This decision was reversed on appeal per October 27, 2011 Supreme Court order in *Appeal of Town of Deerfield*, NH Supreme Court Case No. 2010-764.

STATE OF NEW HAMPSHIRE

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

New England Police Benevolent Association, IUPA, AFL-CIO

and

Town of Deerfield

Case No. G-0139-1

Decision No. 2010-131

Appearances:

Kevin E. Buck, Esq., Nolan Perroni Harrington, LLP, Lowell, Massachusetts for New England Police Benevolent Association, IUPA, AFL-CIO

Robert Upton II, Esq., Upton & Hatfield, LLP, North Conway, New Hampshire for Town of Deerfield

Background:

New England Police Benevolent Association, IUPA, AFL-CIO filed a written majority authorization (WMA) petition for certification on March 24, 2010 seeking to represent certain employees of the Town of Deerfield Police Department. The Town of Deerfield objects to the certification claiming that the proposed bargaining unit does not contain a minimum of ten employees required under RSA 273-A:8, includes supervisory and confidential employees in violation of RSA 273-A:8, II and RSA 273-A:1, IX (c), respectively, and lacks a community of interest because it contains supervisory and confidential employees.

The undersigned hearing officer conducted a hearing on May 7, 2010 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 timely filed post-hearing briefs and the record is closed.

Findings of Fact

1. Town of Deerfield (Town) is a public employer within the meaning of RSA 273-A:1, IX. The Town is governed by a Board of Selectmen.

2. New England Police Benevolent Association, IUPA, AFL-CIO (Union) is an employee organization seeking to be certified as the exclusive representative of a bargaining unit consisting of certain employees of the Deerfield Police Department through written majority authorization pursuant to RSA 273-A:10, IX.

3. The proposed bargaining unit consists of the following positions: Corporal, full time Patrolman, part time Patrolman, and Department Secretary.

4. The present WMA petition for certification was filed on March 24, 2010, and the authorization cards were examined on March 30, 2010. See PELRB Report Re: Confidential Inspection of Written Majority Authorization Cards. At the time the petition was filed and at the time the PELRB examined the authorization cards, the proposed bargaining unit contained ten employees.

5. Officer Craig Maloney retired from the position of full time Patrolman in November, 2009. From November, 2009 until May 1, 2010 Officer Maloney continued to work as a Patrolman on a regular part time work schedule. On May 1, 2010 his employment status changed to that of an "on call" Patrolman. Officer Maloney is presently an "on call" employee with no regular shift. Officer Maloney's "on call" employment contract is a six-month contract ending in October, 2010.

6. At the time the present petition was filed and at the time the PELRB examined the authorization cards, Officer Maloney was a regular part time Patrolman, and as such, a member of the proposed bargaining unit.

7. The Police Department has had one vacant/unfilled full time position since Officer Maloney retired from the full time employment in November, 2009. This position is

funded. The Police Department has been advertising the vacant position in the newspaper and has been interviewing the candidates. The Chief of Police intends to fill the position prior to October, 2010.

8. Michael Greeley has been employed by the Deerfield Police Department for nine years: first in the rank of Lieutenant and, since July, 2007, as the Chief of Police. Chief Greeley has worked in law enforcement since 1988.

9. The Corporal is currently second in command in the Police Department. The duties of the Corporal include patrol, firearms instructions, and field training. The field training is also performed by the Chief of Police and by the Patrolmen. The Corporal goes on patrol in a marked cruiser. His uniform is exactly the same as a Patrolman's uniform.

10. The performance evaluations are conducted by the Chief of Police. The Corporal has no role in the annual performance evaluation process. The Chief reviews evaluations with the Officers.

11. Only the Chief has authority to discipline the employees of the Police Department. If the Corporal has a disciplinary issue with one of the employees, he reports it to the Chief and the Chief determines how to proceed.

12. The Police Department's policies and procedures were drafted before Michael Greeley became the Chief. The Chief, and not the Corporal, supplements or amends them if and when it becomes necessary.

