



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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New Hampshire State Police Command Staff/New Hampshire Troopers Association

and

**State of New Hampshire, Department of Safety,
Division of State Police**

**Case No. G-0222-1
Decision No. 2015-028**

Appearances:

John S. Krupski, Esq., Milner & Krupski, PLLC, Concord, New Hampshire, for the New Hampshire State Police Command Staff/New Hampshire Troopers Association

Marta A. Modigliani, Esq., New Hampshire Department of Safety, Concord, New Hampshire, for the State of New Hampshire, Department of Safety, Division of State Police

Background:

On August 15, 2014, the New Hampshire State Police Command Staff/New Hampshire Troopers Association (Union) filed a petition for certification seeking to represent State Police command staff employees whom they also sought to remove from the existing bargaining unit represented by the State Employees' Association of New Hampshire, SEIU Local 1984 (SEA). See PELRB Decision No. 2014-215 (Modification Petition). The Union proposed the following State Police command staff bargaining unit: "Executive Major, Major, Captain, and Lieutenant. Excluded: Sergeants, Troopers, Colonel, and all other Department of Safety employees." The petition for certification was supported by the requisite number of confidential authorization cards as reflected in the September 12, 2014 PELRB Report re: Inspection of Confidential Authorization Cards.

The State of New Hampshire, Department of Safety, Division of State Police (State or Division) objected to the petition for certification on the ground that the Executive Major position included in the proposed unit was a supervisory and confidential position within the meaning of RSA 273-A:8, II and RSA 273-A:1, IX (c), respectively. The hearing on the State's objection was scheduled for September 22, 2014.

On September 11, 2014, the parties jointly requested that the hearing on objection be postponed until after the election process was completed. The parties' request was granted. See PELRB Decision No. 2014-217. The proposed bargaining unit described above was approved without prejudice to the State's right to a hearing on its objection to the inclusion of the Executive Major position in the unit. The representation election was conducted on September 29, 2014. Pursuant to the results of election, the Union has been selected by a majority of the eligible voters as their representative. See Report of Election and Tally of Ballots (September 29, 2014). The Executive Major was included on the list of eligible voters and was allowed to vote subject to the "Challenges" procedure under Pub 303.08.

An adjudicatory hearing on the State's objection to the inclusion of the Executive Major position in the bargaining unit was conducted on November 4, 2014 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; and the decision is as follows.

Findings of Fact

1. The Division of State Police is a division within the State of New Hampshire Department of Safety (DOS) and a public employer within the meaning of RSA 273-A:1, IX.
2. John Barthelmes is the Commissioner of Safety and the head of the Department of Safety. Colonel Robert Quinn is the Director of the Division of State Police.

3. The Union is an employee organization seeking to represent the proposed State Police command staff bargaining unit containing the following positions: Executive Major, Major, Captain, and Lieutenant.

4. The Division of State Police has a bargaining unit containing "all sworn personnel up to and including the rank of sergeant." This unit has been represented by the New Hampshire Troopers Association since 1990. See PELRB Certification of Representative and Order to Negotiate, Case No. P-0754 (October 18, 1990).

5. The State does not object to the inclusion of positions of Major, Captain and Lieutenant in the command staff bargaining unit. The State objects to the inclusion of the Executive Major position in the bargaining unit. The proposed bargaining unit was approved without prejudice to the State's right to a hearing on its objection to the inclusion of the Executive Major position. With the parties' agreement, the hearing on the State's objection was postponed until after the election process was completed. See PELRB Decision No. 2014-217.

6. A secret ballot election to determine a representative of the command staff bargaining unit was conducted on September 29, 2014. Pursuant to the results of election, the Union has been selected by a majority of the eligible voters as their representative. See Report of Election and Tally of Ballots (September 29, 2014).

