



State of New Hampshire
Public Employee Labor Relations Board

AFSCME Council 93, Local 534, AFL-CIO

and

Town of Moultonborough

Case No. G-0270-1

Decision No. 2018-172

Order

Appearances:

Sean Cronin, Esq., AFSCME Council 93, Burlington, MA, for the AFSCME Council 93, Local 534, AFL-CIO

Mark T. Broth, Esq., Drummond Woodsum, Manchester, NH, for the Town of Moultonborough

Background:

On March 3, 2018, the AFSCME Council 93, Local 534, AFL-CIO (Union) filed a petition for certification seeking to represent certain employees of the Town of Moultonborough Department of Public Works. The Union proposes the following bargaining unit: Landfill Attendants, Landfill Supervisor, Equipment Operators, Mechanic, Highway Office Clerk, and Highway Foreman¹. The petition for certification is supported by the requisite number of confidential authorization cards as reflected in the March 20, 2018 PELRB Report re: Inspection of Confidential Authorization Cards.

The Town objects to the petition on the grounds that the proposed unit inappropriately

¹ The Union amended its original petition on May 11, 2018 by adding a Highway Foreman position to the proposed bargaining unit description. See PELRB Decision No. 2018-063.

includes supervisory (Landfill Supervisor and Highway Foreman) and confidential (Highway Office Clerk) employees in violation of RSA 273-A:8, II and RSA 273-A:1, IX (c), respectively; and that without Landfill Supervisor, Highway Foreman, and Highway Officer Clerk, the proposed unit does not contain a minimum of ten employees required under RSA 273-A:8. The Town “does not dispute that the landfill attendants, equipment operators and mechanic share a community of interest.” See Town Exceptions to Amended Petition (May 24, 2018).

An adjudicatory hearing on the Town’s objection was conducted on June 22, 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 July 9, 2018; and the decision is as follows.

Findings of Fact

1. The Town of Moultonborough is a public employer within the meaning of RSA 273-A:I, X.

2. The Union is an employee organization seeking to represent the proposed bargaining unit consisting of the following Department of Public Works (DPW) positions: Landfill Attendants, Landfill Supervisor, Equipment Operators, Mechanic, Highway Office Clerk, and Highway Foreman. The proposed bargaining unit contains 12 employees. The DPW does not currently have other bargaining units.

3. All employees in the proposed bargaining unit function within the same organizational unit, the Town of Moultonborough Department of Public Works.

4. Although day-to-day duties of the employees in the proposed unit may differ, all of them provide public service to the residents of Moultonborough.

5. The terms and conditions of employment of all employees in the proposed \

bargaining unit are governed by the Town of Moultonborough Personnel Policies and Procedures Manual (Manual), which covers, among others, disciplinary procedure, holiday, personal, and other leaves, overtime, medical and dental benefits, performance appraisals, and dispute resolution procedure. Common work rules and personnel practices apply to all employees in the proposed bargaining unit.

6. The Manual provides in part as follows:

Performance Appraisals

In order for you to improve your performance and better understand the Town's expectations, the performance of employees will be periodically reviewed. You will generally receive performance appraisals from your immediate Supervisor. However, performance review is a continuing process throughout the course of employment, and you may meet with your supervisor to discuss performance more frequently.

Your immediate Supervisor will discuss your performance review, giving you the opportunity to understand the expectations of your position and to examine your strengths, as well as areas in which you need to improve. You will have the opportunity to comment on and sign the review...

A performance appraisal is not a contract or a commitment to provide a compensation adjustment, a promotion, a bonus, or continues employment. Appraisals are only one of several factors that the Town uses in connection with compensation, promotion, and retention decisions...

Union Exhibit 1, page 32 (emphasis added).

7. The Manual contains subsection titled Promotions, Transfers & Job Posting which provides in part as follows:

... If a transfer or promotion is granted, the employee's pay rate in the new position will be determined at the time of the transfer or promotion. The pay rate will be based upon the employee's qualifications, experience, *job performance evaluations*, and other considerations within the discretion of the Town, unless otherwise governed by a collective bargaining agreement or other Town policy.

