheless, as the Court noted in *Appeal of University System of New Hampshire*, the "mere fact that [the officers] have such authority, regardless of whether it is presently exercised, is sufficient...to hold that they are supervisors under the statute." *Appeal of University System of New Hampshire*, 131 N.H. 368, 376 (1988).

Local 3517's argument in its memorandum of law that it is illogical to have nine (9) supervisors (3 Engineers, 1 Chief, 1 Deputy Chief, 1 Captain, and 3 Lieutenants) exercising authority over eight (8) Firefighter/EMT's is well put. However, the critical factor here is not the number of supervisors but instead the level of supervisory authority that such supervisors possess. In this regard, the instant case rests upon an analysis of the evidence presented to relevant case law and provisions of RSA 273-A. The overall management of the GFD is left to the best judgment of the Board of Engineers.

Based upon the foregoing, I find that the Captain and Lieutenants exercise supervisory authority involving the significant exercise of discretion and therefore may not belong to the same bargaining unit as the firefighters they supervise. Accordingly, Local 3517's petition is denied.

So ordered.

Signed this 17th day of June, 2004.



Peter C. Phillips, Esq.
Hearing Officer

Distribution:
John S. Krupski, Esq.
Mark T. Broth, Esq.