



**State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD**

Merrimack County Department of Corrections

and

National Correctional Employees Union, Inc.

**Case No. G-0192-4
Decision No. 2014-262**

Order

Background:

On July 30, 2014 the Merrimack County Department of Corrections (MCDOC) filed an agreed upon petition to remove the Secretary and Charge Nurse positions from, and add the Group II Case Manager position to, the following bargaining unit:

Unit: Shift Supervisor, Corrections Officer, Medical Services Coordinator, Corrections Nurse, Secretary, Maintenance Engineer, Maintenance Worker II, and Training Officer.

Excluded: Administrator, Director of Operations, Director of Safety and Security, Director of Inmate Work Program, Director of Rehabilitation, and Administrative Secretary.

The unit includes Corrections Officers with the rank of Corporal and Sergeant.

The National Correctional Employees Union, Inc. (NCEU), the duly certified exclusive representative of the bargaining unit, has agreed to the modification petition. Charge Nurse Carol Young opposes the modification request, and filed a petition to intervene. She claims that the justification for removal of the Charge Nurse position (statutory supervisor pursuant to RSA

273-A:8, II) is equally applicable to Corporals and Sergeants but they are being allowed to remain in the unit, so Charge Nurse should remain in the unit as well. The County maintains that the County and the National Correctional Employees Union, Inc. (NCEU) have properly agreed to exclude the Charge Nurse position because it is supervisory within the meaning of RSA 273-A:8, II and requests that the PELRB deny the petition to intervene and approve the requested modification of the bargaining unit.

On August 21, 2014 the modification petition was granted in part, and the PELRB approved removal of the Secretary position from the bargaining unit and the addition to the unit of the Group II Case Manager position. See PELRB Decision No. 2014-200. A ruling on the bargaining unit status of the Charge Nurse position was deferred.

A hearing was held on October 29, 2014, at which time all the parties appeared and were provided with the opportunity to present evidence and argument in support of their respective positions. The decision in this case is as follows.

Findings of Fact

1. The MCDOC is a public employer within the meaning of the Public Employee Labor Relations Act.
2. The PELRB certified the NCEU as the exclusive represented of the bargaining unit on June 25, 2012 per PELRB Decision No. 2012-144.
3. Carol Young is a Charge Nurse at the MCDOC and has supervisory responsibilities over the other nursing staff in the bargaining unit.
4. The MCDOC and the NCEU have agreed to the removal of the Charge Nurse position from the bargaining unit on the grounds that it is a supervisory position within the meaning of RSA 273-A:8, II.

5. The evidence submitted at hearing, including the Charge Nurse job description, indicates that the MCDOC and NCEU agreement to exclude the Charge Nurse position from the unit has a reasonable factual basis.

6. The Charge Nurse job description (County Exhibit 1 and Young Exhibit 9) includes the following:

PRIMARY PURPOSE

Coordinate, direct and supervise nursing activities to ensure the implementation of services based on nursing process and standards of practice. Independently Conduct performance evaluations and take corrective or disciplinary action when appropriate.

DESCRIPTION OF DUTIES AND RESPONSIBILITIES

Under the general supervision of the Corrections Superintendent and the direct supervision of the Assistant Superintendent, within established County and Department policies and procedures, the Charge Nurse performs the following functions:

PRIMARY FUNCTIONS

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2. Independently plan, supervise, coordinate and evaluate the work of professional and paraprofessional nursing staff.
3. Assume responsibility to independently direct corrective action or issue appropriate discipline to address performance or behavioral deficiencies.

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6. Accountable for the work performance of staff under his/her supervision

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KNOWLEDGE, SKILLS AND ABILITIES

Requires direct supervision of programs or of employees doing work which differs from the supervisor, including independently disciplining employees, solving personnel problems, effectively recommending hiring and terminating employees, and developing work methods. The supervisor in this position manages a working unit or section with independent responsibility for employee performance appraisal.

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7. The Correctional Officers covered by the unit certification include Corporals and Sergeants.

8. The Sergeant's job description (Young Exhibit 5) provides as follows:

PRIMARY PURPOSE

To supervise correctional officers in the operation of a shift.