Union Exhibit 1, page 32 (emphasis added).

8. The Town's Voluntary Dispute Resolution Procedure provides as follows:

If you feel you have a work-related problem, issue or concern, you should present the situation to your immediate supervisor so that the problem can be settled by examination and discussion of the facts. We hope that the supervisor will be able to satisfactorily resolve most matters.

An employee who is not satisfied with the supervisor's response (or the problem involves your supervisor) is urged to go to the Department Head and again try to resolve the issue. If the matter is not resolved by the Department Head within ten (10) business days, the Town administrator is available to discuss the issue... Any complaint will be investigated and the findings and determination reported back to the employee.

See Union Exhibit 1, page 31.

9. The Discipline subsection of the Manual provides as follows:

It is the policy of the Town to take corrective action against employees who violate rules, regulations, or standards of conduct, or who endanger the safety of others, or perform their duties in an unsatisfactory manner. Generally, there are four (4) types of disciplinary action used by the Town: Documented verbal warning, written warning, suspension, and dismissal. While the Town may apply the concept of progressive discipline when appropriate, it reserves the right to determine the appropriate level of discipline in any circumstance. In addition, nothing in this policy or Personnel Manual undermines the at-will nature of the employment relationship, which may be terminated at any time by either party with or without cause, and regardless of whether any prior disciplinary action has been taken. The Town of Moultonborough may also place an employee on administrative leave, paid or unpaid, on a temporary basis, as permitted under federal and state law.

See Union Exhibit 1, page 31.

10. Appendix 4 to the Manual, titled Job Performance Review & Merit Pay Increases provides in part as follows:

In order for the Board of Selectmen to evaluate the productivity, performance and effectiveness of Town employees, Department Heads and/or supervisory personnel will prepare a Job Performance Review of all personnel...

All employees shall be subject to job performance review (using the form attached hereto and incorporated herein as Appendix 4) which shall be used to determine the extent to which an employee is meeting his/her job expectations and goals as established by his/her supervisor. Evaluations shall be conducted upon the successful conclusion of a probationary period and thereafter following an employee's effective anniversary date.

All Department Heads and supervisory personnel who will conduct Performance Reviews will attend an initial training session on how to conduct a performance review...

...
2. Except as otherwise noted, performance review forms shall be used as the basis for determining merit pay rate increases to be applied as of an employee's effective anniversary date...

See Union Exhibit 1, page 46.

11. The Landfill Supervisor² reports to the DPW Director. The Job Description for the Landfill Supervisor provides in part as follows:

General Summary

Operates the resource recovery park and recycling facility in accordance with the Moultonborough Resource Recovery Park Waste Management Facility Ordinance. Insures the orderly, safe and efficient use of the town transfer and recycling facility by residents and/or taxpayers.

Essential Duties and Responsibilities

- Coordinate the separation and placement of material in appropriate receptacles and/or areas by users of the facility
- ...
- Operates equipment, as needed, in daily waste management activities.
- Contacts contracted vendors for disposal services as required.
- Advises Highway Agent/Director by providing account requisitions management of user violations and assists in preparation of written complaints.
- Monitors expenses and insures proper maintenance; providing accounts management, weekly reports and pay requisitions to the Highway Agent/Director for the division.
- ...
- Supervises, schedules and evaluates employees.
- Manages and is responsible for delivering all revenue collected at the facility and providing balanced revenue reports to the Finance Director on a daily basis when open.
- Performs all duties as Facility Attendant.

...
Supervision Exercised

² In the record, the parties use various designations for this position, including Transfer Station Supervisor, Waste Management Supervisor, and Landfill Supervisor. To avoid confusion, this decision will hereinafter refer to this position as Landfill Supervisor.