7. Prior to the issuance of PELRB Decision No. 2014-215 (September 12, 2014) granting the modification petition in which the Union sought to remove the positions of Executive Major, Major, Captain, and Lieutenant from the existing bargaining unit, all these positions were in the same bargaining unit represented by the SEA. PELRB Case No. G-0097-12. They were in the same unit for over 20 years and were covered by successive collective bargaining agreements (CBAs) between the SEA and the State, including the 2013-15 CBA.

8. The 2013-15 CBA between the State and the SEA contains the following language in Article 43.13:

A unit employee who is a member of the Division of State Police and who holds the rank of *Lieutenant, Captain, Major or Executive Major* shall be placed in that step in his/her labor grade that provides a base annual salary that is higher than the base annual salary of the highest paid subordinate, to include temporary promotions, in the Division. This provision shall expire, only with the adoption of a new salary or salary plan.

See Union Exhibit 1 (emphasis added).

9. The Executive Major and other command staff bargaining unit employees function within the same organizational unit (the Division); are in the same profession of law enforcement; have the same conditions of employment based on personnel rules, SOPs and the CBA; and share a history of workable and acceptable collective negotiations as they were in the same SEA-represented bargaining unit for over 20 years. In addition, they share common work rules and personnel practices that are established by rules and SOPs; and common salary and fringe benefit structures that, until very recently, have been established through the collective bargaining between the State and the SEA and set forth in the SEA CBA.

10. The State Police Executive Major position has existed since at least 1988. It was defunded around 2010 and remained vacant until spring of 2014. Suzanne Forey was the Executive Major immediately prior to the time the position was defunded in 2010. The position was not eliminated.

11. On February 25, 2014 DOS Human Resources (HR) Administrator Patricia Gagne sent the following communication to Acting Director of State Division of Personnel Sarah Willingham:

Chief of Policy and Planning, Kevin O'Brien is requesting to reclassify vacant position 10862 State Police Trooper I, LG 19 to State Police Executive Major, LG 33.

The State Police is currently configured with two Bureaus, Field Operations Bureau and Administration Bureau. The Commanders, both holding the rank of State Police Major, both report directly to the Director of State Police.

For many years the Division of State Police had the position of Executive Major which served as a chief deputy or chief of staff to the Director. This position allowed greater flexibility to the Director by handling much of the routine administration of the Division. The position was defunded in previous budget cycles in an effort to be more efficient.

Not having the position of Executive Major has placed heavier burdens on the Director as well as the 2 Bureau Commanders resulting in less time to provide proactive leadership. The role is one that would be comparable to a Deputy Chief, responsible for broad, comprehensive supervisory managerial functions, implementing policies and exercising sound judgment in interpretation, application and enforcement.

Adding the rank of Executive Major would allow the Division of State Police to create unity of purpose forth mission of public safety [sic]. Additionally, it would provide a key advisor to the Director of State Police who could identify potential problems along with possible solutions, carry forward the Director's vision of consistent leadership, assist in making budgetary decisions that impact the operational effectiveness of the Division, provide counsel through the Division and be decisive in dispensing remedial actions where needed and finally be able to stand for the Director when appropriate.

See State Exhibit 1, page 1 (emphasis added). A proposed supplemental job description for the position was included with the request. Chief of Policy and Planning Kevin O'Brian's request to reinstate the rank of Executive Major was approved.

12. David Parenteau was promoted to the rank of Executive Major effective April 4, 2014. See State Exhibit 6.

13. The State HR Class Specification for the position of State Police Executive Major was established on January 6, 1993 and last revised on April 7, 2008. See State Exhibit 4. It provides in part as follows:

BASIC PURPOSE: To oversee Division of State Police operations, including the administration of all law enforcement field operations and investigations as directed by the Director of State Police.

CHARACTERISTIC DUTIES AND RESPONSIBILITIES:

- Oversees Division of State Police operations on behalf of the Director to accomplish goals and unity of purpose.
- Advises departmental administration on existing or potential problems and implements self-generated solutions.

