



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

I.U.O.E. Local 98

Petitioner

v.

Town of Pembroke

Respondent

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Case No: G-0039

Decision No. 2006-205

APPEARANCES

Representing I.U.O.E. Local 98:
Vincent A. Wenners, Jr. Esq.,

Representing Town of Pembroke:
Thomas J. Flygare, Esq., Flygare, Schwarz & Closson, PLLC

BACKGROUND

On July 6, 2006 I.U.O.E. Local 98 (the "Union") filed a petition for certification. The Town of Pembroke timely filed its Objections to Certification Petition on July 21, 2006. A hearing on the merits of the Union's petition was conducted on August 15, 2006.

FINDINGS OF FACT

1. Town of Pembroke is a public employer within the meaning of RSA 273-A:1, X.
2. The I.U.O.E. Local 98 is an employee organization within the meaning of RSA 273-A.
3. The proposed unit consists of the following Department of Public Works positions: Sr. Foreman (1), Foreman (1), Department of Public Works Secretary

(1), Truck Drivers (7), Fleet Mechanic (1), Janitor (1.5), Laborer (1). The Director of Public Works is excluded from the unit.

4. The Town objects to inclusion of the Sr. Foreman, Foreman, and Department of Public Works Secretary ("DPW Secretary") in the unit.
5. The Sr. Foreman, Foreman, and DPW Secretary all work out of the Department of Public Works building, which is located one to two miles away from Pembroke Town Hall. The two foremen share a ten by twelve office and each has a desk, chair, computer, and printer.
6. The two foreman positions are essentially the same, performing similar tasks in their respective divisions, except that the Sr. Foreman acts as Department Director in the absence of the Director. The Foreman is responsible for the solid waste, recycling, buildings, and grounds divisions, while the Sr. Foreman is responsible for the cemetery and street maintenance divisions.
7. The two foreman manage the winter snowplow crews, with each having responsibility for a crew (the crews work in 12-hour shifts). Together, the two foremen establish the plow routes and assign routes to their drivers. Both foreman are licensed to and operate the six wheel plow trucks. Sometimes the Sr. Foreman operates a loader to load salt and sand on the plow trucks.
8. The Foreman cleans up the transfer station using equipment (a loader and backhoe) and working manually, typically performing this work alone. On occasion the Foreman also rides a trash collector truck.
9. Both foremen perform light maintenance on department equipment. The Foreman also performs minor building maintenance. The Sr. Foreman spends a portion of his time working with his crew on street maintenance issues, including using hand tools and equipment when working in ditches with his crews, and this position also works in basins and on hot top, both related to street maintenance activity. Both foremen visit their crews or observe their crews' work to ensure work is being done properly and according to their directions. Both foremen are responsible for training employees under their supervision, and they make sure safety standards are followed (such as the use of safety vests, safety glasses, steel toe boots).
10. In August, 2006 the Town hired Emile Lacerte, the former Sr. Foreman, as the new Public Works Director. The position had been vacant since Walter Norris' departure in March, 2006. The Town has restructured the position to make the job duties more akin to those of road agent than was previously true – the former Public Works Director held a bachelor's degree in civil engineering, while the current Public Works Director is required to have a valid CDL-B license and experience in the operation of heavy equipment.

11. The Director of the Department of Public Works is a "department head" as that term is used in Union Exhibit B (paragraph E), Union Exhibit G (amendment #3, A), and Town Exhibit 3 (p. 7). As such, the Director is required by Town ordinances to "review the applications that are submitted and conduct interviews of candidates. The Department Head will then present a final candidate to the Town Administrator for his/her review. The Town Administrator shall review the recommendation and present the final candidate to the Board of Selectmen. The Board of Selectmen shall have the final authority concerning the actual appointment of the employee."
12. Town ordinances also require that the Director conduct annual evaluations subject to review by the Town administrator and, when applicable, by the Board of Selectmen.
13. In June, 2006 the Town began using a new written employee evaluation form (Town Exhibit 3) to be completed by the "Department Head." The form was created by Troy Brown, the Town Administrator. Although there was some testimony that the intention is for a Foreman to complete the evaluation form, the form itself refers only to the "Department Head," which in the case of the Public Works Department means the Director (Emile Lacerte). At best, it is unclear whether anyone other than Mr. Lacerte is to conduct and complete the evaluation form.
14. According to the Town Administrator, Troy Brown, Town Exhibit 2 (Senior Foreman Job Summary) is a form that was worked on by Walter Norris, the former Director of Public Works, and Mr. Brown was not sure if Town Exhibit 2 was fully implemented.
15. The other hearing exhibit containing a written description of foremen job responsibilities does not assign to the foreman any duties, limited or otherwise, concerning employee hiring, firing, evaluation, or discipline. (Union Exhibit F)
16. Prior to Walter Norris' two and one-half year tenure as Director of Public Works the foremen were not involved at all in employee evaluations. No information was provided about the foremen's historical involvement in hiring, firing, or discipline. Mr. Norris described the foreman as "working foremen."
17. Mr. Norris did involve the foremen in the evaluation and hiring process (he thought it helped train the foreman). However, employee evaluations were suspended after his first year with the Town until their resumption in approximately the middle of 2006, after Mr. Norris' departure. According to Mr. Norris, during the one year period he overruled employee evaluation input from the foremen six to twelve times; this occurred in a Department with approximately 11 employees (not counting the two foremen). The two foremen worked with or under the close direction and supervision of Mr. Norris during their participation in the employee hiring or evaluation process.