Supervises the work and performance of the Transfer Station Attendants. Directs residents and taxpayers in the use of the facility. Carries out all supervisory functions in accordance with Town's rules, policies, regulations and applicable laws.

See Town Exhibit 2.

12. Kenneth Filpula is the Landfill Supervisor for the Town of Moultonborough.

13. At least three employees, both full time and part time, in the proposed bargaining unit report to the Landfill Supervisor. The Landfill Supervisor sets their schedules and assigns work. When the landfill station is not very busy, the Landfill Supervisor has discretion not to schedule part-time employees for work.

14. The Landfill Supervisor approves vacation and sick/personal leave requests of other landfill employees in the proposed bargaining unit.

15. The Landfill Supervisor evaluates other landfill employees in the proposed bargaining unit and probationary employees. As part of the evaluation process, he rates each employee's performance on a scale from 00 (unacceptable) to 4.0 (exceptional) in the following categories: quality of work, quantity of work, personal work habits, attitude, adaptability and problem solving, safety compliance, professional development, technical skills, organization, teamwork, public relations & communications, and leadership. He also writes comments on, among others, employees' accomplishments, strengths and weaknesses, action plans for improvement, and departmental goals & objectives. The Landfill Supervisor then calculates the total of all evaluation ratings. This numerical "merit" rating corresponds to a particular percentage of merit pay increase. The Landfill Supervisor's scoring determines whether an employee will receive a pay raise and how much of pay raise he/she will receive.

16. The Landfill Supervisor has discretion to recommend pay increase based on his

performance evaluation of other employees in the proposed bargaining unit. He also has authority to set a performance improvement plan, if necessary, and goals for an employee.

17. After the Landfill Supervisor completes an evaluation, he forwards it to the DPW Director for comments, then to the Town Administrator. Thereafter, the Landfill Supervisor and DPW Director discuss the evaluation with the evaluated employee.

18. Mr. Filpula has never been directed by the DPW Director or the Town Administrator to change his evaluation or his merit score.

19. On October 3, 2017, Mr. Filpula was awarded a certificate of attendance for participation in a briefing on conducting effective performance evaluations for the Town. See Town Exhibit 3.

20. The Landfill Supervisor has authority to issue verbal warnings. He reports the disciplinary issues in writing to the DPW Director and has authority to recommend further disciplinary action, including suspension or written warning. The DPW Director consults with the Landfill Supervisor regarding taking a disciplinary action. The Landfill Supervisor and the DPW Director meet with an employee concerning the employee's wrongful action.

21. The Landfill Supervisor does not have authority to suspend or fire an employee.

22. When a disciplinary issue involves safety, the Landfill Supervisor handles it himself, and then follows up with the DPW Director and/or the Town Administrator.

23. The Landfill Supervisor attends regular meetings with the DPW Director, Highway Foreman, and Facilities and Grounds Supervisor during which disciplinary issues are discussed.

24. The Highway Foreman reports to the DPW Director. The Job Description for the Highway Foreman provides in part as follows:

General Summary

Supervises the construction, maintenance and repair of highways, bridges, cemeteries, beaches, playgrounds, park areas and other town facilities. Acts in the absence of the Highway Agent/Director.

Essential Duties and Responsibilities

- Supervises the construction and maintenance of town roads, bridges and drainage.
- Supervises the maintenance of all town cemeteries, to include opening and closing grave sites, and the care of those private and other cemeteries for which the Town becomes responsible.
- Supervises the maintenance of town playgrounds, parks, beaches and other facilities.
- Supervises the maintenance and repair of all town-owned equipment assigned to the Highway Division.
- Supervises maintenance of all Highway Division buildings and facilities.
- Supervises town employees and outside contractors performing snow removal and sanding of all town and private roads that meet minimum recommended road specifications.
- Supervises, schedules and evaluates employees for this division.
- ...
- Assists in the preparation of an annual Highway Division budget submitted to the Board of Selectmen.
- Assists in the training, licensing and required qualifications for personnel of the Highway Division.
- Perform all duties outlined in lower classification positions...
...

