



State of New Hampshire
Public Employee Labor Relations Board

AFSCME Council 93

and

Town of Hampstead

Case No. G-0298-1

Decision No. 2021-156

Appearances:

Sean Cronin, Esq., AFSCME Associate General Counsel, Boston, Massachusetts, for the AFSCME Council 93

Peter C. Phillips, Esq., Soule Leslie Kidder Sayward & Loughman, PLLC, Salem, New Hampshire, for the Town of Hampstead

Background:

On December 14, 2020, the AFSCME Council 93 (Union) filed a petition for certification seeking to represent certain Town of Hampstead Fire Department employees. The petition was supported by the requisite number of confidential authorization cards as reflected in the PELRB December 16, 2020 Report re: Inspection of Confidential Authorization Cards. The Town objected to the petition on the following grounds: (1) part-time per diem Firefighters are irregular and on-call employees within the meaning RSA 273-A:1, IX (d) and, therefore, are not public employees and cannot be included in the bargaining unit; (2) without part-time per diem Firefighters, the proposed unit does not satisfy a 10-employee minimum requirement under RSA 273-A:8, I; (3) the Firefighter Captain is a supervisory employee within the meaning of RSA 273-A:8, II and, therefore, cannot be included in the bargaining unit with employees he

supervises; (4) the Firefighter Captain is a confidential employee within the meaning of RSA 273-A:1, IX (c) and, therefore, is not a public employee and cannot be included in the unit; (5) the proposed bargaining unit lacks a community of interest as required under RSA 273-A:8, I; and (6) certification of the proposed bargaining unit will have a negative effect on the efficiency of governmental functions. The Town requested that the PELRB dismiss the petition.

A hearing on the Town's objections was held on February 9, 2021. 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 March 17, 2021. On May 20, 2021, the undersigned hearing officer issued Decision No. 2021-090 dismissing the Union's petition on the grounds that the "majority (at least 10 out of 14) of the per diem Firefighters in the proposed bargaining unit [were] irregular employees within the meaning of RSA 273-A:1, IX (d)" and after the exclusion of the per diem employees, the proposed bargaining unit contained fewer than 10 employees and, therefore, did not satisfy the statutory 10-employee minimum requirement. The hearing officer did not address the Town's remaining objections because the petition was dismissed pursuant to RSA 273-A:1, IX (d) and RSA 273-A:8, I.

The Union filed a request for Review of a Decision of Hearing Officer pursuant to Admin. R. Pub 205.01 and, on September 8, 2021, the Board issued a decision on the Union's request for review in which it found that, based on the record, part time per diem Firefighters Cousins, Dominijanni, Scipione, Warnock, Genthner, Lonergan, and Sylvester were not persons employed irregularly within the meaning of RSA 273-A:1, IX (d) and were eligible for inclusion in the proposed bargaining unit, which would then satisfy the statutory ten-employee minimum requirement. PELRB Decision No. 2021-150. The Board also directed the hearing officer to address the Town's other objections in a supplemental order. Accordingly, the supplemental

findings of fact and the supplemental decision, which incorporates in full the findings of fact set forth in PELRB Decision No. 2021-090, are as follows.

Supplemental Findings of Fact

1. The Town is a public employer within the meaning of RSA 273-A:1, X.
2. The Union is an employee organization seeking to represent a proposed bargaining unit consisting of the following Town of Hampstead positions:

Unit: Firefighter (full-time and part-time per diem), Firefighter Lieutenant, and Firefighter Captain.

Excluded: Fire Chief, Deputy Fire Chief, Firefighter (on call), and Administrative Assistant.

