



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME COUNCIL 93, LOCAL 3657

PETITIONER

and

TOWN OF MERRIMACK

RESPONDENT

CASE NO. G-0002-2

DECISION NO. 2010-010

APPEARANCES

Representing: AFSCME Council 93, Local 3657
Karen E. Clemens, Esq., Associate General Counsel
Boston, Massachusetts

Representing: Town of Merrimack
Matthew H. Upton, Esq., Drummond Woodsum
Portsmouth, New Hampshire

BACKGROUND

On June 29, 2009 the AFSCME Council 93, Local 3657, Merrimack Police and Fire Officers (Union) filed a petition for modification. The Union amended its petition on June 30, 2009. In its petition, the Union sought to add the positions of Assistant Fire Chief, Deputy Police Chief, Patrol Division Captain, Police Administrative Services Captain, Police Office Manager, and Fire Office Manager to an existing bargaining unit consisting of the following positions:

Deputy Fire Chief, Fire Captain, Fire Lieutenant, Fire Inspector, Police Patrol Lieutenant, Police Detective Lieutenant, Police Prosecutor Lieutenant, Communications Supervisor and Administrative Officer. EXCLUDED: Fire Chief, Assistant Fire Chief, Police Chief & Deputy Police Chief.

The Town of Merrimack (Town) filed objections to the modification petition on June 30, 2009 and amended its objections on July 7, 2009. The Town claims that the petition should be denied because the positions of Police Office Manager, Fire Office Manager, Deputy Police Chief, and Assistant Fire Chief are assigned duties that imply a confidential relationship to the Town of Merrimack; because the positions of Patrol Division Captain, Police Administrative Services Captain, Deputy Police Chief, and Assistant Fire Chief have supervisory authority involving the significant exercise of discretion over current members of the bargaining unit; and because the positions that are proposed to be added to the existing bargaining unit do not share the community of interest with the current members of the bargaining unit.

The undersigned hearing officer conducted a hearing on October 30, 2009 at the Public Employee Labor Relations Board (PELRB) offices in Concord. At the beginning of the hearing, the parties informed the hearing officer that they have reached an agreement as to four out of six disputed positions. The parties agreed, and stipulated on the record, that the positions of Patrol Division Captain and Police Administrative Services Captain will be added to the existing bargaining unit and that the positions of Police Office Manager and Fire Office Manager will be excluded from the unit. The parties further agreed that the only positions at issue are the positions of Deputy Police Chief and Assistant Fire Chief.

The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. At the parties' request, the record was held open until November 30, 2009 to allow the parties to file post-hearing briefs. Both parties filed their briefs on November 30, 2009 and the record is closed.

FINDINGS OF FACT

1. The Town of Merrimack is a public employer as that term is defined in RSA 273-A:1, IX and is, therefore, subject to the provisions of RSA 273-A.

2. The AFSCME Council 93, Local 3657 is the certified exclusive representative for Merrimack Police and Fire Officers bargaining unit which it now seeks to modify. PELRB Case No. A-0575.

3. The most recent Amended Certification for the existing bargaining unit was issued by the PELRB on March 5, 2004 and contains the following positions:

Deputy Fire Chief, Fire Captain, Fire Lieutenant, Fire Inspector, Police Patrol Lieutenant, Police Detective Lieutenant, Police Prosecutor Lieutenant, Communications Supervisor and Administrative Officer. EXCLUDED: Fire Chief, Assistant Fire Chief, Police Chief & Deputy Police Chief.

PELRB Decision No. 2004-020.

4. The Union and the Town are parties to a Collective Bargaining Agreement (CBA) effective July 1, 2006 through June 30, 2010.

5. The Union and the Town have agreed that the positions of Patrol Division Captain and Police Administrative Services Captain shall be added to the existing bargaining unit.

6. The Union and the Town have agreed that the positions of Police Office Manager and Fire Office Manager shall be excluded from the existing bargaining unit.