18. The DPW Secretary performs clerical activity acting as the secretary to the Department of Public Works and works under the direct supervision of the Director of Public Works.
19. The duties of the DPW Secretary are set forth in Union Exhibit E. Among the listed duties are explaining administrative decisions and policies and typing a "variety of material from rough draft, straight copy or oral instructions, including correspondence, reports, memoranda, vouchers, form, bills, applications, notices, etc." The DPW Secretary also "performs other related duties as required."
20. Personnel and payroll records are kept at Town Hall, where the office of the Finance Director is located. Town Hall staff has its own secretarial support. The DPW Secretary maintains spreadsheets to track various information, including tonnage at the transfer station, expenses incurred to date (used in budget analysis), hours worked by employees (this information is reported to the Finance Director where final payroll records are prepared and kept). The DPW Secretary provides employees with worker's compensation claim forms upon request but is not involved in investigating any such claims.

DECISION AND ORDER

JURISDICTION

The PELRB has jurisdiction of all petitions to determine bargaining units and to conduct elections pursuant to RSA 273-A:8 and 10.

DISCUSSION

The first issue in this case is whether the two foreman positions should be excluded from the proposed bargaining unit because they are supervisory positions within the meaning of RSA 273-A:8, II.

RSA 273-A:8, II provides that "[p]ersons exercising supervisory authority involving the significant exercise of discretion may not belong to the same bargaining unit as the employees they supervise." The PELRB has "broad subject matter jurisdiction to determine and certify bargaining units to enforce the provisions of that chapter (RSA 273-A)." Appeal of SAU #21, 126 N.H. 95, 97 (1985). Important factors to consider include an "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. 610 (1993)). "The mere fact that they (putative supervisory positions) have such authority, regardless of whether it is presently exercised, is sufficient for us to hold that they are supervisors under the statute." Appeal of Univ. System of New Hampshire, 131 N.H. 368, 376 (1988). Supervisory employees are generally separated from rank and file

employees because there is "a strong potential for a conflict of interest to arise between the two groups." Id.

The facts in this case establish that both the Sr. Foreman and Foreman positions perform many of the same duties in their respective divisions. While both are involved in assigning work and supervising the proper completion of assigned work, including managing and assigning plow routes to employees during the winter, and assigning and overseeing employee work in their respective divisions, these are duties consistent with their status as working foremen. These duties alone are insufficient to qualify the positions as supervisory within the meaning of the statute.

The Town also relies on evidence concerning the foremen's involvement in the process of employee evaluation, hiring, firing, and discipline. Town Exhibit 3 establishes that it is the Director, as Department Head, who is expected to complete employee performance evaluations, consistent with Town Ordinances (and subject to review by the Town Administrator). Likewise, the Director is responsible for reviewing employment applications, conducting interviews of potential employees, and the selection of a final candidate for review by the Town Administrator (who then conducts his own review and presents the final candidate to the Selectmen, who make the ultimate hiring decision). As already discussed, the foremen's involvement in these areas is not required by or specified in the foreman's job description contained in Union Exhibit F. It is not clear whether Town Exhibit 2, a Senior Foreman Job Summary, was ever fully implemented (a point made by Mr. Brown), so language on the subject contained in this exhibit is not probative. (Mr. Brown also testified that he didn't know of any job description for the Foreman, since he believes that Union Exhibit F only applied to the Senior Foreman.) The other evidence concerning the foremen's involvement in employee hiring, firing, evaluation, and discipline establishes that it is informal, irregular, and ill-defined. When they participated in the process during Mr. Norris' service as Director of Public Works the foremen acted in support of, or directly with, the Director, and without a significant degree of discretion.

On balance, the evidence does not support the conclusion that the positions of Foreman and Senior Foreman exercise supervisory authority involving the significant exercise of discretion, and accordingly these positions are included in the proposed bargaining unit.

The remaining issue is whether the DPW Secretary is a confidential position and should be excluded from the proposed unit on that basis. RSA 273-A:1, IX defines a confidential employee as those "[p]ersons whose duties imply a confidential relationship to the public employer." The PELRB has elaborated on the statute, stating confidential employees:

"are those who have access to confidential information *with respect to labor relations*, negotiations, significant personnel decisions and the like. The Board further finds that the number of such employees in any department or other unit of government must be large enough to enable the labor relations activities of the Department and the personnel activities of the Department to be carried on, but must not be so numerous as to deny employees who are entitled to the rights and benefits of RSA 273-A those rights merely on the assertion that they might somehow be connected with activities related to labor relations."