DESCRIPTION OF DUTIES AND RESONSIBILITIES

Under the general supervision of the Corrections Administrator and the direct supervision of the Director of Operations, within established County and Department policies and procedures, the Sergeants perform the following functions:

PRIMARY FUNCTIONS

1. Support and implement the directives of the Administration.
2. Ensure that correctional officers maintain the care, custody and control and inmates in accordance with state and federal laws and current correctional practice.
3. Ensure adequate staff coverage to maintain the safety and security of the facility and call in additional staff as needed.
4. Assign correctional officers to shift rotations, post positions, and make recommendations with respect to their use of leave time.
5. Participate in the orientation and training of correctional officers.
6. Discipline correctional officers in accordance with the provisions of the S.E.A. contract, i.e. verbal and written warnings.
7. Conduct annual performance evaluations of correctional officers and make recommendations with respect to merit step increases.
8. Maintain order in the facility, discipline inmates, and manage emergency situations.
9. Coordinate all shift activities and programs.

SECONDARY FUNCTIONS

1. Participate in the selection process for new correctional officers.
2. Perform other similar or related duties as required or directed.

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9. The Corporal's job description (Young Exhibit 6) provides as follows:

PRIMARY PURPOSE

To provide care, custody and control of inmates, and assistance to the sergeant.

DESCRIPTION OF DUTIES AND RESONSIBILITIES

Under the general supervision of the Director of Operations and the direct supervision of the Sergeant, within established County and Department policies and procedures, the Corporal performs the following functions:

PRIMARY FUNCTIONS

1. Supervises all inmate activities to ensure a safe and secure environment both inside and outside the Department facilities.
2. Processes incoming inmates, completes intake paperwork, issues clothing and toilet articles, takes fingerprints and identification photos, and advises inmates on correctional facility rules and regulations.
3. Maintains Control Room logs.
4. Answers the phone and receives visitors.
5. Inspects cells, dayrooms, kitchen, dining room, visiting room, and other areas for security breaches.
6. Transports inmates inside and outside the facilities.
7. Conducts inmate counts.
8. Maintains inmate order, discipline, safety and security.
9. Participates in the orientation and training of correctional officers.
10. Assumes supervisory responsibilities in the absence of a sergeant.

SECONDARY FUNCTIONS

1. Performs other similar or related duties as required and directed.

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10. There was no evidence that the County or the NCEU acted in bad faith or otherwise with any improper purpose when they reached an agreement to address several bargaining unit issues and filed the agreed upon modification petition.

Decision and Order

Decision Summary:

The petition to intervene and the agreed upon petition to remove the Charge Nurse position from the bargaining unit are both granted.

Jurisdiction:

The PELRB has jurisdiction over all petitions to determine bargaining units and modify bargaining units pursuant to RSA 273-A:8 of the Public Employee Labor Relations Act (PELRA) and N.H. Admin. Rules, Pub 301-303.

Discussion:

I. Relevant statutory provisions and administrative rules:

Pub 201.10 Petitions to Intervene.

(a) The presiding officer shall grant a petition to intervene and/or to participate as amicus curiae if the presiding officer determines that the petitioner has demonstrated that its rights, duties, privileges or other substantial interests might be affected by the proceeding or if such intervention would be in the interests of justice and would not impair the orderly and prompt conduct of the proceedings.

(b) In the event a petition to intervene is granted, the presiding officer shall limit the intervener's participation to minimize duplication of the case presented by the complainant, petitioner or respondent, provided that such limitation shall not be so extensive as to prevent the intervener from protecting the interest which was the basis for the intervention.

RSA 273-A:8 Determining Bargaining Unit.

I. The board or its designee shall determine the appropriate bargaining unit and shall certify the exclusive representative thereof when petitioned to do so under RSA 273-A:10. In making its determination the board should take into consideration the principle of community of interest. The community of interest may be exhibited by one or more of the following criteria, although it is not limited to such:

- (a) Employees with the same conditions of employment;
- (b) Employees with a history of workable and acceptable collective negotiations;
- (c) Employees in the same historic craft or profession;
- (d) Employees functioning within the same organizational unit.

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II. The board may certify a bargaining unit composed of professional and non-professional employees only if both the professional and non-professional employees, voting separately, vote to join the proposed bargaining unit. Persons exercising supervisory authority involving the significant exercise of discretion may not belong to the same bargaining unit as the employees they supervise.¹

Pub 302.01 Mutually Agreed Bargaining Units.

(a) An employee organization seeking to become the exclusive representative of a bargaining unit shall, in petitioning the board for an election under Pub 301.01, identify how employees shall be grouped together for the purpose of collective bargaining. Before a hearing is ordered on their petition, that employee organization shall contact the public employer with the intent to reach agreement with the public employer whose employees it seeks to represent. If the employee organization succeeds in reaching agreement with the public employer on this question, the petition required by Pub 301.01 shall contain a statement to that effect signed by both parties.

