NH Supreme Court reversed and remanded this decision on 05-22-2015. Slip Op. No. 2014-312. NH Supreme Court Case No. 2014-312

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

New Hampshire Retirement System

and

State Employees Association of New Hampshire, Inc., SEIU Local 1984

Case No. G-0100-3
Decision No. 2013-262

Appearances:

Edward M. Kaplan, Esq., Sulloway & Hollis, PLLC, Concord, New Hampshire, for the Petitioner

Glenn R. Milner, Esq., Molan, Milner and Krupski, PLLC, Concord, New Hampshire, for the Respondent

Background:

The New Hampshire Retirement System (NHRS) filed a petition for modification on March 8, 2013 requesting that the following positions be added to the positions specifically excluded from the existing bargaining unit: Retiree Services Team Lead, Employer Auditing Team Lead, Employer Reporting Team Lead, Member Accounts Team Lead (collectively, Team Leads), Controller, Public Information Officer, Process Improvement Manager, Project Manager, and Regulatory Compliance Officer/Staff Attorney. The NHRS argues that the Team Leads, Public Information Officer, and the Controller are supervisors within the meaning of RSA 273-A:8, II; that the Process Improvement Manager, the Project Manager, and the Public Information Officer are confidential employees within the meaning of RSA 273-A:1, IX (c); and that the newly-created position of Regulatory Compliance Officer/Staff Attorney is confidential and professional position that does not share a community of interest with the exiting bargaining unit.

The State Employees Association of New Hampshire, Inc., SEIU Local 1984 (Union) objects to the petition and argues, among other things, that the circumstances have not changed to a degree warranting modification of the unit as required under Pub 302.05 and that the positions at issue are not supervisory, confidential or otherwise inappropriate so as to warrant the exclusion from the bargaining unit.

An adjudicatory hearing was originally scheduled for May 20, 2013 but, at the parties' requests, was continued three times and was ultimately conducted on September 3, 2013 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 submitted post-hearing briefs on September 17, 2013; and the decision is as follows.

Findings of Fact

1. The NHRS is a public employer within the meaning of RSA 273-A:1, IX.

2. The Union was certified by the PELRB on September 13, 1978 as the exclusive representative of the agreed upon NHRS bargaining unit following a representation election. The PELRB 1978 Certification of Representative and Order to Negotiate contained the following bargaining unit description:

> Classified state employees; i.e., Account Clerk II, Accountant II, Accounting Technician, Auditor I, Clerk Stenographer III, Clerk Typist II and Retirement Counselor. EXCLUDED: Assistant Secretary N.H. Retirement System.

The NHRS bargaining unit is not a "grandfathered" or "recognized" unit. See PELRB Certification of Representative and Order to Negotiate, Case No. S-0340.

3. On May 6, 2004, based on the Union's agreed upon petition to modify, the PELRB issued a Modification of Certified Bargaining Unit setting forth the following agreed upon unit description: "Employees of the NH Retirement System, with the exception of those employees excluded from the definition of public employee under the provisions of RSA 273-

A:1, IX." See PELRB Decision No. 2004-055 (Case No. S-0340).

4. On June 11, 2009, based on the Union's agreed upon petition for modification, the PELRB issued a Modification of Certified Bargaining Unit setting forth the following agreed upon bargaining unit description:

> Employees of the NH Retirement System, with the exception of those employees excluded from the definition of public employees under the provisions of RSA 273-A:1, IX. The following positions are specifically excluded: executive director, chief legal counsel, director of investments, chief member services officer, business and financial operations director, employer services director, information technology director, human resources director/public information officer, internal auditor, hearings examiner, paralegal, executive assistant.

See PELRB Decision No. 2009-116 (Case No. G-0100-1).

5. On March 22, 2010, based on the Union's agreed upon petition for modification, the PELRB issued a Modification of Certified Bargaining Unit setting forth the following agreed upon unit description:

> Employees of the NH Retirement System, with the exception of those employees excluded from the definition of public employees under the provisions of RSA 273-A:1, IX.
>
> The following positions are specifically excluded: executive director, chief legal counsel, director of investments, business and financial operations director, employer services director, information technology director, human resources director/public information officer, internal auditor, hearings examiner, director of member services, human resources coordinator, and administrative coordinator.

See PELRB Decision No. 2010-059 (Case No. G-0100-2).

