

State of New Hampshire
Public Employee Labor Relations Board

**SEA/SEIU Local 1984, Belknap County Jail & House of Corrections
and
Belknap County Commissioners
Case No. G-0232-3**

&

**Belknap County Commissioners
and
SEA/SEIU Local 1984, Belknap County Jail & House of Corrections
Case No. G-0232-4**

**Decision No. 2022-205
(Consolidated Cases)**

Appearances: Gary Snyder, Esq., General Counsel, SEA, SEIU Local 1984, Concord, NH for the SEA/SEIU Local 1984, Belknap County Jail & House of Corrections

Paul T. Fitzgerald, Esq., and Kyle W.T. Amell, Esq., Wescott Law, PA, Laconia, NH for the Belknap County Commissioners

Background:

On August 2, 2022, the SEA/SEIU Local 1984, Belknap County Jail & House of Corrections (Union) filed a modification petition pursuant to N.H. Admin. R. Pub 302.05 seeking to add the position of Corporal to the existing bargaining unit. The County objects to the modification petition for the following reasons: (1) the newly created position will consist of individuals exercising supervisory authority over bargaining unit members (RSA 273-A:8); (2) the newly created position has a different salary structure than current bargaining unit members; and (3) there is a genuine potential for employees to experience a division of loyalties between the public employer and the employee's exclusive representative.

On August 31, 2022, the County filed a modification petition seeking to remove the position of Sergeant from this bargaining unit. The Union objects to this petition for the following reasons: (1) no material change occurred warranting a modification to exclude the Sergeants from the already-certified bargaining unit because the creation of the Corporal position does not affect the relationship between the Sergeants and the Correctional Officers (COs) sufficiently to constitute a shift in the "circumstances surrounding the formation of an existing bargaining unit..." under Admin. R. Pub 302.05; (2) the Sergeants have a strong community of interest with other employees in the bargaining unit; (3) the interests of both the Sergeants and the COs have been adequately represented as part of the same bargaining unit for 19 years without conflicts arising; (4) the Sergeants and the COs do not experience a division of loyalties between the public employer and the employees' exclusive representative as evidenced by the fact that these positions have existed in the same bargaining unit together without incident for at least 19 years; and (5) the County's petition is barred by the rules against repetitious litigation, including res judicata and collateral estoppel because the PELRB previously concluded that the Sergeants are not supervisory employees when it certified the bargaining unit.

These cases have been consolidated for purposes of hearing and decision under Admin. R. Pub 201.11 pursuant PELRB Decision No. 2022-149; and a hearing on consolidated cases was held on October 11, 2022. The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. The parties' Statement of Uncontested Facts is incorporated into the Findings of Fact below and the decision is as follows.

Findings of Fact

1. The County is a public employer within the meaning of RSA 273-A:1, X.
2. The employees of Belknap County Jail are public employees as defined by RSA 273-A:1 (IX).

3. The Union is the exclusive representative for the Belknap County Jail employees in the positions of Sergeant and Correctional Officer. See PELRB Decision No. 2003-108 (October 6, 2003).

4. In 1977, the Union was originally certified as the exclusive representative of the following Belknap County Jail & House of Corrections bargaining unit: "Jail Guards and Psychologist and shall exclude the Superintendent and Captain." See PELRB Certification of Representative and Order to Negotiate, Case No. S-0333 (December 9, 1977). There is no evidence that the bargaining unit contained Sergeants at the time it was originally certified.

5. Since 1977, the bargaining unit was modified only once, in 2003. At that time, the Union filed an agreed upon petition for modification seeking to update the bargaining unit description. The Union provided the following reasons for its request: "Certification of Representation and Order to Negotiate (Case S-0333) has not been updated/changed since 1977. Unit employee job titles have changed. The Collective Bargaining Agreement (CBA) has kept pace but not the Certification. This is a Housekeeping issue agreed to by both parties." See PELRB Case No. S-0333 (2003 Modification Petition).¹ No unit determination hearing has been scheduled or conducted on the modification petition in 2003; and no evidence was presented by the parties as to the Sergeants' duties, responsibilities, or supervisory status.

