



**AFSCME Council 93, Local 1801, AFL-CIO**

**And**

**Derry Cooperative School District (SAU 10)**

**Case No. E-0230-1  
Decision No. 2019-043**

**Appearances:**

Sean Cronin, Esq.,  
AFSCME Council 93, Burlington, Massachusetts for the Petitioner

Peter C. Phillips, Esq.,  
Soule, Leslie, Kidder, Sayward & Loughman, Salem, New Hampshire for the Respondent

**Background:**

The AFSCME Council 93, Local 1801, AFL-CIO (Union) filed a petition for certification under the Public Employee Labor Relations Act, RSA 273-A, on November 30, 2018. The Union requests approval of a bargaining unit composed of Custodians and Custodial Team Leader/Shift Supervisors.

The Derry Cooperative School District (District) objects, arguing that Custodial Team Leader/Shift Supervisors (team leader) exercise supervisory authority involving the significant exercise of discretion and should be excluded under RSA 273-A:8, II. The District also argues that if the team leader is included, the bargaining unit lacks the requisite community of interest.<sup>1</sup> The District maintains that the appropriate unit is full-time and regular part-time custodians, with all other employees excluded.

The undersigned conducted a hearing on January 15, 2019 at the Public Employee Labor Relations Board (PELRB) offices in Concord, and both parties filed post-hearing briefs.

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<sup>1</sup> At hearing, the District withdrew the other objections raised in its answer to the petition. To the extent such objections were not withdrawn, they are overruled.

### **Findings of Fact**

1. The District is a public employer within the meaning of RSA 273-A:1, IX.
2. The Union is an employee organization seeking to be certified as the exclusive representative of the proposed bargaining unit.
3. In terms of organization, District custodians and team leaders are in the Facilities Department, which is headed by Director of Facilities Jeremy Lamothe. The Maintenance Department is a sub-department of the Facilities Department and is headed by Assistant Director of Maintenance Paul Pellerin.
4. Custodians and team leaders are assigned to one of seven elementary schools. Each school has one custodian scheduled for the 6 a.m. to 2 p.m. day shift, and three scheduled for the 2 p.m. to 10 p.m. night shift. Each team leader works the night shift with two other custodians.
5. The job duties of all custodians, including the team leader, are set forth in District Exhibit 2 (Job Description for Custodian) and District Exhibit 3 (Custodial Duties). These two exhibits are four pages in length and contain a detailed description of all custodial responsibilities, including cleaning, trash removal, minor repairs, snow and ice removal, equipment operation, equipment and furniture setup for special events, work.
6. District Exhibit 3 also contains a final paragraph titled "Team Leader," which provides as follows:

Team Leader is a custodial position with the added responsibility of making sure that tasks are accomplished in a timely and efficient matter (sic). The team leader will coordinate with the building principal for the completion and setup of school and special functions and will coordinate with the Maintenance Director with regards to all custodial and cleaning functions. The team leader will also be responsible for the securing of the building at the end of the shift and making sure that all windows and doors are closed & locked and that the security system has been armed.
7. There is no language in District Exhibits 2 or 3 granting to team leaders the authority to discipline other custodians.

8. As to evaluations of custodians, the custodial job description (District Exhibit 2) provides as follows:

Evaluation: the Director of Maintenance will evaluate Performance of this job annually with input from Assistant Director of Maintenance, Building Team Leader, and Building Principal.

9. Recent hirings of team leaders involved the Director of Facilities calling a custodian (like Steve Becker or Robert Gagne) and offering to them the team leader position. There were no job postings, applications, or interviews. When promoted to team leader, these individuals did not receive any additional instruction or training, and they were not advised that they now had authority to discipline other custodians or any other authority beyond what is stated in District Exhibits 2 and 3.

10. Team leaders do not have computers or some other type of conventional office work station, and the vast majority of their time is devoted to performing the same work as the other custodians.

11. Day to day supervision of the custodians is the responsibility of the Director of Facilities, as stated in his job description (Union Exhibit 1).

12. District Exhibit 4 is an October 5, 2017 letter summarizing a verbal reprimand ostensibly issued by team leader Michael Joaquin. Although the exhibit bears the redacted signature of the employee at issue (also dated October 5, 2017), the letter is not signed by Joaquin. According to Business Administrator Jane Simard, she told team leaders about their disciplinary authority in a meeting, and the District cites District Exhibit 4 as an example of the exercise of this authority.

13. At hearing Joaquin suggested, in substance, that District Exhibit 4 is a letter he wrote and which Principal Matt Olsen typed for him, perhaps changing a word or two in the process. If accurate, this is a somewhat peculiar arrangement between a custodial employee and a building

principal. However, based upon the fact that District Exhibit 4 is signed by the affected employee but not Joaquin, Joaquin's ignorance of "Policy GBEB" referenced in the third paragraph of the letter, as well as the overall organization and content of the letter, a more credible explanation is that Principal Olsen wrote the letter over Joaquin's name. Also, it is not clear that Joaquin, acting on his own and independently of Principal Olsen, issued the referenced verbal warning and then decided to document this action with a formal letter to the affected employee. Instead, it appears that Joaquin may have had conversations with Principal Olsen about the situation, which Principal Olsen then proceeded to handle, manage, and document.

14. District Exhibit 13 is an email in which Assistant Director of Maintenance Pellerin addresses a custodian attendance issue brought to his attention by team leader Charles Sarcione. This exhibit demonstrates that Sarcione did not address or handle the underlying matter on his own, but instead complained to Assistant Maintenance Director Pellerin, who then addressed the matter as he deemed appropriate. For example, in his email Pellerin states:

This is not the first time I have had this conversation with (name of employee redacted). More that (sic) once I have had to talk with him about his lack of calling when not showing up for work. On the last occasion he was told that the next time there would be a written response to his actions.