- Coordinates the delegation of supervising authority through the ranks to facilitate efficient management.
- Counsels all levels of law enforcement personnel to resolve personnel problems and dispense remedial action.
- Testifies on behalf of the Division before legislative groups on matters pertaining to public safety.
- Manages the introduction and review of the rules, regulations and procedures in order to correctly administer policy and provide consistent leadership.
- Reviews and recommends promotional candidates to ensure increased managerial quality.
- Prepares and administers the budgetary funds in order to efficiently manage the operational costs and growth of the division.
- Performs all characteristic duties and responsibilities outlined by the class specification for State Police Trooper as mandated by necessity or as assigned.

DISTINGUISHING FACTORS:

Skill: Requires skill in evaluating, planning, or integrating analysis of data to formulate current and long-range solutions, strategies, or policies of a specialized or technical nature.

Knowledge: Requires logical or scientific understanding to analyze problems of a specialized or professional nature in a particular field.

Impact: Requires overall administrative responsibility for achieving agency objectives by directing all aspects of operations management. Errors at this level result in disruption of statewide programs and services as well as long-term adverse impact on agency image and the future success of organizational operations.

Supervision: Requires agency-wide administrative supervision, including the responsibility for developing and evaluating internal personnel policies. This level also involves the administrative management of a program which affects more than one agency, including overseeing the interaction of agency employees or policies to accomplish organizational objectives and goals.

See State Exhibit 4, page 1.

14. Supplemental Job Description for the position of State Police Executive Major indicates that the position was established on August 15, 1988 and was last amended on March 6, 2014. It provides in part as follows:

SCOPE OF WORK: Oversees all Division Operations with a general or specific law enforcement function in accordance with RSA: 106-B governing the Division of State Police.

ACCOUNTABILITIES:

• Oversees the performance of the Division of State Police Administration and State Police Operations to ensure compliance with Division policies and procedures and exercises general field supervisory duties to ensure compliance with Division Rules and Regulations.

• Provides counsel to the Director of State Police regarding agency operations. Acts as the director in his/her absence with full administrative authority.

• Implements supervisory and evaluation standards including planning, assigning, supervising, and counsel to other staff.

• Liaison to legal staff or the preparation and presentation of disciplinary appeals before the Personnel Appeals Board and grievances before the Public Employees Labor Relations Board, the Division of Personnel and Department of Safety Human Resource staff on human resource related matters.

• Manages the development and implementation of Division of State Police rules, regulations, procedures, and policies in order to administer policies and provide consistent leadership.

• Identify and manage strategic risk assessment for the Division of State Police including Operations and Administration.

• Provides legislative testimony on behalf of the Division on matters pertaining to public safety.

• Performs all characteristic duties and responsibilities outlined by the class specification for the rank of State Police Executive Major, including coordination of law enforcement activities with subordinates to ensure public safety objectives are accomplished and administering discipline with the Division of State Police guidelines and maintains availability for assignment and consultation 24 hours a day.

See State Exhibit 5.

15. Chief of Policy and Planning Kevin O'Brian is a member of the State negotiating team along with Assistant Secretary of State Thomas Manning, Manager of Employee Relations Matthew Newland, and three other members. Colonel Quinn is not a member of the negotiating team. Mr. O'Brian asks Colonel Quinn questions concerning matters under negotiations, when

necessary, and the Colonel prepares a list of subjects he wants to be addressed during negotiations.

16. According to Mr. O'Brian, placing the Executive Major position in the bargaining unit will make labor negotiations more difficult because of additional demands it would place on the Colonel's time.

17. There is no evidence that the Executive Major was ever involved in or consulted about negotiations and other labor-related matters involving the rank-and-file State Police bargaining unit, represented by the NHTA since 1990, or any other unit.

18. The State and the Union have already commenced contract negotiations on a successor CBA. Since the negotiations commenced, Executive Major Parenteau has not been consulted on any negotiation-related matters. He has not been asked to serve on the negotiating team or negotiating committee or to compile data for the negotiating team.