Supervision Exercised

Supervises the work and performance of the HEO/Mechanic, Heavy Equipment Operator, Equipment Operators and the Seasonal/Intermittent General Laborer. Carries out all supervisory functions in accordance with Town rules, regulations, policies and applicable laws.

See Town Exhibit 13.

25. Equipment Operators and Mechanic, included in the proposed bargaining unit, report to the Highway Foreman. See Town Exhibit 12.

26. Ron Deducca is a Highway Foreman for the Town of Moultonborough.

27. The Highway Foreman, among other things, assigns duties to employees, sets employee work schedules, processes time cards, decides what training employees need and schedules classes, approves or denies leave requests, supervises day-to-day operations of the Highway Department, and evaluates employees' performance. He also participates on hiring interview boards with other Department Supervisors, including Landfill Supervisor, prepares questionnaires for candidates, and makes hiring and promotion recommendations.

28. The Highway Foreman conducts performance evaluations of Highway Department employees in the proposed bargaining unit and of probationary employees. He rates employees' performance on a scale from 00 (unacceptable) to 4.0 (exceptional). See Findings of Fact at 15. The Highway Foreman assigns the total merit score based on his performance evaluation and the score he assigns an employee determines whether the employee will receive a pay raise and how much of pay raise he/she will receive. The Highway Foreman's evaluations or pay raise scores have never been overruled by the DPW Director or the Town Administrator.

29. The Highway Foreman issues verbal warnings and prepares disciplinary reports for the DPW Director. He has authority to recommend written warnings and suspension.

30. The Highway Office Clerk (Officer Clerk) reports to the DPW Director. The Job Description for the Office Clerk provides in part as follows:

General Summary

Performs a variety of clerical and secretarial functions including word processing, data entry, electronic posting and other common office skills. This work requires the ability to coordinate with other Town departments and to interact with the public.

Essential Duties and Responsibilities

- Assists with administrative aspects of the office.

- Receives incoming telephone, email and fax correspondence. Receives Public inquiries and provides available information and application forms required by Public Works Department. Performs research for inquiries, if needed.
- Prepares copies of Town documents requested by the public.
- ...
- Takes meeting minutes, intradepartmental communications as required.
- Handles all Accounts Payables/Receivables and Payroll accounting for all divisions within the department.
- Maintains, creates, builds work order/Payables/Receivables/Payroll accounting, data entry, report generations and program management.
- Is responsible for general correspondence and document file maintenance.
- ...
- Maintains the facility maintenance management system.
- Monitors the expiration dates of policy related certifications within the respective divisions' i.e. CDL medical examinations, flagger certifications, CPR/AED certifications, and WMF Operators certifications.
- Handles project management accounting, and asset management record keeping...

See Town Exhibit 11.

31. Katherine Joyce is the Office Clerk working for the DPW.
32. Ms. Joyce does not have access to worker's compensation information.
33. Personnel records are kept in the DPW Director's office. Ms. Joyce's desk is not in the DPW Director's office. She makes copies of personnel files when requested.
34. Ms. Joyce does not open mail marked "confidential."
35. Ms. Joyce does not prepare or proofread disciplinary letters. These letters are written by the DPW Director.
36. She has access to complaint/grievance forms but usually after the subject employees have seen them. If she receives a complaint/grievance form or a verbal complaint, she directs it to the DPW Director. She also has access to performance evaluations stored on a shared

computer drive.³

37. She does not discuss pay raises or discipline with the DPW Director.

38. Her involvement in budget is limited to receiving bills and tracking percentage adjustments based on bills. She is not involved in budget discussions and does not attend, or types minutes of, budget or discipline related meetings with the DPW Director or the Town Administrator.