3. The Town of Hampstead Fire Department consists of a Fire Chief, one Deputy Fire Chief (on-call), one Fire Inspector (part-time), one full-time Captain, one "on-call" Captain, one full-time Lieutenant, two "on-call" Lieutenants, three full-time Firefighters, approximately 15 "per diem" Firefighters, and approximately 10 "call" Firefighters. See Joint Statement of Stipulated Facts at 2. This petition concerns only a full-time Captain, a full-time Lieutenant, three full-time Firefighter, and seven per diem Firefighters (Cousins, Dominijanni, Scipione, Warnock, Genthner, Lonergan, and Sylvester) who are eligible for the inclusion in the bargaining unit because they are not persons employed irregularly within the meaning of RSA 273-A:1, IX (d). See PELRB Decision No. 2021-150.

4. All employees in the proposed bargaining unit function within the same organizational unit, the Town Fire Department, and work in common geographic location.

5. All employees in the proposed bargaining unit are employees in the same historic craft or profession, i.e. Firefighters, and all of them are public safety employees serving the residents of the Town.

6. All employee in the proposed bargaining unit are covered by the same evaluation and disciplinary procedures and common work rules and personnel practices apply to all employees in the proposed bargaining unit.

7. Full-time and per diem Firefighters are scheduled to be on duty together each day. See Joint Statement of Stipulated Facts at 3. They perform the same duties, have the same responsibilities, and have a strong self-felt community of interest.

8. The job description for full time Firefighter/EMT position provides in part as follows:

Labor Grade: 5

Job Summary: Performs responsible firefighter work for the Town, including fire suppression, fire prevention and emergency medical services.

Major Duties:

- Responds to assigned alarms and performs firefighter duties, including but not limited to driving and operating apparatus, advancing hose lines, raising and climbing ladders, wearing SCBA's, operating in and around burning structures, performing forcible entry, rescue, ventilation and salvage operations.
- Responds to assigned alarms and performs EMT duties limited to providing rapid emergency medical services, consistent with their level of training, standard operating procedures and protocols of the State of NH and the Fire Department....

* * *

Minimum Qualifications:

Graduation from High School or equivalent. Possession of a New Hampshire Firefighter's Level I Certificate, an Emergency Medical Technician's certificate issued by the National Registry, ambulance provider's license issued by NH, and a valid NH CDL endorsement may be required.....

See Town Exhibit D (incorporated by reference in full).

9. The job description for per diem Firefighter/EMT provides in part as follows:

Labor Grade: Hourly (currently \$13.50) as established by Board of Selectmen.

Job Summary: Performs responsible firefighter work for the Town, including fire suppression, fire prevention and emergency medical services. Responds on an on-call basis as determined by department policy. Works irregular shifts as determined by department policy.

Major Duties:

- Responds to assigned alarms and performs firefighter duties, including but not limited to driving and operating apparatus, advancing hose lines, raising and climbing ladders, wearing SCBA's, operating in and around burning structures, performing forcible entry, rescue, ventilation and salvage operations.
- Responds to assigned alarms and performs EMT duties limited to providing rapid emergency medical services, consistent with their level of training, standard operating procedures and protocols of the State of NH and the Fire Department....

* * *

Minimum Qualifications:

Graduation from High School or equivalent. Possession of a New Hampshire Firefighter's Level I Certificate, an Emergency Medical Technician's certificate issued by the National Registry, ambulance provider's license issued by NH, and a valid NH CDL endorsement may be required.....

The duties, knowledge, skills, and abilities required by the position and minimum qualifications of per diem Firefighters/EMTs are identical to those of Firefighters/EMTs. See Town Exhibit E (incorporated by reference in full).

10. The Firefighter Captain (Fire Captain), who is in charge of the day-to-day operations of the Department, works Tuesday-Friday with the following hours: Tuesday - 12 hours; Wednesday - Friday - 10 hours. See Joint Statement of Stipulated Facts at 3.

11. The full-time Fire Captain is responsible for the scheduling of all per diem Firefighters. See Joint Statement of Stipulated Facts at 4.

12. The job description for the Fire Captain position provides in part as follows:

General Summary

This position is responsible for day-to-day activities of the department, firefighting, emergency medical services, rescue and fire prevention activities of the Town; in the

absence of the Chief or Deputy Chief, takes command at the scene of an emergency and directs and coordinates operations consistent with Department standard operating procedures and safe operating practices.