19. When David Parenteau applied for promotion, he was not informed that the Executive Major's responsibilities included participating in labor negotiations. The Class Specification for the Executive Major position does not mention of responsibilities involving negotiations.

20. The Division has an Executive Security Unit and a Professional Standards Unit. Heads of both units report directly to Colonel Quinn and not to the Executive Major. The Professional Standards Unit contains two sections: Internal Investigations and Inspection/Auditing. See State Exhibit 2.

21. Personnel files for the Division employees are kept in the Colonel's office and are not locked. All Majors, including the Executive Major, have access to personnel files with the Colonel's permission. Unlike personnel files, "confidential files" contain internal investigations information and are kept at the Professional Standards Unit.

22. An internal investigation is conducted when a violation of policy or procedure by an officer is alleged. The Executive Major does not usually conduct internal investigations, although two Majors and the Executive Major review internal investigation files. An investigator compiles a report and submits it first to two Majors for review, then to the Executive Major. The Executive Major makes appropriate comments or recommendations and forwards it to the Colonel for review. If the report is acceptable, the Colonel sends it to the Commissioner for final decision.

23. All supervisory officers give recommendations on internal investigations of their employees.

24. The Division has three bureaus: Operations, Investigative Services, and Support Services. The Operations bureau is headed by Major Christopher Aucoin and three Captains, Investigative Services Bureau – by Captain Mark Armaganian, and Support Service Bureau – by Major Russell Conte and Captain Christopher Wagner.

25. According to Colonel Quinn, his responsibilities as the Director include overseeing three Division bureaus, the Marine Patrol Unit, and the State Hospital campus police; monitoring, understanding, and staying abreast of operational aspects of cases handled by the Division (such as homicides, wiretapping, etc.); and handling and overseeing administrative matters, budget, and personnel day-to-day and investigative matters. In addition, Colonel Quinn has outside-the agency responsibilities, including serving as a member of the Board of the New Hampshire Chiefs of Police, attending meetings of the High Intensity Drug Trafficking program, and staying in contact with the FBI and DEA.

26. According to Colonel Quinn, it is hard to manage the Division staff effectively when three bureaus are headed by staff with equal rank, and hard to ensure that all bureaus are working together and that all workloads are managed. Colonel Quinn testified that it is important

to have one person above the rank of Captain and Major to help him manage the Division and that he expects the Executive Major, who has institutional knowledge of the whole agency, including personnel and operational matters, to be his "right hand" and to be able to "keep an eye" on things.

27. According to Colonel Quinn, he relies on the Executive Major's input and consults with him. The Executive Major oversees other Majors and helps the Colonel to manage the Division.

28. When the Colonel is away, the Executive Major takes over all of the Colonel's responsibilities and assumes some of the Colonel's authority. In the absence of both the Colonel and the Executive Major, the most senior officer takes charge of the Division and has authority to assign work, to relieve employees of duty, and to implement informal discipline (oral counseling). The Colonel is usually available via the telephone during his absence.

29. In the absence of the Colonel, Executive Major Parenteau signs documents for the Colonel and has authority to make recommendations regarding discipline to the Commissioner and to provide information to Mr. Newland regarding negotiations or grievances. He has authority to relieve an employee from duty if necessary.

30. In late spring of 2014, Executive Major Parenteau filled in for the Colonel for a week while the Colonel was away on vacation. He spoke with the Colonel every day and the Colonel was always available by phone.

31. During the 2010-14 time period, when the Executive Major position was vacant and Majors and Captains were in the SEA bargaining unit, one of the Majors or a Captain assumed the Colonel's responsibilities in his absence.

32. The Division of State Police Rules and Regulations, Chapter 1 provides in part as follows:

1.7.3 Grades and ranks: The Division of State Police shall have the following rank titles ranking in the order named:

1. Colonel
2. Executive Major
3. Major
4. Captain
5. Lieutenant
6. Sergeant
7. Trooper First Class
9. Trooper
10. Probationary Trooper

1.7.4 Absence or Disability: When the temporary absence or disability of a Division Member in any position of command in the Division of State Police prevents the performance of their duties, the command devolves to the next highest ranking member unless otherwise ordered by the Commanding Officer or other officer in the chain of command having the authority to issue such order.

