



State of New Hampshire
Public Employee Labor Relations Board

New England Police Benevolent Association

and

Town of Bow

Case No. G-0204-3
Decision No. 2018-046

Appearances:

Peter J. Perroni, Esq., Nolan Perroni, PC, N. Chelmsford, MA for the New England Police Benevolent Association

Paul T. Fitzgerald, Esq., Wescott Law P.A., Laconia, NH, for the Town of Bow

Background:

On November 2, 2017, the New England Police Benevolent Association (NEPBA or Union) filed a petition for certification seeking to represent certain employees of the Town of Bow Police Department. The NEPBA proposed the following bargaining unit: Administrative Specialist, Sergeant, Master Patrol Officer, Full-Time Patrol Officer, and Part-Time Patrol Officer. The petition for certification is supported by the requisite number of confidential authorization cards as reflected in the November 14, 2017 PELRB Report re: Inspection of Confidential Authorization Cards.

The Town objects to the petition on the grounds that the proposed unit inappropriately includes supervisors (Sergeants and Master Patrol Officers) along with persons they supervise in

violation of RSA 273-A:8, II, and that without Master Patrol Officers and Sergeants does not contain a minimum of ten employees required under RSA 273-A:8.

An adjudicatory hearing on the Town's objection was conducted on January 11, 2018 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 on February 12, 2018; and the decision is as follows.

Findings of Fact

1. The Town of Bow is a public employer within the meaning of RSA 273-A:I, X.
2. The NEPBA is an employee organization seeking to represent the proposed bargaining unit consisting of the following police department positions: Administrative Specialist, Sergeant, Master Patrol Officer, Full-Time Patrol Officer, Part-Time Patrol Officer. The NEPBA proposed that the following positions be excluded from the unit: Chief of Police, Lieutenant, and Administrative Assistant. The proposed bargaining unit contains 12 employees, including three Sergeants, one of whom is a Detective Sergeant.
3. The Bow Police Department consists of fifteen employees, including command and administrative employees (Administrative Assistant and Administrative Specialist). The Department has eight Patrol Officers (POs), two of which are designated as Master Patrol Officers (MPOs), three Sergeants, one Lieutenant and the Chief of Police. See Statement of Stipulated Facts at 1 - 3.
4. Margaret Lougee is the Chief of Police. She has served in this position for 13 months. She has served the Bow Police Department for 21 years, including 10 years in the rank of Sergeant prior to becoming a Chief.

5. On June 6, 1994, following a representation election, the PELRB certified the Teamsters Local 633 of New Hampshire as the exclusive representative of the bargaining unit consisting of the following Bow Police Department positions: "Five Police Officers, Four Full-Time Dispatchers, and One Part-Time Dispatcher." See PELRB Certification of Representative and Order to Negotiate, Case No. P-0762. On February 15, 1996, the Teamsters voluntarily surrendered this certification. See PELRB Decision No. 96-013.

6. On October 31, 2003, following a representation election, the PELRB certified the IBPO Local 542 as the exclusive representative of the following bargaining unit: "All full-time and regular part-time patrol officers, detectives, corporals, dispatchers/communications employees employed by the Bow Police Department." See PELRB Decision No. 2003-128. The IBPO Local 542 voluntarily surrendered this certification on August 2, 2004. See PELRB Decision No. 2004-116.

7. In 2013, AFSCME Council 93 filed with the PELRB a petition for certification seeking to represent Bow Police Department employees in the following proposed bargaining unit: Police Sergeants, Police Full-Time and Part-Time, Detective, Communications/Supervisor Specialist. The Town objected to the inclusion of Sergeants, Communications/Supervisor Specialist and Master Patrol Officer. The AFSCME and the Town eventually agreed to the following composition of the proposed bargaining unit: Full-Time and Part-Time Police Officer, Master Patrol Officer, Detective, and Dispatcher. After a representation election, the PELRB certified the AFSCME Council 91 as an exclusive representative of the following bargaining unit: Full time and part time Police Officers, Master Patrol Officers, Detectives, and Dispatchers. The positions of Chief of Police, Police Lieutenant, Police Sergeant, Communications Supervisor, and Administrative Assistant were excluded from the bargaining unit. See PELRB Decisions Nos. 2013-034 (March 5, 2013) and 2013-047 (March 27, 2013).