6. The parties entered into the July 1, 2009 - June 30, 2011 collective bargaining agreement (CBA) on April 16, 2010. The 2009-2011 CBA Recognition Clause provides in part as follows:

> The Employer recognizes the Association which shall serve as exclusive representative of all employees of the NHRS, within the bargaining unit with the exception of those employees excluded from the definition of public employee under the provisions of RSA 273-A:1, IX.

See Joint Exhibit.

7. On December 7, 2011 the parties entered into a CBA with effective dates from

July 1, 2011 through June 30, 2013. The language in the Recognition Clause of the 2011-2013 CBA is the same as the language in the Recognition Clause of the 2009-2011 CBA.

8. The following positions/job descriptions were established/amended as follows:

- The Retiree Services Team Leader position. There is no evidence as to when this position of was established; and the job description for this position was last amended on November 28, 2012.
- The Employer Auditing Team Lead position was established on October 3, 2008; and the job description was last amended on October 1, 2012.
- The Employer Reporting Team Lead position was established on March 10, 2008; and the job description was last amended on October 1, 2012.
- The Member Accounts Team Lead position was established on February 2, 2008; and the job description was last amended on October 25, 2011.
- The Controller position was established on October 25, 2011; and the job description was last amended in 2011.
- The Public Information Officer position was established on August 15, 1988; and the job description was last amended in May of 2011.

See NHRS Exhibit 6. No evidence was offered to show in what manner these job descriptions were amended.

9. It appears that at some point the Public Information Officer position was restructured into a Human Resources Director/Public Information Officer position. This combined position was excluded from the bargaining unit based upon the parties' agreement. See PELRB Decisions, Nos. 2009-116 and 2010-059. It also appears that this position no longer exists. Instead, there are now two separate positions: the Human Resources Manager position and the Public Information Officer position. A separate position of Human Resources Manager was created in June of 2012. See NHRS Exhibit 6. The parties agree that this position is excluded from the bargaining unit.

10. The parties agree that the separate Public Information Officer position has been, until now, treated by both parties as included in the bargaining unit.

11. The job descriptions for the positions of Retiree Services Team Lead, Employer Auditing Team Lead, Employer Reporting Team Lead, Member Accounts Team Lead, Controller, and Public Information Officer contain the following language:

> Carries out supervisory responsibilities in accordance with the organization's policies and applicable laws. Responsibilities include interviewing, hiring and training employees; planning, assigning and directing work; appraising performance; rewarding and disciplining employees; addressing complaints and resolving problems.
>
> . . .
>
> Actively participates in NHRS' Management Team, including development and implementation of strategic planning initiatives, collaborative problem-solving and various project initiatives.

12. George Lagos has been the NHRS Executive Director since February 1, 2012. His main responsibility is to manage the NHRS. He reports to the NHRS Board. Since becoming the NHRS Executive Director, Mr. Lagos has reviewed NHRS procedures, methodology, written policies, and some of the job descriptions. He has met with the Trustees and the management team in order to understand their roles in organizational structure. His goal was to develop a business plan.

13. According to Mr. Lagos, he concluded based on his review that the NHRS lacked management structure because the management team lacked responsibility, accountability, and authority. Mr. Lagos' concern was that managerial employees did not have a proper sense of what their authority and responsibilities were. Prior to Mr. Lagos' arrival to the NHRS, Team Leads, the Public Information Officer, and the Controller had responsibilities for managing other bargaining unit employees, including evaluating performance and issuing discipline, but they were not performing these responsibilities.

14. After completing his review, he commenced instituting changes to improve the management structure, including the training of managerial employees. He developed a three-year business plan, which included tasks of finalizing job descriptions and instituting performance evaluations.

15. In its petition, the NHRS admitted that the Team Lead and Controller positions "have long had supervisory duties listed in the associated position descriptions some of which have not been carried out in fact." See NHRS Modification Petition at 7.1.

16. Rosamond Cain is the NHRS Human Resources (HR) Manager. She was hired on August 20, 2012. As an HR Manager, she is responsible for all human resources functions relative to the NHRS personnel, including recruitment, employee benefit administration, payroll oversight, employee and labor relations, and organizational and employee development. See NHRS Exhibit 6.