7. The only positions at issue in this case are the positions of Deputy Police Chief and Assistant Fire Chief.

8. The positions of Deputy Police Chief and Assistant Fire Chief are not currently covered by any bargaining unit.

9. Mark Doyle is the Deputy Police Chief for the Town of Merrimack. He has been working for the Town of Merrimack for 24 years, the last 2.5 years as the Deputy Police Chief.

10. The position of the Deputy Police Chief is the second ranking position within the Merrimack Police Department, the first being the position of the Police Chief. On the Merrimack Police Department organizational chart, the Deputy Police Chief is one level below the Chief and one level above the Patrol Captain and the Administrative Captain. Town Exhibit 1.

11. The job description for the position of the Deputy Police Chief position provides in part:

SUPERVISION EXERCISED

Supervision is exercised directly or through subordinate supervisors over staff of uniform and /or Investigative Services employees; evaluates, and recommends selection, performance and discipline of assigned personnel.

Town Exhibit 2.

12. Merrimack Police Department Standard Operating Procedures, SOP # 95-0033, Department Organization, provides in relevant part:

In the event of the Chief's absence, the Deputy Chief will assume command. . . . Deputy Chief is second in command. He/She is responsible for matters relating to personnel, internal affairs, training and equipment. He assists in the department's budget preparation. The Investigative Services Commander, Patrol Commanders and Administrative Services Captain report to him or her.

Union Exhibit 5.

13. The Deputy Police Chief is in charge of the Department when the Police Chief is absent. In this position, he has complete control of the Department.

14. Personal Action Request (PAR) is a form used to process changes in the employment status, such as discipline, demotions, promotions, and retirement. PAR forms are often completed by the Deputy Police Chief.

15. The Deputy Police Chief is responsible for planning, budgetary proposals, recruitment, promotions, and transfers. The Deputy Police Chief handles personnel matters. The Police Chief does not get involved in day-to-day personnel matters. Most of the decisions are made on the Deputy Police Chief level, and not on the higher level. The Deputy Police Chief makes decisions on whether to discipline an employee and on the nature of discipline. The decisions are made without prior consultation with the Police Chief.

16. Per the Town's policy, every disciplinary decision affecting employees of the Merrimack Police Department must be approved and signed by the Deputy Police Chief, the Police Chief, and the Town Manager.

17. Mark Doyle made one decision to demote since he became the Deputy Police Chief. The decision was made without consultation with either the Police Chief or the Town Manager but the demotion did not take place, and the person was not informed of it, until the Police Chief and the Town Manager signed the PAR.

18. The Deputy Police Chief disciplines members of the bargaining unit and prepares evaluations for them.

19. Neither the Police Chief nor the Town Manager has ever overridden the Deputy Police Chief's disciplinary decision. The Police Chief has never asked the Deputy Police Chief to change his evaluations or recommendations.

20. The Deputy Police Chief evaluates the Captains who are the members of the bargaining unit. He knows what factors are taken into consideration during the evaluation. These evaluations can be used for promotions or demotions. The promotions carry increases in pay.

21. The Deputy Police Chief participates in many meetings with the Captains and in daily staff meetings. In addition, he participates in periodic informal meetings with the Captains regarding purchases, procedures, scheduling, and other matters. He also attends meetings with the Police Chief and the Town Manager. These meetings are not regular or planned.

22. The Captains in the Police Department do not have the same supervisory and disciplinary authority as the Deputy Police Chief; neither do they exercise the same degree of discretion.

23. The Deputy Police Chief has been involved, as a management representative, in negotiations with the bargaining unit represented by the New England Police Benevolent Association. He was also involved, as a management representative, in basic negotiation discussions with the Police and Fire Officers unit. His participation was advisory in nature and involved discussions of the pay increases and time-off issues. He also discussed negotiation proposals. He provided his opinion regarding the impact of proposals, made suggestions on revisions and changes to the CBA. When he found out that the present petition had been filed, he stopped participating in discussions.

24. David Parenti is the Assistant Fire Chief for the Town of Merrimack. He has been employed by the Merrimack Fire Department for 23 years. Parenti became the Assistant Fire Chief in 2001.