6. The PELRB granted the 2003 petition and the bargaining unit description was modified as follows:

Unit: Correctional Officers and Sergeants.

Excluded: Superintendent, Lieutenant, Administrative Assistant, and Program Director.

¹ As the parties were notified at the hearing, the Hearing Officer takes official notice under Admin. R. Pub 203.03 (d) of all PELRB files/records of other proceedings related to the subject bargaining unit.

See PELRB Decision No. 2003-108 (October 6, 2003). The bargaining unit composition has not been reviewed or modified since 2003.

7. The parties have successfully negotiated at least five CBAs between 2003 and the present, including 2004-07, 2008-11, 2012-14, 2014-17, and 2020-23 CBAs on file with the PELRB pursuant to 273-A:16, I. The 2020-23 CBA is effective from January 1, 2020 through December 31, 2023.

8. Article I of the 2020-23 CBA, titled Recognition Clause, provides in part as follows:

Belknap County recognizes the Association as the exclusive bargaining representative within the context of RSA 273-A, as amended, for full-time and part-time regular employees in the positions of: Sergeant and Correctional Officer. Additionally, it is agreed that the following positions and employees are specifically excluded from recognition or coverage under this Agreement: Superintendent, Deputy Superintendent, Community Correctional Officer, Nurses, Administrative Assistant, Programs Director, all Department Heads, all professional and confidential employees, persons in a probationary or temporary status, employed seasonally, irregularly or on call, and all other employees of Belknap County.

See Joint Exhibit 1.

9. The parties did not negotiate over, or discuss, unit composition during the negotiations on the 2020-23 CBA.

10. In June, 2022, the County created a new position - Corporal. Superintendent Adam Cunningham developed the Corporal position description and presented it to the County Commissioners, who approved the new position.

11. On July 29, 2022, the County upgraded three existing COs to the newly created Corporal position. See Statement of Stipulated Facts at E.

12. Currently, the jail has the following "chain of command" structure: Superintendent, Captain/Deputy Superintendent (1), Lieutenant (1), Sergeants (3), Corporals (3), and Correctional Officers (23).

13. One of the reasons for the establishment of the new Corporal position was to provide consistent supervisory coverage for the period of time when Sergeants were not on duty. While COs work in three shifts, the three Sergeants work only 40 hours per week, and the Lieutenant and the Captain work from 7 am to 3 pm, Monday through Friday. This left several shifts not covered by Sergeants, the Lieutenant, or the Captain. Before the Corporal position was created, Sergeants would designate a senior CO to oversee other COs during the shifts not covered by Sergeants. However, COs do not have any disciplinary authority. Since the creation of the Corporal position, every shift is covered by either a Corporal or a Sergeant, or both.

14. 2020-23 CBA Article 21.3.F provides in part as follows:

Temporary promotion – On any shift where the sergeant is absent, a correctional officer shall be assigned by the Superintendent or Captain as the shift supervisor and shall receive an additional two dollars and fifty cents (\$2.50) per hour for all hours worked as the shift supervisor.

See Joint Exhibit 1.

15. Sergeants and COs in the bargaining unit have a history of workable and acceptable collective negotiations. They have been negotiating as one unit since at least 2003.

16. All Corporals, Sergeants, and COs who work at the Belknap County Jail must maintain certification with the NH Association of Counties.

17. Sergeants, Corporals, and COs are employees in the same historic craft or profession, corrections/law enforcement.

18. Sergeants, Corporals, and COs have the same conditions of employment and function within the same organizational unit, the Belknap County Department of Corrections.

19. Corporals, Sergeants, and COs work in a common geographic location, the Belknap County Jail, and are subject to common work rules and personnel practices.

20. Sergeants and COs have common salary and fringe benefit structures because they are covered by the same CBA. However, the COs who were promoted into the Corporal position currently have a different salary arrangement.

21. The General Summary of the CO Position Description provides as follows:

Under the general supervision of the Watch Commander provides care, custody and control of inmates. Provides protection of society through the detention and confinement of pre-trial detainees and post-trial inmates in a safe and secure environment. Ensures a safe living and working environment for staff and inmates. Performs rounds of the facility. Performs headcounts.