15. There were several examples of evaluations completed by team leaders. See District Exhibits 5-8. This is consistent with the authority of team leaders to provide input into the evaluation of other custodians. At least one of these exhibits involved an edit by the principal. The subsequent meetings with the employee being evaluated were conducted by the Principal. The team leader was also present, but did not play a role at the meeting and did not contribute to the discussion with the employee being evaluated. There was a lack of evidence showing such evaluations were consistently relied upon to determine pay increases.

## Decision and Order

### Decision Summary

The petition for approval of a bargaining unit consisting of custodians and team leaders is approved. The District's request to exclude team leaders under RSA 273-A:8, II is denied. The proposed bargaining unit meets community of interest requirements. This matter shall proceed to a representation election.

### Jurisdiction

The PELRB has jurisdiction over all petitions to determine bargaining units and certify the exclusive representative of an approved bargaining unit through the process of a representation election pursuant to RSA 273-A:8, 273-A:10, and Pub 300.

### Discussion:

#### A. District Request to Exclude Lead Custodians:

RSA 273-A:8, II provides that "[p]ersons exercising supervisory authority *involving the significant exercise of discretion* may not belong to the same bargaining unit as the employees they supervise (emphasis added)." The term "supervisory" employee has special meaning under RSA 273-A:8, II. The assessment of whether a person has statutory supervisory authority includes consideration of an "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. 429, 432 (1999) (citing *Appeal of East Derry Fire Precinct*, 137 N.H. 610 (1993)). However, "[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. at 611. The PELRB examines 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 *Appeal of Stratham*, 144 N.H. 429 (1999)(sergeant and lieutenant with authority to issue verbal warnings and written warnings excluded) and *Appeal of Town of Moultonborough*, 164 N.H. 257 (2012)(sergeant and corporal with authority to issue verbal warnings and written warnings excluded).

In this case, team leaders are charged with providing input to the Director on custodian evaluations, and this is accomplished by their completion of the evaluation form in concert with the Principal. Team leaders do attend the meetings in which the Principal reviews the evaluation with the subject employee but they are passive participants. In summary, the involvement of team leaders in employee evaluations is limited, and occurs under the supervision and oversight of the building principal.

Team leaders possess some general supervisory authority in areas outlined in the custodian job description, including making sure that custodial tasks are accomplished in a timely and efficient manner, and they are also given ultimate responsibility for the completion of certain tasks, like locking the building at night and activating the security system. However, there was no evidence that such activity requires the exercise of significant judgment or discretion.

There are a number of factors which weigh against a finding that team leaders possess the disciplinary authority claimed by the District. For example, the disciplinary authority of supervisors is normally documented in writing,<sup>2</sup> but in this case, there is a conspicuous and perplexing absence of any references to the putative disciplinary authority of team leaders in such documents, notwithstanding the District's claims to the contrary. See District Exhibits 2 and 3. When custodians were promoted to team leader they were not informed they now had the

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<sup>2</sup> In written job descriptions, for example.

authority and responsibility to discipline other custodians in any respect. The team leader's workplace does not include a proper work station, or its equivalent, equipped with basic equipment like a computer, as might be expected in the case of a management level employee with authority to issue and document discipline. As to District Exhibit 4 and 13, neither is a good example of the disciplinary authority of team leaders. If anything, these exhibits cut the other way and undermine the assertion of such authority.<sup>3</sup> The testimony of the Business Administrator that she told team leaders in a meeting that they should issue discipline does not outweigh this evidence, and it is insufficient to tip the scales in favor of a finding that team leaders have the disciplinary authority ascribed to them by the District in these proceedings.

The underlying purpose of the RSA 273-A:8, II supervisory exclusion is the avoidance of conflicts of interest within the bargaining unit. Team leaders are part of the custodial team, and their workday is virtually indistinguishable from that of their co-workers. In fact, they are more a member of the team than a supervisor of the team, and are akin to a "working foreman." See, e.g., *I.U.O.E. Local 98 v. Town of Pembroke*, PELRB Decision No. 2006-205. Their supervisory duties are fairly limited, and do not involve the significant exercise of discretion within the meaning of RSA 273-A:8, II.<sup>4</sup>

**B. Community of Interest:**

"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)). The PELRB

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<sup>3</sup> See findings of fact 12-14.

<sup>4</sup> It is axiomatic that the District is free to approve and issue amended and updated job descriptions for team leaders which expressly include the authority to issue verbal and written reprimands to be documented in personnel files, as well as the authority to independently conduct employee evaluations to be kept in personnel files and relied upon by management. These changes could serve as the basis for a subsequent modification petition requesting the exclusion of team leaders under RSA 273-A:8, II.

determines bargaining units in accordance with the provisions of RSA 273-A:8 and Pub 302.02

(b). RSA 273-A:8, I provides that:

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

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

*See also* Pub 302.02 (b)(Additional Criteria for Determining Appropriate Bargaining Units).

In this case, the custodians, including the team leaders, are in the same historic craft or profession, have the same or similar conditions of employment, and function within the same organizational unit. The proposed bargaining unit meets community of interest requirements.

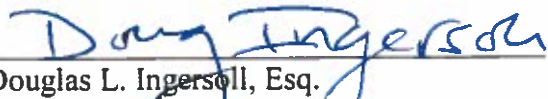
An Order for Election shall issue, and an election will be conducted to determine the exclusive representative, if any, of the following unit:

**Unit:** Full-time and regular part-time Custodians  
and Custodial Team Leader/Shift Supervisors

**Exclusions:** All other employees

So ordered.

Date: 2-22-2019

  
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Executive Director/Presiding Officer

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