State of New Hampshire, Dept. of Rev. Administration v. State Employees' Ass'n, Decision No. 78001 at 5 (PELRB Jan. 1978)(emphasis in original). See also State Employees Association of New Hampshire Local 1984 SEIU v. State of New Hampshire, PELRB Decision No. 2002-045 (April 5, 2002). There "is no set minimum or maximum number of employees who may be deemed confidential." Appeal of Laconia, 135 N.H. 421, 424 (1992). In a similar case involving the Town of Newport, the public works department secretary, who was considered to be the administrative assistant to the director of public works, was excluded from the bargaining unit as a confidential employee. Appeal of Town of Newport, 140 N.H. at 348. The department secretary in Newport "keeps the personnel records, is privy to any disciplinary actions taken, and attends staff meetings at which confidential matters are discussed." Id. at 347.

Providing testimony concerning the present DPW Secretary's duties was complicated, according to Mr. Brown, because he was reluctant to contact her to discuss day to day operations since she was a Union witness. Mr. Brown's acknowledged lack of knowledge about the DPW Secretary suggests that she is in fact not involved in personnel, financial, and other confidential town affairs. Additionally, the DPW Secretary's appearance on the witness list did not bar Mr. Brown from having such contact. Mr. Brown could also have contacted Mr. Lacerte for this information, or the Town could have called Mr. Lacerte as a witness on the subject. This and the other evidence in the case indicates that the current DPW Secretary is not privy to confidential information.

The reason for the DPW Secretary's lack of involvement in such matters is understandable given the location of the Public Works Department relative to Town Hall. All of the more important and significant financial and personnel information is kept and maintained at Town Hall, which is staffed independently of the Public Works Department. The Town Administrator and Finance Director's offices are located at the Town Hall.

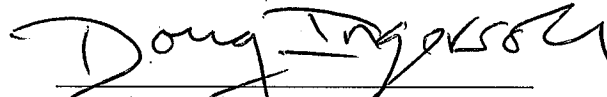
Mr. Brown did identify a number of tasks he thought the DPW Secretary might be expected to perform, such as typing up disciplinary decisions, letters of reprimand, and employee evaluations, arranging scheduling concerning grievance matters, dealing with time limits, as well as the preparation of responses to grievances. However, the current responsibilities and activities of the DPW Secretary are a better measure of her likely involvement with confidential matters, including labor relations issues, in the event a bargaining unit is formed. These indicate that the DPW Secretary (unlike the department secretary in Newport) is not relied upon or involved with personnel or other confidential labor relations matters in any meaningful way.

At hearing Mr. Brown also talked about the need for the DPW Secretary to provide data and information which may be necessary in carrying out labor relations. However, the amount of data and information the DPW Secretary retains at the Public Works Department is limited and innocuous. Most, if not all, pertinent employee data, including personnel files and payroll records, are maintained at Town Hall. Further, it is not necessary for the DPW Secretary to be deemed a confidential employee and excluded from the proposed bargaining unit because the DPW Secretary may be asked to produce to Town Hall some of the limited data or information retained at the Public Works Department.

Mr. Brown did call the DPW Secretary the "personal assistant" to the Director of Public Works. However, this description, without a showing that the Director plays a role in labor-management relations and reasonably and necessarily relies upon the DPW Secretary for confidential support, as was true in Newport, is neither dispositive nor persuasive. In fact, a complete description of the duties of the current Director of Public Works was not provided at the hearing. Mr. Lacerte, the current Director, did not testify. It is unclear whether the only written job description for the Director of Public Works submitted at hearing even applies to Mr. Lacerte. (Union Exhibit D-1) This is because, as the former Director (Mr. Norris) testified, the Town changed the Director of Public Works position from a "professional" position requiring a bachelor's degree in civil engineering to a "road agent" type of public works department, with a working director. Some of the current Director's duties include employee hiring and evaluation (Union Exhibit B and G and Town Exhibit T-3). The employee evaluation form involves filling in the blanks and assigning numbers, a process the Director can complete without the DPW Secretary. Additionally, there was no evidence that historically or currently the DPW Secretary was involved in the preparation of written evaluations, or that the DPW Secretary was involved to any degree in personnel file issues.

Accordingly, the appropriate unit consists of the following positions: Truck Drivers (7), Fleet Mechanic (1), Janitor (1.5), Laborer (1), Department of Public Works Secretary (1), Sr. Foreman (1), and Foreman (1). The Director of Public Works is excluded from the unit.

So Ordered.



Douglas L. Ingersoll, Esq.
Hearing Officer

Date Issued: November 13, 2006

Distribution:

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