39. She is not involved in approval of leave requests and has no role in hiring.

40. According to the DPW Director, if the DPW bargaining unit were certified and if he became involved in labor relations activity after the certification, he would be able to change the filing system in order to deny the Officer Clerk access to labor relations information. For example, as the Office Clerk does not open mail marked "confidential," all labor relations communications could be marked "confidential."

Decision and Order

Decision Summary

The Landfill Supervisor and the Highway Foreman are statutory supervisory employees and are, therefore, excluded from the proposed bargaining unit. The Highway Office Clerk is not a confidential employee within the meaning of RSA 273-A:1, IX, has a sufficient community of interest with other employees in the proposed bargaining unit and is, therefore, included in the bargaining unit. The Union's request for a representation election is granted.

Jurisdiction

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

³It is unclear from Ms. Joyce's testimony whether she has access to evaluations before or after DPW employees had a chance to review and discuss them with supervisors and whether her access is limited to old/archived personnel documents only.

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 appropriate bargaining units and certify an exclusive representative thereof.

In this case, the Town argues that the proposed unit inappropriately includes supervisory (Highway Foreman and Landfill Supervisor) employees in violation of RSA 273-A:8, II. Under RSA 273-A:8, II, “[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. 429, 432 (1999). 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.*, 131 N.H. 368, 376 (1988). 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. See also *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 corporal and sergeants were supervisory employees within the meaning of RSA 273-A:8, II. In *Moultonborough*, the corporal and sergeants were authorized to evaluate subordinate officers in the proposed unit and the evaluations were considered in determining step increases. *Id.* at 265-66. 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 and written reprimands. *Id.* The Supreme Court found that the corporal and sergeants had sufficient supervisory responsibility over subordinate officers so that the inclusion of them in the same unit was unreasonable. *Id.* at 266-67.

Similarly, in *Appeal of Town of Stratham*, *supra*, 144 N.H. at 432, the Supreme Court found, *inter alia*, that the PELRB erred in including a sergeant in the bargaining unit. In *Stratham*, the sergeant was third in the chain of command. *Id.* He assigned shifts, performed evaluations, and had authority to discipline fellow employees in emergencies, while performing patrol shifts like 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 was a supervisory employee within the meaning of RSA 273-A:8, II. *Id.* See also *Appeal of Town of Newport*, 140 N.H. 343, 351 (1995) (finding that public works department superintendents were statutory supervisory employees).

The Landfill Supervisor's and the Highway Foreman's supervisory authority and responsibilities in this case are akin to the corporal's and sergeants' supervisory authority in *Moultonborough* and *Stratham* cases. Like the corporal and sergeants in *Moultonborough* and the sergeant in *Stratham*, the Landfill Supervisor and the Highway Foreman conduct annual evaluations of other employees in the proposed unit. Their evaluation scores determine whether an employee would receive a pay raise and the amount of this raise. They set the work schedule and assign work to employees, participate in hiring and promotion processes, approve leave requests, issue verbal warnings, and recommend further discipline. Based on the foregoing, the Landfill Supervisor and the Highway Foreman are "[p]ersons exercising supervisory authority involving the significant exercise of discretion." Under RSA 273-A:8, II, the Landfill Supervisor and the Highway Foreman cannot belong to the same bargaining unit as the DPW employees they supervise, and they are, therefore, excluded from the proposed bargaining unit.

The Town also seeks to exclude the position of Office Clerk from the proposed bargaining unit claiming that this position is confidential within the meaning of RSA 273-A:1, IX, (c), which excludes confidential employees from the definition of a "public employee."

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." However,

Confidential employees, in terms of a labor relations statute, are not those who merely deal with sensitive material or confidential matters, such as tax returns, 'state secrets', financial or personal matters which might be deemed 'confidential' in the sense that they should not be divulged to the general public. Indeed, most state employees (teachers, policemen, and others) have access to and are familiar with 'confidential' information and the drafters of the statute could not have intended that they be excluded from bargaining units.

