



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

New England Police Benevolent Association

and

Town of Henniker

Case No. G-0156-1
Decision No. 2011-113

Appearances:

Kevin E. Buck, Esq., Nolan Perroni Harrington, LLP, Lowell, Massachusetts for the New England Police Benevolent Association

Barton L. Mayer, Esq., Upton & Hatfield, LLP, Concord, New Hampshire for the Town of Henniker

Background:

The New England Police Benevolent Association (NEPBA) filed a written majority authorization (WMA) petition on December 15, 2010 seeking certification as an exclusive representative of the proposed bargaining unit consisting of the following positions within the Henniker Police Department: full-time Patrol Officer, part-time Patrol Officer, Receptionist, Administrative Assistant, and Parking Officer.¹ The Town objects to the petition claiming, among other things, that the proposed bargaining unit does not contain a minimum of ten employees as required under RSA 273-A:8, I; that the part-time Patrol Officers are irregular or on call employees and, therefore, should be excluded from the unit under RSA 273-A:1, IX (d);

¹ The original petition contained the position of Animal Control Officer instead of Parking Officer. The NEPBA amended its petition to remove the position of Animal Control Officer and include the position of Parking Officer in the proposed bargaining unit. See PELRB Decision No. 2011-016.

and that the Administrative Assistant and Secretary/Receptionist are confidential employees, and, therefore, should be excluded from the proposed unit under RSA 273-A:1, IX (c) and (d).

The undersigned hearing officer conducted a hearing on March 4, 2011 at the Public Employee Labor Relations Board (PELRB) offices in Concord. The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. The parties filed post-hearing briefs and the decision is as follows.

Findings of Fact

1. The Town is a public employer within the meaning of RSA 273-A:1, IX.
2. The NEPBA is an employee organization seeking to be certified as the exclusive representative of a bargaining unit consisting of certain employees of the Henniker Police Department through written majority authorization pursuant to RSA 273-A:10, IX.
3. At the time the petition was filed, the proposed bargaining unit contained 13 employees in the following positions: full-time Patrol Officers (6), part-time Patrol Officers (4), Administrative Assistant (1), Receptionist/Secretary (1), and Parking Officer (1).
4. Part-time Patrol Officer Ben Tokarz's employment with the Henniker Police Department ended prior to the filing of this petition.
5. The Town has no objections to the inclusion of full-time Patrol Officers and the Parking Officer in the proposed bargaining unit.
6. Ryan Murdough has been the Chief of Police in the Town of Henniker for almost two years. Prior to being promoted to the position of Chief, he served as a patrol officer, detective, and detective sergeant. He has worked for the Town of Henniker Police Department for 16 years.
7. Full-time Patrol Officers work 40 hours a week but are paid for 43 hours. They are expected to work the whole year and have a set schedule. Each full-time Patrol Officer, except for the Patrol Officer/Detective, who is on a Monday through Friday fixed schedule, is

assigned to one of the following 5 Shifts:

Shift 1 – Tuesday to Friday, 6:00 AM to 4:00 PM

Shift 2 – Saturday, Sunday, Monday 6:00 AM to 4:00 PM; Tuesday 4:00 PM to 2:00 AM

Shift 3 – Sunday to Thursday, 10:00 PM to 6:00 AM

Shift 4 – Wednesday, Thursday, 4:00 PM to 2:00 AM; Friday, Saturday, 8:00 PM to 6:00 AM

Shift 5 – Sunday, Monday, 2:00 PM to 12:00 AM; Friday, Saturday, 5:00 PM to 3:00 AM

Each full-time Patrol Officer goes through the following work schedule rotation: 12 weeks on Shift 1, then 12 weeks on Shift 2, and so forth. A full-time Patrol Officer goes back to Shift 1 after completing 12 weeks on Shift 5. Each such Shift consists of several 10-hour or 8-hour time blocks or shifts. There are 21 time blocks/shifts per week for a total of approximately 1,092 per year.

8. A full-time Patrol Officer cannot decline to work his scheduled shift.

9. Full-time Patrol Officers are hourly employees. The Town utilizes the State Police pay scale to pay full-time Patrol Officers. They receive longevity pay increases and other benefits, including medical insurance. Each full-time Patrol Officer has an assigned desk in the Patrol Officers' room.

10. Full-time Patrol Officers cannot have a second job without the Chief's approval.

11. The Town allows the Police Department to hire a maximum of 5 part-time Patrol Officers. The maximum number of hours per year part-time Patrol Officers are allowed to work is 1300.

12. Part-time Patrol Officers are hourly employees. They are paid an hourly rate of \$16.25 or \$16.75 and do not receive longevity pay increases. The Police Department does not provide medical insurance benefits to part-time Patrol Officers.

13. Part-time Patrol Officers are hired to fill in for full-time Patrol Officers during holidays, annual leaves, and sick/disability leaves. They are not guaranteed a certain number of

hours and are hired to work on as needed basis only. Part-time Patrol Officers do not have set work schedules or regular shifts. They are not required to work particular hours or to work a set number of hours.

14. Part-time Patrol Officers share one desk in the Patrol Officers' room. Patrol Sergeant Matthew French, after receiving notice of a full-time Patrol Officer's absence, prepares and posts on the part-time Patrol Officers' desk a list of time periods/shifts² for which the coverage is needed. There is no set deadline to post the list and the part-time Patrol Officers are not required to sign up for one of the shifts available. Part-time Patrol Officers periodically stop by the Patrol Officer's room to check the shift availability on the list. A part-time Patrol Officer then chooses the time period he can cover and marks it on the list. The assignments are made on "first-come, first-served" basis. If a full-time Patrol Officer, whose absence a part-time Patrol Officer signed up to cover, becomes, for some reason, available to work (cancelled vacation, etc.), the shift in question is taken away from the part-time Patrol Officer and assigned to the full-time Patrol Officer.