13. The Corporal has no access to personnel files. The files are held in a locked cabinet in the Chief's office. Only the Chief has access to the personnel files.

14. The Chief schedules Officers to work.

15. The Chief formulates budget requests after taking suggestions from everyone in the Department. He does not review budget proposals with anyone within the Department.

16. When the Chief is away, the Corporal is in charge of the Department and the Chief is accessible over the phone. The Corporal has no authority, under the written job description or otherwise, to impose discipline when the Chief is away. The Detective is also sometimes in charge of the Department and can perform the same duties as the Corporal when the Chief and the Corporal are both absent.

17. The Chief, not the Corporal, has authority to award meritorious pay increases.

18. In the hiring process, the Corporal gathers information regarding the candidate. The final decisions on hiring and firing are made by the Chief.

19. Glenda Smith is a full time Department Secretary and part time Patrolman. When she acts as a Patrolman, she wears the Patrolman's uniform. When she works as the Secretary, she wears civilian clothes. The Department Secretary's work schedule is Monday through Friday 8:00 AM to 4:00 PM. As a Patrolman she only serves on work details.

20. As part of her duties, the Department Secretary prepares arrest statistics, handles mail, files documents with the Court, types the dictations, and transcribes the suspects' interviews. She prepares arrest statistics monthly by taking information from the logs. Her filing activity involves court paperwork, citations, and reports. As Department Secretary, she has access to the payroll information. She picks up mail at the post office and opens the mail. The Department email comes to her.

21. The Department Secretary has no access to the personnel files. When she gets the information from a training certification, she puts it into a separate file, not into a personnel file. She does not put disciplinary paperwork or documents into the personnel files.

22. The Chief occasionally has meetings with the Selectmen regarding the budget. The Secretary is not present during these meetings. If there are any notes from the meeting, the Chief does not give them to the Department Secretary to type or transcribe.

23. When the Chief prepares the budget, he constructs line items indicating how the funds will be allocated. The Secretary has no role in the budget preparation process.

24. The Department Secretary does not type performance evaluations.

25. All employees in the proposed bargaining unit, including the Department Secretary/part time Patrolman, are in the same historic craft or profession of law enforcement and function within the same organizational unit, i.e. the Town of Deerfield Police Department.

26. All employees in the proposed bargaining unit share a common geographic location - the Town of Deerfield Police Department.

Decision and Order

Decision Summary

The Corporal is not a supervisory employee within the meaning of RSA 273-A:8, II, as he does not exercise supervisory authority involving the significant exercise of discretion, and is, therefore, properly included in the bargaining unit. The Department Secretary is not a confidential employee within a meaning of RSA 273-A:1, IX (c), as her duties do not imply a confidential relationship to the public employer, and is, therefore, properly included in the bargaining unit. The proposed bargaining unit shares a sufficient community of interest. Finally, the Union's petition is granted even though a temporary vacancy occurred during the pendency of these proceedings which reduced the number of employees from ten to nine.

Jurisdiction

The PELRB has jurisdiction of all petitions to determine bargaining units and certify the exclusive representative of an approved bargaining unit through the process of written majority authorization pursuant to RSA 273-A:8, 273-A:10, IX, and Pub 301.05.

Discussion

The Town claims that the Corporal is a supervisory employee within the meaning of RSA 271-A:8, II and, therefore, should be excluded for the bargaining unit. RSA 273-A:8, II provides

that the "[p]ersons exercising supervisory authority involving the significant exercise of discretion may not belong to the same bargaining unit as the employees they supervise." In determining whether an employee exercises supervisory authority, 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,* 144 N.H. 429, 432 (1999). See also *NEPBA, Inc. Local 40/NH Fish & Game Conservation Officers et al. v. SEA/SEIU Local 1984*, PELRB Decision No. 2006-174. "Supervisory employees are separated from the employees they supervise 'to avoid conflicts between the two groups because of the differing duties and relationships which characterize each group.'" *Appeal of Town of Stratham,* 144 N.H. at 432. See also *New England Police Benevolent Association, Inc., Local 50 et al. v. State of New Hampshire, Department of Safety, DMV*, PELRB Decision No. 2006-169. "[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. 607, 611 (1993). See also *Tilton Police Union, NEPBA Local 29 and Town of Tilton*, PELRB Decision No. 2007-100. 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 AFSCME Council 93, Local 3657 v. Town of Merrimack,* PELRB Decision No. 2010-010.