25. For the last 4 years the Assistant Fire Chief has been second ranking position in the Merrimack Fire Department, after the Fire Chief.

26. The job description for the position of the Assistant Fire Chief provides in relevant part:

Reports directly to the Chief of department and is responsible for managing all Divisions. This is a senior management position and is second in command of the department. Position involves highly responsible administrative and management work and is a critical component of the management team of the department. . . . Reports directly to the Fire Chief. Work is performed under general guidance of the Fire Chief with minimal supervision. . . . Supervises all personnel in all divisions in coordination with the Deputy Chiefs. Coordinates activities of all members at the emergency scene during command assignments; supervises shifts and companies.

Town Exhibit 4.

27. In the Merrimack Fire Department, the employees' evaluations are prepared by the Lieutenants and Captains, after which they must be sent to the Deputy Chief, then to the Assistant Deputy Chief for his comments and signature, then to the Fire Chief, and lastly, to the Town Manager. All of the hiring, termination, disciplinary, and promotional decisions must be approved by the Fire Chief and the Town Manager.

28. The Assistant Fire Chief is involved in PAR process when it concerns discipline. He helps draft PARs. The Captains often come to the Assistant Fire Chief to ask him to create a PAR. All PARs must be signed by the Fire Chief and the Town Manager.

29. The Assistant Fire Chief can issue informal discipline, such as counseling, without consulting the Fire Chief. In all other cases, the Assistant Fire Chief consults with the Fire Chief before issuing discipline although the Fire Chief has never ordered the Assistant Fire Chief to consult with him before issuing discipline. The Assistant Chief has authority to follow through on the discipline. The Assistant Fire Chief, not the Deputy Fire Chief, can initiate the disciplinary process.

30. The Deputy Fire Chief does not have the same supervisory and disciplinary authority as the Assistant Fire Chief; neither does he exercise the same degree of discretion.

31. After a PAR is signed, the Assistant Fire Chief, not the Fire Chief, conducts a disciplinary hearing.

32. The Assistant Fire Chief handles hiring. He reviews the eligibility list provided by the State and selects the candidates for hiring.

33. The Assistant Fire Chief conducts daily staff meetings with the Deputy Chief and the Captains, after which the Assistant Fire Chief and the Deputy Chief go to the Fire Chief's office to discuss the daily matters with the Chief.

34. The Assistant Fire Chief supervises all personnel, including members of the Police and Fire Officers bargaining unit.

35. When a problem arises, the members of the Police and Fire Officers bargaining unit come to the Assistant Fire Chief in an attempt to resolve it.

36. Most grievances come to the Assistant Fire Chief.

37. The Assistant Fire Chief has been involved in collective bargaining for the Town of Merrimack for longer than one year. He attended the negotiations meetings as a member of the management team and gave his opinion. The Town consulted him on negotiations proposals.

38. Mr. Parenti was a member of the Police and Fire Officers bargaining unit when he served in a rank of Lieutenant. The Assistant Fire Chief is familiar with the past practices and actions of the Union.

39. The Assistant Fire Chief prepares evaluations for the Deputy Chief and the Administrative Officer.

40. The Assistant Chief conducts all internal investigations, as a result of which discipline can be imposed, including investigations of such incidents as using improper procedures and not following orders. Internal investigations are conducted only by the Assistant Fire Chief. The Fire Chief is

not involved in investigations. The Deputy Fire Chief does not conduct investigations. Following an internal investigation, the Assistant Fire Chief makes recommendations.

41. In the absence of Fire Chief, the Assistant Fire Chief is in charge of the Fire Department. The Assistant Fire Chief signs PARs in the absence of the Fire Chief.

42. Neither the Fire Chief nor the Town Manager has ever overridden the Assistant Fire Chief's disciplinary decision. The Fire Chief has never asked the Assistant Fire Chief to change his evaluations or recommendations.