See Joint Exhibit 3.

22. The "Essential Job Function" of a CO include the following:

- Maintains security of assigned facility by observing and controlling inmate behavior, enforcing department rules and regulations, and reporting observations;
- Attends to inmates in an orderly manner and ensures that they receive the best treatment in all aspects of their daily lives;
- Receives inmates from law enforcement agencies. Receives, processes and classifies as assigned, incoming inmates. Processes release of inmates;
- Answers inmates' questions concerning law enforcement and legal agencies as qualified or directs questions to appropriate person(s);
- Monitors inmate movement and visitation within facility. Oversees inmate recreation, exercise and work details as assigned. Prevents altercations between inmates when possible. Works with other Correctional Officers...

For full CO Position Description, see Joint Exhibit 3 (incorporated by reference).

23. The General Summary of the Corporal Position Description provides as follows:

Under the direct supervision and direction of the Corrections Sergeant, supervises and provides the care and custody of inmates housed in the facility. Enforces policies and procedures and carries out orders as directed in a timely manner. Trains new officers.

See Joint Exhibit 4.

24. The "Essential Job Functions" of a Corporal include the following:

- Performs the duties of a Corrections Officer;
- Acts as the watch commander in the absence of the Corrections Sergeant;
- Makes supervisory recommendations to the Corrections Sergeant;

- Confers with the Corrections Sergeant to keep them informed on key issues and progress toward objectives and to gain their support and approval; makes recommendations to assist management in making needed improvements;
- Works under general supervision following departmental rules, regulations, and policies requiring the ability to plan and to perform operations to complete assigned tasks according to the prescribed time schedule;
- Maintains an orderly, safe and secure facility, and provides care, control and safety of inmates;
- Maintains security of facility through supervision of Correctional Officers and by observing and controlling inmate behavior, enforcing department rules and regulations, and reporting observations;
- ...
- Writes incident and/or accident report. Files and organizes paperwork ensuring documentation is complete and correct. Maintains a daily log of facility activities. Reports any and all problems to supervisor;
- ...
- Maintains appropriate security and confidentiality of all information and materials encountered in the performance of duties;
- Prepares lessons plans, instructs corrections officers and inmates, coordinates corrections training programs, and assists with in-service training.

For full Corporal Position Description, see Joint Exhibit 4 (incorporated by reference).

25. The Corporal Position Description section titled "Supervisory Responsibility" provides as follows:

Directly supervises the activities and performance of Correctional Officers, Tutors, Clergy, Program Instructors. Carries out any supervisory responsibilities in accordance with Belknap County's policies and applicable laws. Responsibilities include training employees; planning, assigning, and directing work; appraising performance; rewarding and disciplining employees; addressing complaints and resolving problems in the absence of the Corrections Sergeant.

See Joint Exhibit 4.

26. Corporals have authority to evaluate COs and will be conducting COs' annual evaluations.

27. The evaluations are relied upon in determining the CO's eligibility to receive a wage increase. The evaluations are also used in promotional determinations.

28. Corporals have authority to issue oral and written warnings to COs. Written warnings are placed in employees' personnel files.

29. CBA Article 20, titled "Disciplinary Action," provides for the following disciplinary procedure:

1. Oral reprimand;
2. Written reprimands;
3. Suspension without pay;
4. Demotion;
5. Dismissal. (Dismissal will be controlled by and undertaken pursuant to RSA 28:10-a as amended. It is specifically agreed by the parties that any dismissal pursuant to this section shall not be reviewable pursuant to the grievance procedure of this contract but will be reviewable only pursuant to the provisions or the review set forth therein).

See Joint Exhibit 1.

30. The CBA Article 20.2 also provides that:

Any documentation of oral warnings shall include a narrow and brief statement of the reasons for the oral warning. An oral warning shall not be considered to be a written warning. Oral warning shall not be grievable higher than the department head. All written warning shall be placed in the employee's personnel file at the time they are given...