15. If a particular time period needs coverage and no part-time Patrol Officer indicates his or her availability for that time period, the Sergeant calls one part-time Patrol Officer after another to determine whether he or she is available to cover the vacant time period. If no part-time Patrol Officer is available, then, depending on the importance of the situation, one of the full-time Patrol Officers might be required to come in to cover the open shift and the schedule of that full-time Patrol Officer is changed to provide the necessary coverage.

16. In 2008-2010, the number of time blocks/shifts each part-time Patrol Officer worked per month varied from 0 to 17 depending on the Department's needs and the part-time Patrol Officers' availability. For example, in 2010, part-time Patrol Officers Tokarz, Lindsey and Iadonisi worked the following number of time blocks/shifts per month:

² Per parties' stipulations, in the context of part-time Patrol Officers, a "shift" represents a single period or block of time, and not a full week.

Shifts worked by month	Part-time PO Tokarz	Part-time PO Lindsey	Part-time PO Iadonisi
January	4	3	5
February	4	3	8
March	6	0	4
April	10	7	9
May	8	6	9
June	7	2	3
July	10	3	16
August	9	1	14
September	14	5	9
October	11	3	3
November	10	4	0
December	7	3	1
Total	100	40	81

The three part-time Patrol Officers listed above worked a total of 121 time blocks/shifts in 2010. In 2009, five part-time Patrol Officers worked a total of 385 time blocks/shifts and in 2008, five part-time Patrol Officers worked a total of 282 time blocks/shifts. Joint Exhibits 8, 9, and 10.

17. Part-time Patrol Officers are not restricted from obtaining concurrent full-time or part-time employment outside the Police Department. Most part-time Patrol Officers have a second job. At present, one of the part-time Patrol Officers is a student, and the other works for a public works department in another Town.

Decision and Order

Decision Summary

The position of part-time Patrol Officer is excluded from the proposed bargaining unit as it is an irregular position within the meaning of RSA 273-A:1, IX (d). Because after the exclusion of the part-time Patrol Officers the proposed bargaining unit does not contain a

minimum of ten employees required under RSA 273-A:8, I, the petition for certification is denied.

Jurisdiction

The PELRB has jurisdiction of all petitions to determine bargaining units and certify the exclusive representative of an approved bargaining unit through the process of written majority authorization pursuant to RSA 273-A:8, 273-A:10, IX, and Pub 301.05.

Discussion

The Town seeks to exclude part-time Patrol Officers from the bargaining unit on the ground that they are irregular or on call employees. RSA 273-A:1, IX (d) excludes persons who are employed seasonally, irregularly or on call from the definition of a “public employee.” The New Hampshire Supreme Court has applied dictionary definitions for the terms “irregular” and “on call,” stating that “[i]rregular’ is defined as ‘lacking continuity or regularity of occurrence, activity, or function’ [and] ‘[o]n call’ means ‘ready to respond to a summons or command.’” *In re Town of Stratham*, 144 N.H. 429, 431 (1999) (citation omitted). See also *Teamsters Local 633/Plaistow Town Employees and Town of Plaistow*, PELRB Decision No. 2010-062; *Brentwood Police Union, NEPBA v. Town of Brentwood*, PELRB Decision No. 2008-247. In *Stratham*, the part-time officers worked “substantial hours” but had no set work schedule and only worked when a shift opened because a full-time officer was unavailable. *Supra*, 144 N.H. at 431. The Court found that these part-time officers were “on-call employees who work on an irregular basis” and should, therefore, be excluded from the bargaining unit. *Id.* See also *International Brotherhood of Teamsters, Local 633 of NH v. State of New Hampshire, Administrative Office of the Courts*, PELRB Decision No. 2009-048.

In this case, the Town’s evidence, including Chief Murdough’s uncontroverted testimony, proves that the part-time Patrol Officers in Henniker Police Department are irregular employees. As was true with the disputed positions in the *Stratham* case, there are no shifts


specifically assigned to the part-time Patrol Officers in Henniker. The part-time Officers may decline to work when requested and do decline to work. The part-time Patrol Officers are not the primary officers for any regular shift and their schedule is sporadic and unpredictable since whether they work depends upon whether shifts are open and upon their availability to fill those shifts. They have alternative employment/occupations and attend to their patrol duties only when they are both needed and available. Under these facts, the part-time Patrol Officers employed by the Henniker Police Department qualify as irregular employees within the meaning of RSA 273-A:1, IX (d) and are excluded from the proposed bargaining unit on that basis.

After the exclusion of the part-time Patrol Officer position, the proposed bargaining unit contains fewer than 10 employees. RSA 273-A:8, I provides that “[a] public employer may recognize a bargaining unit with 3-10 members, but in no case shall the board certify a bargaining unit of fewer than 10 employees with the same community of interest without the prior approval of the governing body of the public employer.”

In the present case, there is no evidence of the prior approval of the bargaining unit with fewer than 10 employees by the governing body of the public employer. Accordingly, the NEPBA’s petition is denied. Since the NEPBA’s petition is denied pursuant to RSA 273-A:1, IX (d) and RSA 273-A:8, I, it is unnecessary to address the other objections raised by the Town.

So ordered.

April 15, 2011


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