17. According to Ms. Cain, prior to her arrival to the NHRS, some of "lead"[1] employees had supervisory responsibilities but did not exercise them; and performance appraisals were not being performed. Ms. Cain testified that the new NHRS management had concerns that employees in question did not perform their assigned responsibilities and felt that they needed assistance in managing teams. To address these concerns, the new management created a three-part training program for management, focused on evaluations, employee expectation, and job performance, and began amending some of job descriptions and conducting training sessions on performance appraisals and supervisors' accountability. All changes were made after Ms. Cain's arrival and with her participation under the direction of the new Executive Director.

18. According to Ms. Cain, since her arrival, she modified some of job descriptions. The evidence is insufficient to permit a finding as to which job descriptions were modified and in what manner they were modified.

19. Ms. Cain testified that Team Leads, the Controller, and the Public Information Officer now have the same responsibilities, including assigning work, issuing discipline, and conducting performance evaluations; and that they all now conduct evaluations of other

[1] Ms. Cain appears to refer to the positions of Teams Leads and the Controller.

employees in the bargaining unit. The evaluations are reviewed by the Executive Director and the HR, after which the original is placed in an evaluated employee's personnel file. Evaluations can affect employees' chances for promotion or lead to placement on an improvement plan or to termination. No completed performance evaluations, redacted or otherwise, have been submitted into the record.

20. Ms. Cain also testified that these employee now issue disciplinary letters/written warnings. A copy of a disciplinary letter is placed in an employee's personnel file. As Exhibit 4, the NHRS submitted 3 written warnings, two of which were issued by Member Accounts Team Lead and one - by Employer Reporting Team Lead, and two letters summarizing conversations with employees regarding attire and behavioral concerns, which were issued by Retiree Services Team Lead. The NHRS did not submit any examples of discipline issued by the Controller, the Public Information Officer, or the Employer Auditing Team Lead.

21. According to Ms. Cain, a bargaining unit employee filed a grievance against a Team Lead because the Lead denied an employee's leave request. The Lead spoke with the grievant and, later, participated in a meeting with the employee, the HR, and the employee's Union representative, which resolved the grievance. No evidence was offered as to which Team Lead position was involved in this grievance.

22. The Process Improvement Manager position was established after October 24, 2012. See Union Exhibits 2 &3. The Draft job description for the Process Improvement Manager position provides that the "scope of work" includes the following:

> Determine operations to produce and develop processes to ensure quality, cost and efficiency are at their peak. Implement smooth, speedy and efficient workflow in all areas of the organization. Support the development of, refine and document policies, procedures and practices. Perform special studies and projects to implement design/strategy/changes as well as regulatory/ compliance changes.

See NHRS Exhibit 6. The Process Improvement Manager reviews all processes in the organization and recommends modifications of some processes and elimination of others. He

improves processes and productivity by streamlining processes. He has access to all information and can recommend staffing changes.

23. The Process Improvement Manager's responsibilities include the following:

> Create, implement and maintain a system for organization-wide policy, procedure and practice management.
>
> Partner with Executive Team to implement design/strategy changes as well as regulatory/compliance changes.
>
> Monitor and improve the efficiency of processes through observations and collecting and interpreting data from management and operation personnel.
>
> Create, implement and maintain a system for monitoring organization-wide risk management activities, working with the Executive Director and the Executive Team to articulate the risk appetite of the organization.
>
> Manages staff resources and teams, coordinates and establishes original priorities related to project completion and reviews project work.
>
> In addition to representing the organization in the core team and being responsible for all deliverables to that program, this individual is likely to be leading the cross functional team, which increase the level of responsibility and accountability.
>
> Makes recommendations for resources needed to ensure successful execution of project plans.
>
> Actively participates on NHRS Management Team including development and implementation of strategic planning initiatives, collaborative problem-solving and various project initiatives.

See NHRS Exhibit 6.

24. The Project Manager position was established in March of 2010. The "functional area" of the Project Manager is information technology (IT) and the IT Director is the Project Manager's supervisor. The job description for the Project Manager position provides as follows:

> The Project Manager is an individual who is able to manage/oversee multiple activities within the organization and is able to represent NHRS in the programs. As such, a Project Manger [sic] is responsible for all deliverables to the program to which they are assigned. To ensure that all the deliverables meet or exceed customer expectations by leading at least one project, facilitating the completion within the given schedule, budget and scope constraints and ensuring adherence to established design and control policies.