See Joint Exhibit 1.

31. Corporals perform the duties of a Sergeant when Sergeants are not on duty. Corporals have authority to call a CO back to duty, if necessary, and to assign tasks to a CO. They also have authority to send a CO home, if necessary, e.g. if an employee comes to work inebriated.

32. The General Summary of the Sergeant Position Description provides as follows:

Under the general supervision of the Deputy Superintendent and Superintendent, supervises and provides the care and custody of inmates housed in the facility. Enforces policies and procedures and carries out orders as directed in a timely manner. Trains new officers.

See Joint Exhibit 5.

33. The Sergeant Position Description section titled "Supervisory Responsibility" provides as follows:

Directly supervises the activities and performance of Correctional Officers, Tutors, Clergy, Program Instructors. Carries out any supervisory responsibilities in accordance

with Belknap County's policies and applicable laws. Responsibilities include interviewing hiring [sic], and training employees; planning, assigning, and directing work; appraising performance; rewarding and disciplining employees; addressing complaints and resolving problems.

See Joint Exhibit 5.

34. The "Essential Job Functions" of a Sergeant include the following:

- Works under general supervision following departmental rules, regulations, and policies requiring the ability to plan and to perform operations to complete assigned tasks according to the prescribed time schedule.
- Confers with upper management to keep them informed on key issues and progress toward objectives and to gain their support and approval; makes recommendations to assist management in making needed improvements.
- Maintains an orderly, secure facility, and provides care, control and safety of inmates.
- ...
- Maintains security of assigned facility through supervision of Correctional Officers and by observing and controlling inmate behavior, enforcing department rules and regulations, and reporting observations;
- ...
- Monitors inmate movement and visitation within facility. Oversees inmate recreation, exercise and work details as assigned. Prevents altercations between inmates when possible. Works with other Correctional Officers;
- ...
- Writes incident and/or accident report. Files and organizes paperwork ensuring documentation is complete and correct. Maintains a daily log of facility activities. Reports any and all problems to supervisor;
- ...
- Assists in updating policies, operational procedures, programs, and statistical data;
- Provides information and tours for outside agencies and authorized visitors;
- Prepares lesson plans, instructs corrections officers and inmates, coordinates corrections training programs, and assists units with in-service training;
- May serve in specialized assignments, e.g. Assist with the monitoring of inmate phone calls to help with local agencies and any phone recording requests. Maintain and control the employee scheduling and leave requests...

Sergeants are required to have a knowledge of "effective Supervisory principles, practices, and techniques" and be skilled in "supervising effectively." The Sergeant Position Description has not changed since at least June, 2013. For full Sergeant Position Description, see Joint Exhibit 5 (incorporated by reference).

35. Sergeants participate on oral hiring boards that conduct initial interviews of applicants and help determine whether an applicant is a good fit for the job.

36. Sergeants set the COs' schedules, assign tasks, assure staffing, and order employees to work overtime if necessary. They are in charge of the facility in the absence of a superior officer. They have authority to issue verbal warnings and written warnings, which are placed in employees' personnel files. They conduct performance evaluations of COs. The score a Sergeant assigns to an employee in an evaluation is the basis for a merit pay increase. The Lieutenant reviews the completed evaluations for accuracy but does not change the scores assigned by a Sergeant.

37. Captain, Lieutenant, Sergeants, and Corporals participate in monthly supervisory meetings, during which they discuss facility operations, policy changes, staff interactions, staff training, and other issues. They don't discuss specific staff members.

38. All employees of the Belknap County Jail, including the Lieutenant, the Captain, and the Superintendent perform the CO's duties when necessary.

39. Because of the establishment of the new Corporal position, the Sergeants have more time to dedicate to the supervision of other bargaining unit employees as they now spend less time overseeing inmates.

Decision and Order

Decision Summary:

Union's modification petition: The evidence shows that Corporals are supervisory employees within the meaning of RSA 273-A:8, II with respect to Correctional Officers. Accordingly, the Union's request to add the Corporal position to the existing bargaining unit is denied and the Union's modification petition is dismissed.