See State Exhibit 3.

33. Any senior officer has authority to remove a more junior officer from duty, if necessary, and to recommend discipline regarding a more junior officer.

34. The Executive Major is not usually involved in hiring and the Colonel has not spoken with the Executive Major regarding hiring matters.

35. According to the Colonel, the Executive Major will be evaluating two Majors.

36. Majors evaluate Captains and Lieutenants. Majors, Captains and Lieutenants have been in the same bargaining unit for many years.

37. For each evaluation, there is an evaluatee, evaluator, and evaluator's supervisor. Evaluations are conducted in accordance with detailed norms set forth in the Police Standards and Training Rules. All senior officers evaluate subordinate officers.

38. The Commissioner decides whether to withhold a salary increment.

39. RSA 106-B:5 Chapter 106:8, titled State Police, provides in part as follows:

Director's Authority. —

I. Any police employee may be suspended, discharged, or demoted by the director for cause, *with the approval of the commissioner of safety*, but shall be entitled to a public hearing before discharge or demotion, but not suspension, if he or she so requests in writing addressed to the director not later than 10 days after notice of said discharge or demotion.

II. The director may place any police employee on administrative leave with pay for purposes of conducting an administrative review of incidents involving the use of deadly or non-deadly force as defined in RSA 627:9 or if the employee was involved in a critical incident...

See State Exhibit 8 (emphasis added).

40. At the Division, the discipline is administered in accordance with Administrative Rule Per 1002. Under Per 1002, discipline must be imposed by the "appointing authority." The Administrative Rules set forth, in detail, circumstances under which each step of discipline must be administered, including reasons for discipline, the manner in which the discipline must be administered, and what the "appointing authority" may or may not do with regards to discipline.¹

See Per 1002.

41. Commissioner Barthelmes is the appointing authority for the Division of State Police. Commissioner Barthelmes has the final authority to hire, discipline, demote, and terminate employees of the Division. The Commissioner can delegate this authority.

42. Colonel Quinn makes recommendations regarding suspension or termination of an employee to the Commissioner who has the final approval authority. Recommendations come from review-reports. Reviews are usually conducted by the Professional Standard Unit. Occasionally, the Colonel assigns other officers to conduct a review. Lieutenant Scott Gilbert is in charge of the Professional Standards Unit. He reports directly to the Colonel and not to the Executive Major.

¹ See e.g. Per 1002.06 (d) stating that "[n]o appointing authority shall suspend a classified employee without pay under this rule until the appointing authority: (1) Offers to meet with the employee to present whatever evidence the appointing authority believes supports the decision to suspend the employee; and (2) If a meeting is held, provides an opportunity for the employee to refute the evidence presented by the appointing authority,...."

43. The content of supervisory performance evaluation work files (supervisory work files) must be purged after one year. Supervisory work files usually contain letters of recognition and documentation concerning formal or informal training and discipline. The decision to document informal training is within the discretion of a first-line supervisor. If a supervisory officer believes that a formal remedial training is required, then he/she must first make a recommendation to the Colonel and obtain his approval.

44. Reports of all other formal disciplinary actions are distributed in accordance with Division of Personnel Administrative Rules, Per 1500. Reports of corrective actions may be purged from the employee's personnel file at the Colonel's discretion.

45. Counseling is one of the forms of discipline at the Division. The decision as to whether the counseling should be documented and placed into the supervisory work file is within the supervising officer's discretion.

46. The Executive Major cannot issue formal discipline (apart from counseling) without Colonel's approval. Currently, the Executive Major has authority to sign letters regarding formal discipline, with the Colonel's approval, after which the Colonel forwards the letters to the Commissioner for approval.

47. Any recommendation regarding discipline must be approved by the Commissioner. The Commissioner has discretion to withdraw his approval. Usually, the Commissioner relies on the Colonel's recommendations.