8. On May 23, 2013, the PELRB accepted the AFSCME's notice of intent to surrender certification and issued an Order of Voluntary Surrender of Certification, PELRB Decision No. 2013-077. See PELRB Decision No. 2013-078.

9. The Town's Personnel Plan applies to all Police Department employees and contains the following disciplinary procedure:

Depending upon the nature of the offense, discipline may be initiated at the appropriate level. This sequence need not be followed in cases of serious infractions that warrant immediate suspension, demotion or discharge.

(1) Verbal warning. The immediate supervisor or department head shall issue a verbal warning as soon as possible after knowledge of the infraction. The supervisor or department head shall notify the employee of the nature of the infraction and will offer remedial suggestions. Documentation regarding the verbal warning is to be filed within the department and it will not be forwarded for placement in the employee's personnel file.

(2) Written warning. The department head shall issue a written warning for the repeat of the offense that was the source of verbal warning or for a more serious offense. The warning will outline the nature of the infraction and will offer remedial suggestions. A copy of the warning will be placed in the employee's personnel file and the Town Manager shall be made aware of the action initiated.

(3) Suspension. The department head may suspend the employee without pay for recurring offense or an offense that warrants suspension. The length of the suspension shall depend upon the nature of the offense. The department head shall notify the Town Manager of the suspension within one (1) workday of initiating the suspension. The employee shall be notified in writing, and a copy of the letter of suspension shall be placed on the employee's personnel file.

(4) Termination. The department head shall recommend to the Town Manager that the employee be terminated. The recommendation shall be made in writing. The Town Manager will meet with the department head to discuss the recommendation and shall render a decision within fourteen (14) days.

See Town Exhibit F.

10. The Job Description for the Master Patrol Officer provides in relevant part as follows:

- The position of "Master Patrolman" reflects an officer that has experience, longevity, professional maturity and by virtue of those skills represents a significant resource to the agency/police department...
- The position of Master Patrolman shall continue with the same job summary as is indicated in the position of patrolman, but also it is recognized that this is a position that is preparatory for potential supervisory responsibilities.
- Works under the general supervision of a department supervisor, who makes general assignments as to the area to be covered, specific cases to be investigated, etc. Duties are performed independently and patrolman must exercise independent judgements in meeting emergencies and determining lawful and appropriate course of action.
- Master Patrol Officer's duties include but are not limited to the following:
 - Patrols in an assigned area of the town in a police cruiser, on bike, or on foot; checks overall security of vacant homes and buildings; periodically checks business establishments and public places for violations of the law and takes appropriate enforcement action; confronts suspicious person(s) and situations and determines appropriate action;
 - Negotiates settlements between emotionally upset and often irrational persons involved in domestic disputes, drunkenness, break-ins, larcenies, vandalism, assaults, etc.;
 - Receives dispatch orders and responds to calls for service, emergency situations and serious crimes; takes charge of crime scenes until relieved by higher authority; exercises knowledge of state laws, federal laws, Supreme Court decisions and city ordinances in determining legal justification for arrest, search an [sic] seizure, protective custody, etc.
 - Directs activities at accidents and disasters areas rendering first aid and restoring traffic to normal; investigates traffic accidents to determine cause. Periodically directs traffic to assure steady flow; stops motor vehicles, confronts drivers and issues citations for violations; makes physical arrests when laws have been violated; administers breathalyzer tests to determine the degree of blood alcohol in possible drunk driving situations;
 - Assists in the investigation of crimes and/or suspected criminal acts to identify, locate, apprehend and prepare prosecution of persons charges with committing crimes; examines crime scenes to collect evidence; interviews and interrogates witnesses and suspected offenders; determines the extent of criminal activity and need for further police assistance;