County's modification petition: The circumstances surrounding the formation of the current Belknap County Jail bargaining unit have changed sufficiently to justify the filing of the

modification petition. The Sergeants are supervisory employees within the meaning of RSA 273-A:8, II with respect to Correctional Officers. Accordingly, the County's petition to remove the position of Sergeant from the bargaining unit is granted.

Jurisdiction

The PELRB has jurisdiction of all petitions to determine and modify bargaining units pursuant to RSA 273-A:8² and Admin. R. Pub 302.05. See also *Prof. Fire Fighters of Wolfeboro v. Town of Wolfeboro*, 164 N.H. 18, 22 (2012) and *Appeal of the University System of N.H.*, 120 N.H. 853, 854 (1980).

Discussion:

Modifications of existing bargaining units are governed by Admin. R. Pub 302.05, which provides in relevant part as follows:

(a) Where the circumstances surrounding the formation of an existing bargaining unit are alleged to have changed, or where a prior unit recognized under the provisions of RSA 273-A:1 is alleged to be incorrect to the degree of warranting modification in the composition of the bargaining unit, the public employer, or the exclusive representative, or other employee organization if the provisions of section (d) are met, may file a petition for modification of bargaining unit.

(b) A petition shall be denied if:

(1) The question is a matter amenable to settlement through the election process; or

(2) The petition attempts to modify the composition of a bargaining unit negotiated by the parties and the circumstances alleged to have changed, actually changed prior to negotiations on the collective bargaining agreement presently in force.

The language of Admin. R. Pub 302.05 leaves the PELRB discretion in deciding whether or not to grant petitions to modify. See *Appeal of the Bow School District*, 134 N.H. 64, 73 (1991).

²"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..." RSA 273-A:8, I.

In accordance with Admin. R. Pub 302.05 (a), contested modification petitions must be supported by the evidence demonstrating either that the circumstances have changed since the formation of the bargaining unit relative to bargaining unit composition or that the unit "is incorrect to the degree warranting modification."³ See *Rochester Municipal Managers Group and City of Rochester*, PELRB Decision No. 2009-182 (September 3, 2009) See also *Salem Public Administrators' Association and Town of Salem*, PELRB Decision No. 2009-171 (August 18, 2009); *Teamsters Local 633 of New Hampshire and Town of Hooksett*, PELRB Decision No. 2008-193 (September 25, 2008). Examples of a change in circumstances that may warrant modification of a bargaining unit include the creation of a new position,⁴ a modification of a job description/duties,⁵ and an increase in working hours resulting in a material change in the nature of the position (e.g. an increase in daily contact with students, teachers and parents sufficient to permit a school nurse to be included in the teachers' bargaining unit because it intensified the community of interest between the school nurses and the teachers.⁶)

I. Union's Modification Petition

The Union argues that the inclusion of the newly-created Corporal position to the existing

³ Admin. R. Pub 302.05 (b) (2) does not come into play unless there is evidence that the parties actually negotiated a bargaining unit composition during the most recent CBA negotiations. The purpose of this subsection is to "prevent the parties to the CBA from agreeing to unit composition and then entering the CBA on that basis and thereafter ... appearing at the PELRB and, contrary to the prior agreement on the unit composition and the CBA, asking the PELRB to alter the bargaining unit." See *New England Police Benevolent Assn, Local 50 & 55 and State of New Hampshire, Dept of Safety, DMV*, PELRB Decision No. 2006-169 (October 5, 2006). In this case, there is no evidence of such negotiations taking place during the bargaining on the most recent CBA. See Findings of Fact at 9.

⁴See *New Hampshire Retirement System and State Employees Association of New Hampshire, Inc., SEIU Local 1984*, PELRB Decision No. 2013-262 (June 30, 2015), rev'd on other grounds, *Appeal of New Hampshire Retirement System*, 167 N.H. 685 (2015). See also *Town of Gilford and AFSCME Council 93, Local 534, Gilford Public Works Employees*, PELRB Decision No. 2015-196 (August 31, 2015).