See NHRS Exhibit 6.

25. The Program Manager's responsibilities include the following:

Work with designated teams to develop a well-defined project plan that meets the organization's stated objectives by balancing the organizational needs and wants with the organizations budget and schedule constrains.

Effectively communicate project expectations to team members and stakeholders in a timely and clear fashion. Liaise with project stakeholders on an ongoing basis.

Coordinates and manages project resources and teams including assigning tasks, establishing deadlines, reviewing work and prioritizing.

Managing staff resources and teams, coordinates and established [sic] original priorities related to project completion and reviews project work.

Makes recommendations for resources needed to ensure successful execution of project plans.

Oversees project development and documentation to ensure compliance with organizational expectations, policies and procedures.

Work with management to ensure that projects are adequately staffed and that sufficient trainings are provided to complete the assigned tasks.

Track and report on the status of project deliverables, assess and mitigates project related risk.

Work with the respective staff to develop, improve and promote documented, efficient and consistent procedures that facilitates the development of quality projects, reports and preparing budgets.

Conduct overall project assessment to identify project elements, best practices and tools for future project use.

Manages staff responsible for database management and web development and maintenance.

Manages pension system related portion of IT helpdesk system reviewing and assigning regulations, establishing deadlines and priorities, ensuring completion. Review and reports on all helpdesk items to management.

Serves as primary point of contact with pension software vendor, collaboration on software affects, customizations, maintenance items, [sic] etc.

Budgetary responsibilities include the management of vendors, working either in-house or externally.

In addition to representing the organization in the core team and being responsible for all deliverables to that program, this individual is likely to be leading the cross

functional team, which increase [sic] the level of responsibility and accountability.

Actively participates in NHRS Management Team, including development and implementation of strategic planning initiatives, collaborative problem-solving and various project initiatives.

See NHRS Exhibit 6.

26. Both the Process Improvement Manager and the Project Manager have access to personnel files.

27. Neither the Process Improvement Manager nor the Project Manager supervise anybody.

28. The Public Information Officer "plans, develops, coordinates, and oversees the implementation of the public information, membership education, and internal and external communications initiatives" of the NHRS.

29. According to HR Manager Cain, the Public Information Officer might be involved in issuance of NHRS press releases.

30. The NHRS website contains over 100 press releases dating back to 2005 and none of them concern contract negotiations. See parties' stipulation.

31. The position of Regulatory Compliance Officer, which did not require a law degree and was previously held by a non-attorney, was modified into the position of Regulatory Compliance Officer/Staff Attorney in January of 2013. The new Regulatory Compliance Officer/Staff Attorney position requires the employee to hold a JD degree from a recognized law school and be a member in good standing in the New Hampshire Bar Association. The Regulatory Compliance Officer/Staff Attorney reports to the NHRS Chief Legal Counsel/Director of Legal Services and his responsibilities include representing staff in administrative hearings under the direction of the Chief Legal Counsel and assisting the Chief Legal Counsel with drafting of agency rules and regulations, with matters of statutory interpretation and application, and with special projects as requested. See NHRS Exhibit 6. The

Chief Legal Counsel has authority to delegate any case, including personnel and labor related cases, to the Staff Attorney.

Decision and Order

Decision Summary

The NHRS' request to exclude the positions of Retiree Services Team Lead, Employer Auditing Team Lead, Employer Reporting Team Lead, Member Accounts Team Lead, and Public Information Officer on the ground that they are supervisory employees is denied because the evidence is insufficient to prove that the circumstances have changed since the prior representation proceedings to a degree warranting modification of the existing bargaining unit. The NHRS' request to exclude the Controller position on the ground that the Controller is a supervisory employee is denied because the evidence is insufficient to prove that the Controller exercises supervisory authority involving the significant exercise of discretion within the meaning of RSA 273-A:8, II. The NHRS' request to exclude the positions of Process Improvement Manager, Project Manager, and Public Information Officer on the ground that they are confidential employees is denied because the evidence is insufficient to prove that these employees are confidential employees within the meaning of RSA 273-A:1, IX (c). The NHRS' request to exclude the position of Regulatory Compliance Officer/Staff Attorney on the ground that this position is confidential is granted.