State of New Hampshire, Department of Revenue Administration v. State Employees' Association, PELRB Decision No. 78001. Rather, 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*, supra, 164 N.H. at 262 (emphasis added).

In *Appeal of Town of Moultonborough*, supra, 164 N.H. at 263-64, 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. The Court stated as follows:

[T]he 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 *Moultonborough*, the executive assistant's responsibilities included answering all phone calls, including calls directed to the police chief, entering payroll information into computer system, conducting billing, handling worker's compensation reports, sending bills to the finance department for payments, and opening departmental mail unless it was marked "confidential." See *NEPBA, Moultonborough Police Association and Town of Moultonborough*, PELRB Decision No. 2011-039, aff'd in part, rev'd in part, *Appeal of Town of Moultonborough*, supra, 164 N.H. at 264. However, the executive assistant did not file anything into the personnel files

and had no access to the locked cabinet containing personnel files without the Chief's permission, did not open confidential mail, and did not attend non-public meetings between the chief and the Board of Selectmen. See *id.*

Likewise, in *University System of New Hampshire v. State of New Hampshire, et al.*, 117 N.H. 96, 101 (1977), the Supreme Court agreed with the PELRB that department chairs were not confidential employees despite the fact that they had access to personnel files. See also *I.U.O.E. Local 08 v. Town of Pembroke*, PELRB Decision No. 2006-205 (finding that public works secretary was not confidential employee because evidence was insufficient to prove that she was involved with personnel or other confidential labor relations matter in any meaningful way). See also *Keene State College Directors and Supervisors Association, NEA-NH and Keene State College*, PELRB Decision No. 2016-115; *State Employees' Association of New Hampshire, SEIU Local 1984 v. Plymouth State University*, PELRB Decision No. 2013-133; *NEPBA, Inc. Local 40 (NH Fish & Game Conservation Officers) and SEA/SEIU Local 1984 and NEPBA, Inc. Local 45 (NH Fish & Game Supervisory Officers) and SEA/SEIU Local 1984*, PELRB Decision No. 2006-174, *aff'd, Appeal of State Employees' Association of New Hampshire, Inc.*, 156 N.H. 507 (2007).

In contrast, in *Appeal of City of Laconia*, the Supreme Court concluded that the administrative secretary was a confidential employee because she "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." *Appeal of City of Laconia*, *supra*, 135 N.H. 421, 423 (1992). See also *Appeal of Town of Newport*, 140 N.H. 343, 354 (1995). Similarly, in *Hooksett Police Supervisors, NEPBA Local*

38 and *Town of Hooksett*, the executive secretary was excluded from the proposed bargaining unit because she took and typed the minutes of the Police Commission's meetings, both public and non-public, typed the chief's letters, including budgetary and labor related letters, maintained all personnel files and performance evaluations, and was privy to the chief's ideas regarding collective bargaining negotiations with the exclusive representative of an existing bargaining unit. See PELRB Decision No. 2010-182. See also *Teamsters Local 633 of NH/Newmarket Public Works Employees and Town of Newmarket*, PELRB Decision No. 2008-127; *Rochester Municipal Employees Association and City of Rochester*, PELRB Decision No. 2009-150; *Northfield Police Union, New England Police Benevolent Association and Town of Northfield*, PELRB Decision No. 2009-030.

In the present case, the evidence is insufficient to prove, by a preponderance of the evidence,⁴ that the Office Clerk is a confidential employee within the meaning of RSA 273-A:1, IX (c). Unlike the secretary in *Hooksett*, the Office Clerk here does not open mail marked "confidential," does not type or edit/proofread disciplinary letters, and does not attend, or type the minutes of, budgetary meetings between the DPW Director and the Town Administrator.⁵ She does not discuss pay raises or discipline with the DPW Director. The evidence here is insufficient to establish that the Office Clerk types or maintains the DPW Director's confidential communications or is privy to his thoughts regarding significant personnel decisions or labor relations matters. The Office Clerk's responsibilities here are more akin to those of the executive assistant in *Moultonborough*. Although the Office Clerk has access to employees' personnel

⁴Admin. Rule Pub 201.06 (c) provides that in all adjudicatory hearings the party asserting the affirmative of a proposition, like the Town here, "shall bear the burden of proving the proposition by a preponderance of the evidence."