⁵*Windham School District, SAU #95 and Windham Education Association, Affiliated with NHEA/NEA*, PELRB Decision No. 2015-148 (June 30, 2015). See also *Freedom School Employees Association, NEA-NH and Freedom School District*, PELRB Decision No. 2008-207 (October 13, 2008).

⁶*Appeal of Bow School District*, supra, 134 N.H. at 73.

bargaining unit is appropriate because there has been a change in circumstance, i.e. the establishment of a new position, and because the Corporals share a community of interest with the other employees in the bargaining unit. The County objects to the petition on the ground, among others, that the Corporals are supervisory employees within the meaning of RSA 273-A:8, II and, therefore, should not be included in the same unit with the COs, the employees they supervise.

The threshold requirement of a change in circumstances is satisfied in this case with respect to the Corporal's position because this is a new position and the creation of a new position is a change in circumstances that may indeed warrant a modification of a bargaining unit. See *Town of Gilford and AFSCME Council 93, Local 534, Gilford Public Works Employees*, PELRB Decision No. 2015-196 (August 31, 2015). However, the Corporals cannot be included in the bargaining unit with the COs if they are statutory supervisory employees.

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). Furthermore, employees with certain authority, regardless of whether it is presently exercised, are supervisors under RSA 273-A:8, II. See *Appeal of New Hampshire Retirement System*, 167 N.H. 685, 692 (2015). See also *Appeal of University System of N.H.*, 131 N.H. 368, 376 (1988).

In determining whether an employee exercises “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.* In these circumstances, 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 court found that the sergeant was a supervisory employee within the meaning of RSA 273-A:8, II. *Id.* 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.* 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”).

The Corporals in this case have authority and responsibilities similar to those of the corporal in the *Moultonborough* case. The Corporals here have authority to issue verbal and written warnings to COs and these warnings are placed in employees’ personnel files. They also have authority to conduct COs’ annual performance evaluations and the score they assign to a CO in an evaluation is a basis for an award of a merit pay increase. In addition, the Corporals have authority to assign tasks and send an employee home, if necessary. They are in charge of the facility in the absence of a superior officer.

The Union’s reliance on the fact that Corporals perform the same duties as COs is misplaced because, as the Supreme Court stated in *Stratham*, the “concurrent responsibility of [an employee] ... to perform the same duties as that of the other officers, under the same rules and departmental policy, does not diminish [his/her] supervisory responsibility.” *Appeal of Town of Stratham*, supra, 144 N.H. at 432.

Based on the foregoing, the Corporals exercise supervisory authority involving the significant exercise of discretion and are supervisory employees within the meaning of RSA 273-A:8, II. The Union's petition to add the position of Corporal to the existing Belknap County Jail bargaining unit is, therefore, denied.

II. County's Modification Petition

The County argues that the position of Sergeant should be removed from the bargaining unit because Sergeants are supervisory employees within the meaning of RSA 273-A:8, II and should not be included in the same unit with the employee they supervise as this creates a division of loyalties between the public employer and the employees' exclusive representative. The Union objects to the petition on the grounds that the County failed to prove that there has been a change in circumstances since the last time the unit was modified or that Sergeants are statutory supervisory employees. The County counters that the creation of the Corporal position is a change in circumstances required under Admin. R. Pub 302.05 (a).

The threshold consideration in this case is whether the County has met its burden of proving by a preponderance of the evidence that a change in circumstances has occurred since the bargaining unit composition was last certified. See Admin. Rules Pub 302.05 and Pub 201.06 (c). See also *Rochester Municipal Managers Group and City of Rochester*, PELRB Decision No. 2009-182; *Salem Public Administrators' Association and Town of Salem*, PELRB Decision No. 2009-171; *Teamsters Local 633 of New Hampshire and Town of Hooksett*, PELRB Decision No. 2008-193.