48. The Colonel confers with all Majors before making a disciplinary decision.

49. Under the Professional Standards of Conduct, a supervisor who witnesses an infraction is required to take immediate corrective action, to collect and document initial facts concerning the infraction, and to notify the appropriate commanding officer immediately.

50. Immediately prior to his appointment as the Executive Major, David Parenteau

held the rank of Captain in the Professional Standards Unit and was a member of the bargaining unit represented by the SEA. As Captain in the Professional Standards Unit, Mr. Parenteau had access to personnel files and conducted investigations. Following the investigation, he made findings but not recommendations. As Captain, he evaluated Lieutenants but had no authority to issue formal discipline. At the time, he was in the same bargaining unit as Majors and Lieutenants.

51. According to David Parenteau, being a part of the bargaining unit did not interfere with his ability to perform his work as a Captain.

Decision and Order

Decision Summary

The evidence is insufficient to establish that the State Police Executive Major is a confidential employee within the meaning of RSA 273-A:1, IX (c). Further, the Executive Major does not exercise supervisory authority involving the significant exercise of discretion and, therefore, is not a supervisory employee within the meaning of RSA 273-A:8, II. The Executive Major shares a community of interest with other employees in the command staff bargaining unit. Accordingly, the State's objection is overruled and the Executive Major position is included in the command staff bargaining unit.

Jurisdiction

The PELRB has jurisdiction to determine the appropriate bargaining units pursuant to RSA 273-A:8 and Pub 302.

Discussion

The New Hampshire legislature has recognized the "right of public employees to organize and to be represented for the purpose of bargaining collectively with the state or any political subdivision thereof ..." Laws 1975, 490:1." See *Appeal of International Brotherhood of*

Police Officers, 148 N.H. 194, 196 (2002). RSA 273-A:8, I vests the PELRB with the authority to determine the appropriate bargaining unit and certify the exclusive representative thereof. See also *Appeal of the University System of N.H.*, 120 N.H. 853, 854 (1980) (legislature has vested PELRB with primary authority to determine appropriate bargaining units).

Here, the State argues, among other things, that the Executive Major position should be excluded from the command staff bargaining unit because this position is confidential within the meaning of RSA 273-A:1, IX (c). RSA 273-A:1, IX (c) defines "public employee" as "any person employed by a public employer except ... [p]ersons whose duties imply a confidential relationship to the public employer." Confidential employees are "those employees who have access to confidential information *with respect to labor relations, negotiations, significant personnel decisions and the like.*" *Appeal of Town of Moultonborough*, 164 N.H. 257, 262 (2012) (emphasis added).

In *Appeal of Town of Moultonborough*, the Supreme Court agreed with the PELRB that the executive assistant to the police chief was not a confidential employee within the meaning of RSA 273-A:1, IX. *Id.* The Court provided the following overview:

In *Appeal of City of Laconia* ... [o]ur review of the record, however, indicated that the administrative secretary was privy to the personnel director's personal thoughts, strategies, and notes about the collective bargaining process. Moreover, the administrative secretary opened all inter-departmental communications, including those involving labor negotiation strategies between the city manager and the personnel director. Accordingly, we concluded that it was unreasonable to require the personnel director, as the city's chief labor negotiator, to work under circumstances in which he must keep secrets from his secretary regarding a significant part of his work, and concluded that the position was confidential.

We reached a similar conclusion in *Appeal of Town of Newport*. In *Newport*, the department secretary worked under the general supervision of the director of public works, an administrative superior who outlined departmental policy, made work assignments, and evaluated work in terms of effectiveness of results. Moreover, she maintained personnel records, was privy to disciplinary actions taken, and attended staff meetings at which confidential matters were discussed. In addition, the director of public works testified that if a proposed bargaining unit was created, the department secretary might be put in a situation in which her loyalties would be divided between the union and

the town. Based upon this evidence, we concluded that the department secretary position was not sufficiently distinguishable from the administrative secretary position that we found confidential in *Laconia* and, therefore, should be excluded from the proposed unit.