- Maintains log of activities and record of intelligence material received; works with other law enforcement personnel to facilitate the flow of information about criminal activity and the cooperative enforcement of state and federal laws; engages in undercover investigations and conducts state-outs [sic];
- Completes and submits all required reports and records in conformance with department regulations and statutory requirements; conducts follow-up investigations on unsolved crimes;
- Escorts the transportation of large amounts of money and various dignitaries; marches in parades; assists general public in rendering assistance and/or direction; may give safety and crime prevention talks to children and civil groups.
- Performs Other Related Duties as Required.

See Town Exhibit A.

11. The Job Description for the position of Sergeant provides in relevant part as follows:

It is the policy of the Bow Police Department to employ Sergeants, whose responsibilities include supervision of Patrol Officers on a daily basis, taking corrective action when violations of procedure or rules and regulations take place, and performing duties as police officer.

The Sergeant's duties cover the following areas:

- Internal: These are duties performed within the limits of the police station or when dealing with other organization in the judicial system (other police departments, courts, labs, etc.).
- Patrol Operations: Operate a police vehicle on patrol, inspect conditions of equipment and vehicle, use the police radio, maintain uniform to present a neat and professional appearance, use specialized police equipment, assist other law enforcement agencies and coordinate activities with other agencies.
- Arrest and Detention Activities: Transport prisoners, guard prisoners to avoid escape, aid arrested in making phone calls, book prisoners by completing arrest forms, inventory prisoner's belongings, determine emotional stability of prisoners, and photograph prisoners.
- Investigation: Interviews victims and/or witnesses, conducts preliminary investigation for misdemeanors and/or felonies.

- Administrative Planning and Decision Making: Supervise the care and control of equipment and supplies, review reports and paperwork of others, request equipment repairs and issue equipment, prepare memorandums, directives, and letters, test and evaluate equipment, keep current with professional literature, establish priorities for law enforcement services, requisition and inventory supplies and equipment, and prepare documentation on officers' performances.
- External...
- Patrol Operations: Enforce motor vehicle laws, respond to routine calls for service, check buildings for signs of unlawful entry, enforce municipal ordinances, respond to burglar/intrusion alarms, conduct criminal investigations, operate a police vehicle at high speeds during emergency responses or pursuits, apprehend criminal suspects, operate a police vehicle during hazardous weather conditions, conduct traffic direction and control, provide directions, administer breath tests, check homes of persons on vacation, deal with mentally or emotionally disturbed persons, assist ambulance or rescue squad, protect crime scenes and assist fire department.
- Arrest and Detentions Activities...
- Investigations: Perform directed patrol assignments, search person/place incident to arrest, interrogate suspects,...
- Patrol Operation: Issue parking tickets, identify wanted persons/vehicle....
- Arrest and Detention Activities: Fingerprint prisoners, plan strategy for making arrest...
- Investigations: Packages and submits evidence...
- Administrative Planning and Decision Making: Recommend policy and/or procedural changes, investigate citizen complaints, supervise a records keeping system, prepare performance evaluations on subordinates, identify problems and recommend a course of action, identify and correct deviations from plans, coordinate the implementation of projects and monitor the projects for adjustment as needed, file and/or purge documents in records keeping system, research/define how policy change will effect [sic] present operations, investigative police applicant background, measure or evaluate the progress of projects...

See Town Exhibit B.

12. The Job Description for the position of Detective Sergeant provides in part as

follows:

It is the policy of the Bow Police Department to employ a detective whose responsibilities include the further investigation of all felonies, misdemeanors, and certain violations that require extended investigation, security of evidence, and performing duties as police officer.