⁵I find the Office Clerk's testimony at hearing vague, excessively generalized, and occasionally evincing a lack of candor.

information/evaluations on a shared drive, this access, without more, is insufficient to establish confidential nature of her duties to a degree contemplated by RSA 273-A:1, IX, (c). Access to personnel files, "would not alone require a finding" that Office Clerk is a confidential employee. See *University System of New Hampshire v. State of New Hampshire*, 117 N.H. 96, 101 (1977).

Moreover, here, like in *Moultonborough*, the Town relies on "conjecture regarding her role after the unit is certified" and, like in *Moultonborough*, the Town's objection here is premature, as until now, the DPW did not have a bargaining unit and the DPW Director has not yet been involved in collective bargaining or union-related activities. Furthermore, the DPW Director testified that if the DPW bargaining unit were certified and if he became involved in union-related activities after the certification, he would be able to change the filing system to deny the Office Clerk access to labor relations information and could mark all labor relations communications as "confidential, as she does not open mail marked "confidential." Based on the foregoing, like the executive assistant in *Moultonborough* and the secretary in *Pembroke*, the Office Clerk here is not involved with significant personnel decisions or other confidential labor relations matter in any meaningful way. Accordingly, the position of Office Clerk is a not a confidential position within the meaning of RSA 273-A:1, IX (c) and is eligible for inclusion in the bargaining unit.

Lastly, the Office Clerk has a sufficient community of interest with the other employees in the proposed bargaining unit. "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*, supra, 140

N.H. at 352. 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.

(Emphasis added).

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 *may* be considered in determining whether a community of interest exists.” *Appeal of University System of New Hampshire*, 131 N.H. 368, 374 (1988) (emphasis in original). 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*, *supra*, 140 N.H. at 352. Furthermore, the clear and unambiguous statutory language indicates that satisfaction of just one of the criteria listed in RSA 273-A:8, I may be sufficient to establish a requisite community of interest.

In the present case, all employees in the proposed bargaining unit function within the same organizational unit, the Town of Moultonborough DPW and provide public service to the residents of Moultonborough. Furthermore, the terms and conditions of employment of all employees in the proposed bargaining unit are governed by the Town of Moultonborough Personnel Policies and Procedures Manual, which covers, among others, disciplinary procedure;

holiday, personal, and other leaves; overtime, medical and dental benefits; performance appraisals; and dispute resolution procedure. Common work rules and personnel practice apply to all employees in the proposed bargaining unit. In addition, the evidence in this case is insufficient to prove that the creation of the proposed bargaining unit will have a negative effect on government operations. Therefore, the employees in the proposed bargaining unit, with the exception of Landfill Supervisor and Highway Foreman, as discussed above, share a community of interest in working conditions such that it is reasonable for the employees to negotiate jointly.

Based on the foregoing, the proposed bargaining unit contains 10 employees with the same community of interest as required under RSA 273-A:8, I.⁶ The Town's objections to the petition for certification based on RSA 273-A:1, IX (c) and RSA 273-A:8, I are overruled, and the following bargaining unit is approved: Landfill Attendants, Equipment Operators, Mechanic, and Highway Office Clerk. Accordingly, the PELRB will conduct a secret ballot election pursuant to RSA 273-A:10 to determine the exclusive representative of the approved unit, if any. "AFSCME Council 93, Local 534, AFL-CIO" and "No Representative" will appear as choices on the ballot. An Order for Election shall issue in due course and a pre-election conference shall be conducted pursuant to Pub 303.02.

So ordered.

Date: 9/21/2018


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Staff Counsel/Hearing Officer

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⁶ 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."