Laconia and *Newport*, however, are distinguishable from this case. Unlike in *Newport*, in which the department secretary maintained personnel records, here, the executive assistant does not maintain personnel files and only the chief has a key to the locked cabinet containing personnel files. Additionally, she does not attend staff meetings or non-public meetings between the chief and board of selectmen. Moreover, although she receives all of the department mail, she does not open mail marked 'confidential.'

The Town's objection to the inclusion of the executive assistant position in the proposed bargaining unit rests largely upon conjecture regarding her role after the unit is certified. Whatever her potential role may be with regard to labor negotiations, the objection is premature. Accordingly, we concur with the PELRB's conclusion that 'the Executive Assistant is not involved with personnel or other confidential labor relations matter[s] in any meaningful way,' and, therefore, should be included in the bargaining unit.

Appeal of Town of Moultonborough, supra, 164 N.H. at 263-64 (citations omitted).

In this case, the evidence is insufficient to establish that the Executive Major is a confidential employee within the meaning of RSA 273-A:1, IX (c). The record shows that the Executive Major is not involved in labor negotiations or other labor-related matters. Although the State Police rank-and-file bargaining unit has existed for a long time and the Executive Major position has existed since at least 1988, there is no evidence that the Executive Major has ever participated in, or was consulted about, labor negotiations concerning the rank-and-file unit or any other unit. In addition, the evidence is insufficient to establish that the Executive Major is privy to the Colonel's, the Commissioner's, or any employer negotiator's thoughts regarding negotiations or other labor-related issues; that he acts as a liaison to the legal staff in presentation of disciplinary appeals or grievances; or that he has any significant involvement in budget-related matters. The Executive Major's access to personnel files is the same as that of other Majors (bargaining unit employees), i.e. all Majors can access the files with the Colonel's permission. Furthermore, the Executive Major does not routinely conduct or oversee internal investigations. The internal investigations are handled by the Professional Standards Unit and

internal investigation files are kept at the Unit's offices.

It appears that, in this case, the State's RSA 273-A:1, IX(c) objection rests, like that of the employer in *Appeal of Town of Moultonborough*, largely upon conjecture regarding the Executive Major's role in the future. And, like in *Appeal of Town of Moultonborough*, whatever the Executive Major's "potential role may be with regard to labor negotiations," the objection is premature. Accordingly, I find that the Executive Major is not involved with personnel or other confidential labor relations matters in any meaningful way and is, therefore, not a confidential employee within the meaning of RSA 273-A:1, IX (c).

The State also argues that the Executive Major is a supervisory employee within the meaning of RSA 273-A:8, II. Persons "exercising supervisory authority involving the significant exercise of discretion may not belong to the same bargaining unit as the employees they supervise." RSA 273-A:8, II. Statutory 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. 429, 432 (1999). See also *New England Police Benevolent Association, Inc., Local 50 et al. v. State of New Hampshire, Department of Safety, DMV*, PELRB Decision No. 2006-169; *New England Police Benevolent Association, IUPA, AFL-CIO v. Town of Hillsborough*; PELRB Decision No. 2010-112.

A supervisory relationship within the meaning of RSA 273-A:8, II exists "when the supervisor is genuinely vested with significant supervisory authority that may be exerted or withheld depending on his or her discretion." *International Chemical Workers Union Council and Hillsborough County Nursing Home*, PELRB Decision No. 1999-079. In determining whether an employee exercises supervisory authority involving the significant exercise of discretion, 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. at 432. See also *NEPBA, Inc. Local 40/NH Fish & Game Conservation Officers et al. v. SEA/SEIU Local 1984*, PELRB Decision No. 2006-174; *Teamsters Local/Plaistow Town Employees v. Town of Plaistow*, PELRB Decision No. 2010-062. A proper assessment of whether a position is supervisory "requires consideration of matters such as the nature, extent, character and quality of [employee's] authority and involvement in the areas of discipline, evaluations, and hiring." *Tilton Police Union, NEPBA Local 29 v. Town of Tilton*, PELRB Decision No. 2007-100. "[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. 607, 611 (1993). See also *Hampstead Police Union, NEPBA Local 37 and Town of Hampstead*, PELRB Decision No. 2008-071.