Essential Duties and Responsibilities

Performs fire prevention, fire suppression, rescue and emergency medical services...

...

Meets with the Fire Chief to discuss situations, progress and/or concerns.

...

Meets with full-time and on-call personnel to provide instruction, suggestions, encouragement and positive feedback.

Supervises personnel by scheduling, assigning work, instructing, evaluating, and disciplining.

Assumes the responsibility for the safety and conduct of personnel under his/her supervision.

....

Guidelines: Guidelines are available but are not completely applicable to the work or have gaps in specificity. The employee uses judgement in interpreting and adapting guidelines such as agency policies, regulations, precedents and work directions for application to specific cases or problems. The employee analyzes results and recommends changes.

...

Supervisory and Management Responsibility: First line supervisors at this level are usually responsible for the work performance of a small group of employees or a larger group with a homogeneous objective, i.e. employees all perform the same basic type of work. They are responsible for planning, organizing and monitoring day-to-day work on a short-term cycle. They assign work to subordinates, adjust workflow to maintain balance among positions and meet priorities or deadlines and make minor changes in structure, methods or procedures as necessary to accommodate changes in work pattern, emphasis or capability. They may recommend major changes for higher-level action. They usually counsel employees, hear and resolve minor complaints and grievances, participate in performance evaluations and personnel management recommendations.

See Town Exhibit C (incorporated by reference in full).

13. The Fire Captain manages the hiring process for per diem Firefighters. Per diem Firefighters are hired following either referrals or advertisements, and a meeting with the Captain. See Joint Statement of Stipulated Facts at 10.

14. The Fire Captain completes all performance evaluations of subordinate Firefighters. The Fire Captain makes a recommendation for an annual salary increase as part of

the evaluation. See Joint Statement of Stipulated Facts at 11. See also Town Exhibits I & K.

15. The Fire Captain has authority to issue verbal and written warnings and to recommend suspension.

16. The Fire Captain reviews and signs off on time sheets for the per diem Firefighters. See Joint Statement of Stipulated Facts at 12.

Decision and Order

Decision Summary

The Fire Captain is a supervisory employee within the meaning of RSA 273-A:8, II and, therefore, cannot be included in the bargaining unit with employees he supervises. The rest of the employees in the proposed bargaining unit share a sufficient community of interest so that it is reasonable for them to negotiate jointly. The proposed bargaining unit contains 10 employees with the same community of interest as required under RSA 273-A:8, I and 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.

Jurisdiction

The PELRB has jurisdiction to determine the appropriate bargaining unit and to certify the exclusive representative thereof. See RSA 273-A:8, RSA 273-A:10, and Admin. R. Pub 302.

Discussion

The Town argues that the Fire Captain is a supervisory employee within the meaning of RSA 273-A:8, II and should, therefore, be excluded from the unit. 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). 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.

In *Appeal of Town of Moultonborough*, 164 N.H. 257, 266-67 (2012), 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. *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).

In contrast, in *Specialists of Monadnock District, SAU 93/NEA-NH and Monadnock Regional School District, SAU 93*, PELRB Decision No. 2012-086, the PELRB included Speech Language Pathologists (SLPs) and Occupational Therapists (OTs) in the same unit with Speech Language Pathology Assistants and Occupational Therapy Assistants because the evidence was insufficient to establish that they had “supervisory authority involving the significant exercise of discretion” over the assistants. In *Monadnock*, SLPs and OTs did not have authority to, and did not, hire, discipline, demote, promote, or terminate the assistants; nor did they have authority to recommend such actions. *Id.* Although SLPs and OTs had professional responsibility to provide clinical oversight to the assistants in accordance with professional norms, this kind of oversight was not “supervision” within the meaning of RSA 273-A:8, II, as it did not involve evaluation of employees for the purposes of discipline, promotion, demotion, pay increases, or termination. Although they completed checklists concerning the assistants’ performance, these checklists had no effect on the assistants’ compensation or on decisions to discipline, promote, demote, or terminate the assistants. See also *Appeal of City of Concord*, 123 N.H. 256, 257-58 (1983) (finding that fire department battalion chiefs were not statutory supervisory employees “[b]ecause the record does not indicate that the battalion chiefs exercise supervisory authority

entailing significant discretion”).