Jurisdiction

The PELRB has jurisdiction of all petitions to determine and modify bargaining units pursuant to RSA 273-A:8 and Pub 302.05.

Discussion

The legislature has vested the PELRB with primary authority to determine appropriate bargaining units. See *Appeal of the University System of N.H.*, 120 N.H. 853, 854 (1980). Although the PELRB has "discretion to redetermine the composition of bargaining units",

established "expectations in collective bargaining should not be casually altered ..." See *Appeal of the Bow School District*, 134 N.H. 64, 67, 71 (1991). Redeterminations or modifications of existing bargaining units are governed by 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.

Pub 302.05. The language of Pub 302.05 leaves the PELRB discretion in deciding whether or not to grant petitions to modify. *Appeal of Bow School District*, supra, 134 N.H. at 73.

In accordance with Pub 302.05, contested modification petitions must be supported by evidence demonstrating either that the circumstances have changed since the time of the prior bargaining unit proceedings or that "a prior unit recognized under the provisions of RSA 273-A:1" is incorrect to the extent that modification is required. See *Teamsters Local 633 of New Hampshire and Town of Hooksett*, PELRB Decision No. 2008-193 (September 25, 2008) (modification petition dismissed because there has been no change in circumstances since time of prior bargaining unit proceedings). See also *Salem Public Administrators' Association and Town of Salem*, PELRB Decision No. 2009-171 (August 18, 2009) (union's modification petition denied because there was "insufficient evidence that there has been a change in circumstances since the most recent proceedings involving this bargaining unit"); *Rochester Municipal Managers Group and City of Rochester*, PELRB Decision No. 2009-182 (September 3, 2009) (union's modification petition denied because change in employment status from probationary to

permanent is not material change in circumstances warranting modification). There is no claim in this case that the unit at issue is a "unit recognized under the provisions of RSA 273-A:1" that is "incorrect to the degree of warranting modification."[2] Pub 302.05.

In this case, the existing bargaining unit consists of "[e]mployees of the NH Retirement System, with the exception of those employees excluded from the definition of public employees under the provisions of RSA 273-A:1, IX."[3] The SEA and the NHRS agreed to this unit composition in 2004. In 2009, the exclusion list was added to this unit description pursuant to the parties' agreed upon request to specifically exclude certain positions from the bargaining unit. On March 22, 2010, the exclusion portion of the unit description was modified again, pursuant to the parties' agreed-upon modification request. The NHRS now seeks to modify the existing bargaining unit by adding several positions, some of which are new positions, to the exclusion list. The threshold consideration is whether a moving party, here the NHRS, has satisfied its burden of proving by a preponderance of the evidence that a change in circumstances has occurred since the PELRB modified the existing bargaining unit on March 22, 2010. See PELRB Decision No. 2010-059. See also Pub 302.05; 201.06 (c); *Salem Public Administrators'*

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[2] In addition, the rule-making history and the language of this section of the rule indicate that it was intended to cover only bargaining units that were "grandfathered" or "recognized" pursuant to the "grandfather clause" and, therefore, did not go through the normal unit determination hearing and election process. See Laws 1975, 490:3, *State Employees Ass'n v. NH. Pub. Employee Labor Relations Bd.*, 116 N.H. 653, 366 A.2d 494 (1976).

[3] RSA 273-A:1, IX provides as follows:

> "Public employee" means any person employed by a public employer except:
>
> (a) Persons elected by popular vote;
>
> (b) Persons appointed to office by the chief executive or legislative body of the public employer;
>
> (c) Persons whose duties imply a confidential relationship to the public employer; or
>
> (d) Persons in a probationary or temporary status, or employed seasonally, irregularly or on call. For the purposes of this chapter, however, no employee shall be determined to be in a probationary status who shall have been employed for more than 12 months or who has an individual contract with his employer, nor shall any employee be determined to be in a temporary status solely by reason of the source of funding of the position in which he is employed.

Association and Town of Salem, PELRB Decision No. 2009-171.