In the present case, the Town's evidence is insufficient to prove that the Corporal exercises supervisory authority involving the significant exercise of discretion. The Corporal has no authority to hire, fire, or discipline employees. He plays no role in annual performance evaluation process and has no access to the personnel files. He is not involved in scheduling, budget preparation, or policy-making processes. Even when the Chief is absent, the Corporal does not have authority to impose discipline on his own. Accordingly, the position of Corporal is

not a supervisory position within the meaning of RSA 271-A:8, II and is properly included in the bargaining unit.

The Town also seeks to exclude the position of Department Secretary claiming that this position is confidential. RSA 273-A:1, IX (c) excludes confidential employees from the definition of a "public employee." Confidential employees are "[p]ersons whose duties imply a confidential relationship to the public employer." RSA 273-A:1, IX (c). The PELRB has previously defined "confidential employees" as those employees who have "access to confidential information with respect to labor relations, negotiations, significant personnel decisions and the like." *State of New Hampshire, Dept. of Rev. Administration v. State Employees' Ass'n*, PELRB Decision No. 78001. See also *Teamsters Local 633 of NH/Newmarket Public Works Employees and Town of Newmarket*, PELRB Decision No. 2008-127.

In the present case, the Town's evidence is insufficient to prove that the Department Secretary is a confidential employee. The Town failed to offer sufficient evidence demonstrating that the duties and responsibilities of the Department Secretary involve handling confidential personnel matters or matters related to the labor relations. On the contrary, the evidence demonstrates that the Department Secretary does not have access to the personnel files, does not type performance evaluations, and has no role in budget preparation process. Neither does she place the disciplinary documentation in the personnel files. She is not present at the budget meetings between the Selectmen and the Chief and does not type or transcribe the notes from such meetings. Accordingly, the position of Department Secretary is not a confidential position within the meaning of RSA 273-A:1, IX (c) and is properly included in the bargaining unit.

The Town further argues that the members of the proposed bargaining unit lack a community of interest because the Corporal is a supervisory employee and the Department Secretary is a confidential employee. The Town does not claim that the proposed unit otherwise lacks a community of interest. As the undersigned hearing officer finds that the Town's evidence

is insufficient to prove that the Corporal is a supervisory employee and the Department Secretary is a confidential employee, the Town's claim of the lack of community of interest is without merit. In addition, the evidence proves that the members of the proposed bargaining unit, including the Department Secretary who is a part time Patrolman, are in the same historic craft or profession, function within the same organizational unit, and share a common geographic location. See RSA 273-A:8, I[1] and Pub 302.02 (b)[2]. Accordingly, the proposed bargaining unit has a requisite community of interest.

The Town also argues that the proposed bargaining unit does not meet the ten-employee minimum required by RSA 273-A:8, I because of Officer Maloney's change in status from a regular part time Officer to an "on call" Officer. RSA 273-A:8, I provides in relevant part:

> A public employer may recognize a bargaining unit with 3-10 members, but in no case shall the board certify a bargaining unit of fewer than 10 employees with the same community of interest without the prior approval of the governing body of the public employer. . . .

In the present case, the Union filed the present WMA petition for certification on March 24, 2010, and the PELRB representative examined the authorization cards on March 30, 2010. It is undisputed that Officer Maloney's employment status changed from regular part time to "on

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[1]RSA 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.)