The Detective's duties cover the following areas:

- Having a thorough knowledge of police investigative techniques and procedures
...
- Conduct thorough investigations into all assigned cases, and provide investigative/technical assistance as necessary in investigative matters to officers within the police department...
...
- Regularly update the Chief of the progress of investigations and request additional instruction when further progress appears impossible. Ensure that any information uncovered regarding criminal activity beyond the scope of the immediate investigation is properly documented consistent with department reporting procedures.
- Submit appropriate reports regarding assigned casework in a timely manner...
...
- Prepare court complaints, affidavits, search warrants, and other official documents necessary for the proper performance of police duties. Present, prosecute, or testify in court cases as required.
...
- The Detective may be called to duty at any time of the day or night to assist Officers in processing a crime scene by:
 1. Maintaining crime scene logs;
 2. Maintaining evidence seized logs;
 3. Maintaining photograph and video logs;
 4. Packaging evidence or property;
 5. Transferring evidence or property from the scene to the Bow Police Department;
 6. Entering all evidence and property in to the department had written and computerized logs; and/or

7. Storing evidence and property in appropriate secure spaces within the evidence room...

See Town Exhibit C.

13. Lieutenant is the "executive officer" of the Police Department. The Job

Description for the position of Lieutenant provides in relevant part as follows:

It is the policy of the Bow Police Department to employ a Lieutenant whose responsibilities include professional standards, prosecution, community programs, support staff, maintenance, budget, etc.

The Lieutenants' duties include, but are not limited to, the following:

- Patrol - the Lieutenant is the commander of patrol. The sergeants report to him/her and he/she is responsible for monitoring all activities in patrol.
- Training – the Lieutenant is responsible for the scheduling and records maintenance of the department members training.
- Schedule – the Lieutenant is responsible for completing the monthly schedule. He/she will coordinate patrol coverage, training, leave request, holidays, special events, and overtime. He/she may also be responsible for handling last minute schedule conflicts, emergencies, and/or adjustments.
- Reports: A large portion of the Lieutenants' time is dedicated to reviewing patrol reports, preparing memos, administrative reports, directives, filing new documents, entering information in a master computer file, and maintaining confidential data.
- Internal Affairs: The Lieutenant shall conduct internal investigations of internal and external source complaints as requested by the Chief of Police. Conclusions drawn by the Lieutenant will include recommendations for appropriate discipline, training, counseling, and/or termination, as applicable.
- ...
- The Lieutenant shall act as Chief of Police as circumstances require in compliance with the Standard Operating Procedures of the Bow Police department. At a minimum, while acting as Chief of Police, the Lieutenant shall participate in all applicable town executive staff meetings...

See Town Exhibit D.

14. Chief Lougee testified as follows. The Sergeants position is the third in the chain of command. Both the Lieutenant and the Chief rely heavily on the Sergeants to help run the department. Sergeants are in charge of all operations of the police department when the Lieutenant and the Chief are absent, which happens often. Sergeants provide guidance to Patrol Officers and regularly review and approve/reject reports prepared by Patrol Officers. They also prepare performance appraisals of Patrol Officers and have authority to issue verbal and written warning and to recommend further discipline. Sergeants determine the level of training a Patrol Officer needs to perform his job and one of the Sergeants is in charge of the field training of Patrol Officers. Sergeants participate on oral boards for hiring and promotion. Two of the Sergeants prepare questions for a written examination that is currently used in the hiring and promotion processes (e.g. when a PO applies for a promotion to the MPO position).

Decision and Order

Decision Summary

The Sergeants, including Detective Sergeant, are statutory supervisory employees and are, therefore, excluded from the proposed bargaining unit. The Union's petition for certification is dismissed because without the Sergeants the proposed bargaining unit contains fewer than 10 employees as required under RSA 273-A:8.

Jurisdiction

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

Discussion

The Town argues that the proposed unit inappropriately includes supervisors (Sergeants and Master Patrol Officers) along with persons they supervise in violation of RSA 273-A:8, II,

and that the unit without Master Patrol Officers and Sergeants does not contain a minimum of ten employees required under RSA 273-A:8.