DECISION

DECISION SUMMARY

The Union's petition for modification is granted as to the positions of Patrol Division Captain and Police Administrative Services Captain. The position of Police Office Manager and Fire Office Manager are excluded per the parties' agreement. The Union's request to add the positions of Deputy Police Chief and Assistant Fire Chief is denied because these positions are supervisory positions within the meaning of RSA 273-A:8, II.

JURISDICTION

The PELRB has jurisdiction of all petitions to determine and modify bargaining units pursuant to RSA 273-A:8 and Pub 302.05.

DISCUSSION

RSA 273-A:8, II provides that the "[p]ersons exercising supervisory authority involving the significant exercise of discretion may not belong to the same bargaining unit as the employees they supervise." Important factors to consider include "the employee's authority to evaluate other employees, the employee's supervisory role, and the employee's disciplinary authority." *Appeal of Town of Stratham*, 144 N.H. 429, 432 (1999) (citing *Appeal of East Derry Fire Precinct*, 137 N.H. 607, 610 (1993)). "Supervisory employees are separated from the employees they supervise 'to avoid conflicts between the

two groups because of the differing duties and relationships which characterize each group.” *Appeal of Town of Stratham*, 144 N.H. at 432 (citing *Appeal of University System of N.H.*, 131 N.H. 368, 375 (1988)). “[S]ome employees performing supervisory functions in accordance with professional norms will not be vested with the ‘supervisory authority involving the significant exercise of discretion’ described by RSA 273-A:8, II.” *Appeal of East Derry Fire Precinct*, 137 N.H. at 611. It is therefore proper to examine the degree of significance of the exercise of discretion as well as the propensity to create conflict within the bargaining unit because of the differing duties and relationships. See *Londonderry Executive Employee Association v. Town of Londonderry*, PELRB Decision No. 2001-118. See also *Tilton Police Union, NEPBA Local 29 v. Town of Tilton*, PELRB Decision No. 2007-100.

In the present case, not only are the Deputy Police Chief and the Assistant Fire Chief vested with the supervisory authority involving the significant exercise of discretion but they routinely exercise this authority. Both the Deputy Police Chief and the Assistant Fire Chief have authority to evaluate other employees of their departments, including the members of the Police and Fire Officers bargaining unit, to conduct investigations, and to recommend disciplinary actions. Both are involved in personnel matters, such as hiring, promotion, and demotion, and in collective bargaining negotiations. Both are second in command and are in charge of their respective departments in the absence of the Chiefs. Furthermore, none of the disciplinary decisions or recommendations made by either the Deputy Police Chief or the Assistant Fire Chief has ever been overridden by their respective Chiefs or by the Town Manager. Therefore, both the Deputy Police Chief and the Assistant Fire Chief are persons exercising supervisory authority involving significant exercise of discretion and therefore, they may not belong to the same bargaining unit as the employees they supervise.

Accordingly, the Union’s request to add the positions of the Deputy Police Chief and the Assistant Fire Chief is denied. Since the Union’s request is denied pursuant to RSA 273-A:8, II, it is unnecessary for the hearings officer to address the other objections raised by the Town. The positions of the Police Office Manager and the Fire Office Manager are excluded from the unit pursuant to the parties’ agreement. The positions of the Patrol Division Captain and the Police Administrative Services Captain

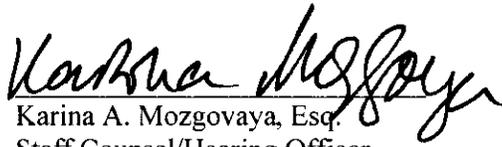
are added to the existing bargaining unit. Therefore, the modified bargaining unit shall contain the following positions:

Deputy Fire Chief, Fire Captain, Fire Lieutenant, Fire Inspector, Police Patrol Lieutenant, Police Detective Lieutenant, Police Prosecutor Lieutenant, Communications Supervisor, Administrative Officer, Patrol Division Captain, and Police Administrative Services Captain.

EXCLUDED: Fire Chief, Assistant Fire Chief, Police Chief, Deputy Police Chief, Fire Officer Manager, and Police Officer Manager.

So ordered.

January 8, 2010


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

Distribution:

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