[2] Pub 302.02 (b) provides additional criteria for determining whether the 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.

call" on May 1, 2010. RSA 273-A:8, I does not specify at precisely what stage of the often lengthy certification process, which includes the filing of a petition, the examination of the authorization cards, the adjudicatory hearing, the filing of the post-hearing briefs and closing of the record, the issuance of the order on the merits, the issuance of the order on motions for rehearing, if any, and the issuance of the certification, the number of employees in the proposed unit be examined. However, RSA 273-A:10, IX and Pub 301.05 provide that the PELRB must examine the sufficiency of the authorization cards within ten days after the filing of the WMA petition for certification, absent exceptional cause. This administrative examination, involving a review of the authorization cards using the "employee list" submitted by the Town per Pub 301.05 (j) (2), demonstrated that at the time the petition was filed the proposed bargaining unit contained ten employees, thereby satisfying the ten-employee minimum requirement imposed by RSA 273-A:8, I.

The effect of the Town's argument is that the Union must prove that the ten-employee requirement was satisfied not just at the time the petition was prepared and filed, but throughout the course of the entire proceedings. This interpretation of the statute is not persuasive because it would frustrate the purposes of RSA 273-A[3] by encouraging "on-going fluctuation or tinkering, for whatever reason(s), above or below the statutorily required ten employees" during the certification process, from the filing of the petition to the issuance of the certification order, which often takes several months:

> This would make the obligation to bargain an ever changing 'moving target' vis-à-vis the requirement to negotiate in good faith. In order to avoid such a situation, we take a 'snapshot' of the status of the bargaining unit as of the time it is organized and recognized whether by mutual agreement or by decision. If this 'snapshot' passes the 'rule of ten' test,

[3] "[T]he legislature enacted RSA chapter 273-A because 'it is the policy of the state to foster harmonious and cooperative relations between public employers and their employees and to protect the public by encouraging the orderly and uninterrupted operation of government.' Laws 1975, 490:1." *Appeal of City of Laconia,* 150 N.H. 91, 94 (2003).

> then the obligation to bargain attaches; to hold otherwise would make that obligation an unacceptable 'moving target.'

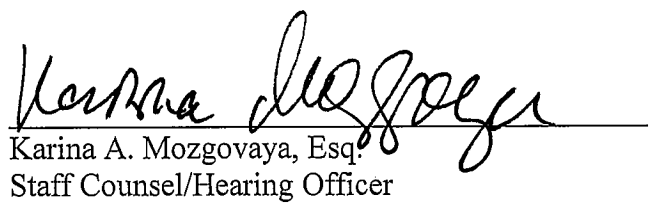
See State Employees' Association of New Hampshire Local 1984 v. Town of Ashland, PELRB Decision No. 1999-120. The "snapshot" of the numerical sufficiency of the proposed bargaining unit is taken at the time the PELRB examines the authorization cards pursuant to RSA 273-A:10, IX. This involves a review of the "employee list" and an administrative determination of, among other things, whether the petition, when filed, satisfied the ten-employee minimum requirement.

This is not to say that evidence concerning changes affecting the proposed bargaining unit which happen during the pendency of the proceedings is never relevant. For example, evidence that a position has been legitimately and permanently vacated or eliminated subsequent to the filing of a petition could lead to a finding that the petition does not meet the ten-employee requirement. However, such circumstances are not present in this case. "Given that the position still exists and could be filled at any time, we again have a 'moving target' on the issue of 'getting to ten,' an eventuality which would foster ineffective and uncertain labor relations contrary to the purposes of RSA 273-A." *State Employees' Association of New Hampshire Local 1984 v. Town of Ashland*, PELRB Decision No. 1999-120.

Accordingly, the approved bargaining shall consist of the following positions: Corporal, full time Patrolman, part time Patrolman, and Department Secretary. As the number of the authorization cards is sufficient to establish a written majority authorization, the Union's petition for certification is granted. A Certification of Representative and Order to Negotiate shall issue in accordance with Pub 301.05 (m).

So ordered.

July 27, 2010



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