In this case, the evidence is insufficient to establish that the Executive Major exercises "supervisory authority involving the significant exercise of discretion." The Executive Major's "supervisory" duties are not different from those of other employees in the command staff bargaining unit and appear to involve very little discretion. In the Division's chain-of-command structure, all senior officers evaluate subordinate officers. The evaluations and discipline are conducted in accordance with professional norms detailed in administrative rules and SOPs.² It appears that the Executive Major plays no significant role in hiring and has no authority to administer discipline, beyond oral counseling, or to suspend, demote, or terminate employees. The most senior officer present always has authority to relieve a subordinate officer from duty, if necessary, and to oversee the Division in the absence of more senior officers. This type of authority is not unique to the Executive Major and does not appear to involve the significant

² "[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. 607, 611 (1993).

exercise of discretion. Furthermore, despite the fact that, for a long time, the Executive Major was in the same bargaining unit (represented by the SEA), with other command staff employees (Majors, Captains & Lieutenants), there is no evidence that the placement of the Executive Major in the same bargaining unit with other command staff employees led to "conflicts between the two groups" or to the inappropriate division of loyalties.

For the forgoing reasons, the Executive Major is not a supervisory employee within the meaning of RSA 273-A:8, II.

Lastly, I find that the Executive Major shares a community of interest with other employees in the command staff bargaining unit as required under RSA 273-A:8, I.³

RSA 273-A:8, I provides that:

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.

Further, the PELRB rules provide additional criteria for determining whether a community of interest exists:

- (1) A common geographic location of the proposed unit;
- (2) The presence of:
 - a. Common work rules and personnel practices; and
 - b. Common salary and fringe benefit structures; and
- (3) The self-felt community of interest among employees.

Pub 302.02 (b).

"[T]he statutory framework which guides PELRB decisions is flexible, and gives much discretion to the PELRB's expertise. The statute and regulation require only that certain factors

³ "The principal consideration in determining an appropriate bargaining unit is whether there exists a community of interest in working conditions such that it is reasonable for the employees to negotiate jointly." *Appeal of Town of Newport*, 140 N.H. 343, 352 (1995) (quoting *Appeal of the University System of New Hampshire*, 120 N.H. 853, 855 (1980)).

may be considered in determining whether a community of interest exists." *Appeal of University System of New Hampshire*, 131 N.H. 368, 374 (1988). Under the statute and regulations, "the

PELRB need not find each criterion satisfied in order to find that a community of interest exists." *Appeal of Town of Newport*, 140 N.H. 343, 352 (1995).

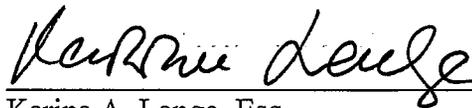
Here, the Executive Major and other command staff bargaining unit employees function within the same organizational unit (Division); are in the same profession (law enforcement); have the same conditions of employment (set forth in personnel rules and the SEA CBA); and share a history of workable and acceptable collective negotiations as the Executive Major and other command staff employees were within the same bargaining unit represented by the SEA for over 20 years. In addition, they share common work rules and personnel practices that are established by rules and SOPs; and common salary and fringe benefit structures that, until very recently, have been established through the collective bargaining between the State and the SEA and set forth in the SEA CBA.

Based on foregoing, the Executive Major shares a community of interest with the other employees in the command staff bargaining unit.

Accordingly, the State's objections to the inclusion of the Executive Major position are overruled and this position is included in the command staff bargaining unit.

So ordered.

February 20, 2015



Karina A. Lange, Esq.
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