RSA 273-A:8, I provides in relevant part that “[i]n no case shall the board certify a bargaining unit of fewer than 10 employees with the same community of interest.” RSA 273-A:8, II further 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.” “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)). Employees with certain authority, “regardless of whether it is presently exercised,” are supervisors under RSA 273-A:8, II. See *Appeal of University System of N.H.*, supra, 131 N.H. at 376. In determining whether an employee exercises a “supervisory authority” within the meaning of RSA 273-A:8, II, 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*, supra, 144 N.H. at 432 (citing *Appeal of East Derry Fire Precinct*, 137 N.H. 607, 610 (1993)). 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 *Appeal of Town of Moultonborough*, 164 N.H. 257, 266-67 (2012), the Supreme Court found that the police sergeants and corporal were supervisory employees within the meaning of RSA 273-A:8, II. In *Moultonborough*, the sergeants and corporal were authorized to evaluate

subordinate officers in the proposed unit although the evidence was insufficient to prove that the evaluations were “relied upon to determine pay increases, promotion, demotions discipline or terminations.” *Id.* at 265. They were in charge of the department in the chief’s absence and were involved in certain aspects of the hiring process, although their involvement was “limited to the participation in oral boards and ranking candidates along with other employees.” *Id.* at 266. They were authorized to issue verbal counseling (corporal and sergeants) and written reprimands (sergeants). Despite the fact that neither sergeants nor corporal had authority to recommend pay increases, promotions, demotions, hiring, termination or continued employment, and the limited nature of their participation in hiring, the Supreme Court found that the sergeants and corporal had sufficient supervisory responsibility over subordinate officers so that the inclusion of them in the same unit was unreasonable. *Id.* at 265-67.

Similarly, in *Appeal of Town of Stratham*, supra, 144 N.H. at 432, the Supreme Court found that the PELRB erred in including the sergeant and lieutenant in the bargaining unit. In *Stratham*, the sergeant was the third in the chain of command. *Id.* He had the authority to discipline fellow employees in emergencies, assigned shifts, performed evaluations after the extended absence of the chief while performing patrol shifts like the other officers. *Id.* The Court opined that the “concurrent responsibility of the sergeant ... to perform the same duties as that of the other officers, under the same rules and departmental policy, [did] not diminish [his] supervisory responsibility.” *Id.* The Court found that the sergeant and lieutenant were supervisory employees within the meaning of RSA 273-A:8, II. *Id.* See also *Appeal of East Derry Fire Precinct*, supra, 137 N.H. at 611-12 (finding that captain and lieutenants were statutory supervisory employees); and *Appeal of University System of New Hampshire*, supra, 131 N.H. at 376-77 (finding that fire department captains were supervisory employees).

The Sergeants' authority and responsibilities in this case are akin to those in *Moultonborough* and *Stratham* cases. Like the corporal and sergeants in *Moultonborough* and the sergeant in *Stratham*, they evaluate and discipline other employees in the proposed bargaining unit and have authority to issue verbal and written warnings and recommend further discipline. Sergeants conduct annual evaluations of Patrol Officers. Sergeants also participate on hiring and promotion oral boards, and prepare questions for promotion examinations. Sergeants take over the responsibility of running the police department in the absence of the Chief and the Lieutenant. I find that the Sergeants positions here are not sufficiently distinguishable from the corporal and sergeants positions in *Moultonborough* and the sergeant position in *Stratham* to warrant inclusion in the bargaining unit.

For the foregoing reasons, the Sergeants are “[p]ersons exercising supervisory authority involving the significant exercise of discretion.” Under RSA 273-A:8, II, the Sergeants cannot belong to the same bargaining unit as the Patrol Officers and they are excluded. Without the Sergeants, the proposed unit contains nine employees. RSA 273-A:8, I mandates that “[i]n no case shall the board certify a bargaining unit of fewer than 10 employees with the same community of interest.” Accordingly, the Union’s petition is dismissed.¹

So ordered.

Date: 4/23/2018


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

Distribution: Peter J. Perroni, Esq.
Paul T. Fitzgerald, Esq.

¹ Based on the foregoing, I find it unnecessary to consider the Town’s remaining arguments.