(b) Discussions between a public employer and an employee organization pursuant to (a) above shall not be construed as evidence of recognition by the public employer of any bargaining rights in the employee organization. Agreement between a public employer and an employee organization shall not prejudice the rights of any intervenor not participating in such discussions and shall not be binding on the board.

Pub 302.05 Modification of Bargaining Unit:

(a) 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, or other employee organization if the provisions of section (d) are met, may file a petition for modification of bargaining unit.

(b) A petition shall be denied if:

(1) The question is a matter amenable to settlement through the election process; or

¹ Factors used to assess whether a particular person has the requisite supervisory authority involving the significant exercise of discretion include the nature and extent of their general supervisory responsibilities, their disciplinary authority, and their authority to evaluate other employees. See, e.g., *Appeal of Moultonborough*, 164 N.H. 257 (2012); *Appeal of Town of Stratham*, 144 N.H. 429 (1999).

(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.

(c) The petition shall set out the same categories of information, including the present bargaining unit positions; which is required of a petition filed under Pub 301.01 except no showing of interest shall be required to accompany a petition filed under this section. The petition shall set out a clear and concise statement of the circumstances prompting the filing of the petition. This information may be provided on a modification petition form, copies of which may be obtained from the board pursuant to Pub 103.01.

(d) An employee organization, other than the exclusive representative, may file a petition for modification only during time periods or under conditions when it would be entitled by statute or these rules to petition for an election to be certified as the exclusive representative. At other times, only the employer or exclusive representative may file a petition for modification of a bargaining unit.

II. Petition to Intervene and Motion to Dismiss:

The County's argument that the petition to intervene should be summarily dismissed based upon the decision in another Merrimack County Case, PELRB Decision No. 2009-201 (September 29, 2009) is not persuasive. In that case the PELRB dismissed a modification petition filed by individual employees because there was no evidence that they were seeking, via a modification petition and a certification petition, to remove positions from an existing unit, form a new bargaining unit, and become certified as the exclusive representative of the proposed new unit. Whether a petition to intervene should be allowed is a matter within the PELRB's discretion based upon the criteria set forth in Pub 201.10. I find that in this particular case intervention is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings and that it is important to hear and consider Ms. Young's argument. Accordingly, the petition to intervene is granted.

III. Agreed Upon Request to Remove Charge Nurse Position from the Bargaining Unit:

Based upon the record for decision and the applicable law and rules, I accept the MCDOC and NCEU agreement that the Charge Nurse position should be excluded from the unit. I am not persuaded by Ms. Young's argument that the modification petition should not be

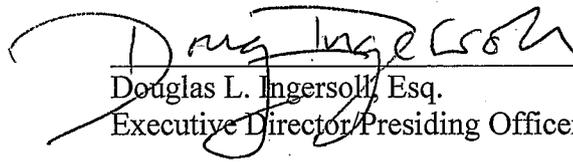
granted because the Corporal and Sergeant positions will remain in the unit. There is nothing in the relevant administrative rule (Pub 302.05) directing that a modification petition should be denied if other unit positions, like the Corporal and Sergeant positions in this case, are, at least according to the intervenor, susceptible to exclusion from the unit for the same reasons. I have included information from the Corporal and Sergeant job descriptions in the findings of fact as background but I make no finding as to the RSA 273-A:8, II status of these positions because such a determination is not relevant and because the record is otherwise insufficient to allow a properly informed determination.

I accept the MCDOC and NCEU agreement on the following basis. While the PELRB is not bound by public employer and exclusive representative unit composition agreements per Pub 302.01 (b), as a practical matter such agreements made by the parties most familiar with working conditions, job responsibilities and duties are highly valued and regularly relied upon by the PELRB. The record in this case reflects that the agreement to exclude the Charge Nurse position is not arbitrary but was based upon the duties and responsibilities of the position. Had evidence been submitted to show that agreed upon modification petition was filed in bad faith or was based upon some improper motive I would scrutinize the stated grounds for exclusion more closely. However, there was insufficient evidence that the MCDOC or the NCEU acted improperly in reaching agreement on the modification petition. To the contrary, the record indicates that the MCDOC and the NCEU acted consistent with PELRB expectations that public employers and exclusive representatives will work cooperatively to the extent possible to address and resolve unit composition issues.

In accordance with the foregoing I accept the MCDOC and the NCEU judgment and agreement that the Charge Nurse position should be excluded from the unit. The modification

petition is granted, and the position of Charge Nurse is excluded from the bargaining unit. An updated description of the bargaining unit will issue consistent with this decision.

Date: 11/26/2014



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