In *Appeal of New Hampshire Retirement System*, supra, 167 N.H. at 693, the court found that the team leads were statutory supervisory employees and that there was a sufficient change in circumstances to justify their removal from the existing bargaining unit. In that case, the team leads had been in a bargaining unit for a period of time and always had supervisory responsibilities in

their job descriptions, but never exercised them. *Id.* at 688. Although there were no changes to the team leads' job descriptions, the new management wanted them to start exercising these supervisory responsibilities. *Id.* The court found that this was a sufficient change in circumstances to justify the modification of the unit and the removal of team leads from the bargaining unit as statutory supervisory employees. *Id.* at 688.

Conversely, in *Rochester Municipal Managers Group and City of Rochester*, PELRB Decision No. 2009-182, the union petitioned to modify a recently certified bargaining unit by adding a communications supervisor position. This position existed and was filled at the time the unit was certified. *Id.* The communications supervisor position was not included in the previous certification petition due to an oversight and the only change since the issuance of the certification was the change in the employee's status from probationary to permanent. *Id.* The Union's petition was dismissed on the grounds that the change in the employee's status from probationary to permanent was not a material change in circumstances warranting modification and that the correction of an oversight, or a mistake, was not a sufficient ground for filing a modification petition. *Id.*

The circumstances of this case are akin to those in *Retirement System*. Like team leads' job descriptions in *Retirement System*, the job description for the Sergeant position has not changed since at least June, 2013. However, with the creation of the Corporal position, there has been a change in the facility's hierarchical structure. This change affects the bargaining unit employees' relationships and, in part, Sergeants' responsibilities, as the Sergeants will now be dedicating more time to the supervision of COs. Based on the evidence relating to the new Corporal position, the County has alleged and proven a sufficient change in circumstances within the meaning of Admin. R. Pub 302.05 (a).

The next issue is whether the Sergeants are supervisory employees within the meaning of RSA 273-A:8, II with respect to other members of the bargaining unit. Again, *Retirement System, Moultonborough*, and *Stratham* are instructive on this point. Like the sergeants in *Moultonborough*, the Sergeants in this case conduct COs' performance evaluations and the score they assign to employees in the evaluations directly affect the employees' merit pay increases. They have authority to discipline the COs. This discipline includes verbal and written warnings, which are placed in the employees' personnel files. They participate in hiring interviews, schedule work, assign tasks, recall employees back to work if necessary, and have authority to send an employee home if necessary, for example, if an employee comes to work inebriated. The Sergeants are also in charge of the facility in the absence of a superior officer.

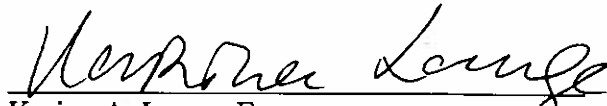
Further, like in *Stratham*, the Union's reliance on the fact that Sergeants often perform the same duties as COs is misplaced because "concurrent responsibility" of Sergeants to perform the same duties as COs, "under the same rules and departmental policy, does not diminish [their] supervisory responsibility." *Appeal of Town of Stratham*, supra, 144 N.H. at 432.

Finally, although the Union mentions in its objection that the County's petition is barred by the rules against repetitious litigation, including res judicata and collateral estoppel because the PELRB "has already concluded that the sergeants are not supervisors when it certified the bargaining unit," the Union failed to brief this issue. Furthermore, as stated in the Findings of Fact at 5, Sergeants were added to the bargaining unit in 2003 by the parties' agreement. No hearing was held on the unit determination and no evidence was submitted to the PELRB regarding the Sergeants' duties, responsibilities, or supervisory status when the parties asked the PELRB to modify the bargaining unit in 2003 as a matter of "housekeeping." Therefore, the PELRB had never determined or concluded that the Sergeants were not supervisors.

For the foregoing reasons, the Sergeants exercise supervisory authority over COs and are supervisory employees within the meaning of RSA 273-A:8, II. Therefore, Sergeants cannot be in the same bargaining unit with COs. Accordingly, the County's petition to remove Sergeants from the bargaining unit is granted. Based on the foregoing, it is unnecessary to address the other objections raised by the Union and the County. A Unit Modification order shall issue in due course.

So ordered.

Date: 12/05/2022


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

Distribution: Gary Snyder, Esq.
Paul T. Fitzgerald, Esq.
Kyle W.T. Amell, Esq.