In this case, the Fire Captain's supervisory authority and responsibilities 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 Fire Captain conducts annual evaluations of other employees in the proposed unit. His evaluations determine whether an employee would receive a pay raise. The Fire Captain sets the work schedule and assigns work to other employees in the proposed unit, participates in hiring process, and oversees the department's day-to-day operations. Furthermore, the Fire Captain has authority to issue verbal and written warnings and to recommend suspension. Based on the foregoing, the Fire Captain is a person "exercising supervisory authority involving the significant exercise of discretion" and, therefore, under RSA 273-A:8, II, cannot belong to the same bargaining unit as the Fire Department employees (full time and per diem Firefighters) he supervises. Accordingly, the Fire Captain is excluded from the proposed bargaining unit.

The Town also argues that the employees in the proposed bargaining unit lack a requisite 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). RSA 273-A:8, I provides as follows:

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.

(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.

Admin. R. 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. In addition, 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.

Moreover, when determining a community of interest, the focus must necessarily be on similarities, not the differences, between the positions in a proposed bargaining unit. See RSA 273-A:8, I and Pub 302.02 (b). *Teamsters Local 633 v. Town of Loudon*, Decision No. 2018-209. For example, the differences in bargaining unit positions’ training requirements, benefits eligibility or specific job duties do not preclude a formation of a cohesive bargaining unit that is otherwise appropriate under RSA 273-A:8, I and Pub 302.02 (b). See *State Employees’*

Association of New Hampshire, Inc., SEIU Local 1984 and Rockingham County, Decision No. 2019-171 (certifying bargaining unit containing, among others, full time and per diem nursing home employees). See also *Town of Hampstead and Hampstead Police Union, NEPBA Local 37*, PELRB Decision No. 2021-089 (certifying bargaining unit containing dispatchers, full time patrol officers, regularly scheduled part time patrol officer, sergeants, and school resource officer).

In the present case, all employees in the proposed bargaining unit are employees in the same historic craft or profession, i.e. Firefighters, and all of them function within the same organizational unit, the Town of Hampstead Fire Department. The employees in the proposed unit work in the same geographic location and have a strong self-felt community of interest. Also, common work rules and personnel practices, including evaluation and disciplinary procedures, apply to all employees in the proposed bargaining unit. Although full time and part time per diem Firefighters have differing compensation and fringe benefits structure, this alone is not enough to deny the employees their statutory right to be represented by the same exclusive representative and to bargain collectively. Furthermore, there is a dearth of evidence that the creation of the proposed bargaining unit will have a negative effect on the Town's government operations. Therefore, the employees in the proposed bargaining unit, with the exception of the Fire Captain, 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.¹ The following bargaining unit is

¹ 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.”

approved:

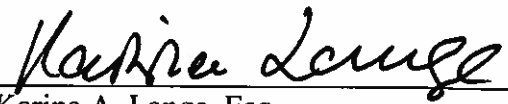
Unit: Full time Firefighter, part time per diem Firefighter², and Firefighter Lieutenant.

Excluded: Fire Chief, Deputy Fire Chief, Firefighter (on call), Firefighter Captain, Administrative Assistant, and all other per diem Firefighters.³

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" 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: 9/10/2021



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

Distribution: Sean Cronin, Esq.
Peter C. Phillips, Esq.

² As per PELRB Decision No. 2021-150.

³ See PELRB Decisions Nos. 2021-090 & 2021-150.