The NHRS asserts that the change in circumstances, which provides a basis for modification, occurred when "the hiring of Mr. Lagos as the new NHRS Executive Director, in February 2012, initiated a process that has significantly modified the NHRS management structure and the responsibilities of certain positions." See NHRS Post-Hearing Brief. According to the NHRS, "certain positions became directly and significantly involved with employee supervision, evaluation, and discipline; certain recently - created or - revised positions came to involve access to confidential information..." Id. Specifically, the NHRS claims that the positions of Retiree Services Team Lead, Employer Auditing Team Lead, Employer Reporting Team Lead, Member Accounts Team Lead, Public Information Officer, and Controller are supervisory within the meaning of RSA 273-A:8, II; that the positions of Process Improvement Manager, Project Manager, Public Information Officer, and Regulatory Compliance Officer/Staff Attorney are confidential within the meaning of RSA 273-A:1, IX (c); that the newly-created position of Regulatory Compliance Officer/Staff Attorney is confidential and professional position that does not share a community of interest with the exiting bargaining unit.

In *Appeal of City of Laconia*, 147 N.H. 495, 497 (2002), the Supreme Court agreed with the PELRB's determination that "preparing written, as opposed to oral, evaluations was not a material 'change in circumstances' warranting modification of the bargaining unit." In *Laconia*, the public employer requested to remove captains and lieutenants as supervisory employees from the bargaining unit that had included firefighters, captains, and lieutenants since 1956 and was recognized and certified by the PELRB in 1976. *Id* at 495. The Supreme Court stated in part:

> As the PELRB noted, witnesses for both sides testified that both lieutenants and captains had evaluated firefighters orally since the bargaining unit was originally certified in 1976. The record supports the PELRB's conclusion that the written evaluations have little or no more effect than the oral evaluations. That the evaluations must now be written does not materially change the responsibility.

Id. at 497.[4]

In *Salem Public Administrators' Association and Town of Salem*, supra, PELRB Decision No. 2009-171, the union's modification petition was denied because there was "insufficient evidence that there has been a change in circumstances since the most recent proceedings involving this bargaining unit were completed in March, 2007 or that the current composition of the bargaining unit is incorrect to a degree warranting modification." In *Salem*, the most recent proceedings involving the bargaining unit concluded in March, 2007, i.e. two years prior to filing of the modification petition. The 2007 changes to the bargaining unit, and in particular the exclusion of the disputed six positions, were deemed appropriate and necessary by the union and by the Town, and the parties' agreement on unit composition was accepted and approved by the PELRB. See *id.* In 2009, the union claimed that six previously-excluded positions should be added to the bargaining unit and that this modification was appropriate because the Town failed to make progress on individual employment agreements with six employees. The PELRB found that "[t]he evidence concerning the Town's failure to make progress to the [Union's] satisfaction on individual employment agreements with some or all of the employees holding the six positions excluded from the bargaining unit in 2007 is not a change in circumstance which justifies these modification proceedings." *Id.*

Similarly in *Teamsters Local 633 of New Hampshire and Town of Hooksett*, PELRB Decision No. 2008-193, the PELRB denied the union's modification petition seeking to add a position of sergeant to the existing bargaining unit on the ground that the supervisory responsibilities of sergeants decreased due to the addition of the layer of supervisors to the department. The PELRB found that there was insufficient evidence that the current

[4] The PELRB decision in this case was affirmed in part; vacated in part; and remanded. The Court remanded the case for a determination as to: "(1) whether lieutenants and captains are supervisors within the meaning of RSA 273-A:8, II; (2) if the lieutenants and captains are supervisors, whether it is permissible to include them in the same bargaining unit as firefighters; and (3) whether the city is barred from challenging the composition of the bargaining unit because of laches or any other reason, see Laws 1975, 490:3, *State Employees Ass'n v. NH. Pub. Employee Labor Relations Bd.*, 116 N.H. 653, 366 A.2d 494 (1976)." See *Appeal of City of Laconia*, supra, 147 N.H. at 497.

responsibilities of sergeants in the areas of employee discipline, employee evaluation, hiring, and general supervision or applicable legal standards had changed to a degree justifying re-examination of the exclusion of sergeants from bargaining unit since the PELRB considered union's previously unsuccessful modification petition.

On the other hand, an increase in working hours, "reflecting the need for more daily contact with students, teachers and parents, could constitute a change in circumstances sufficient to permit a school nurse to be included in the teachers' bargaining unit because the PELRB could reasonably determine that it intensified the community of interest between the school nurses and the teachers." *Appeal of Bow School District*, supra, 134 N.H. at 73.

I. The NHRS' request to exclude Team Leads, Public Information Officer, and Controller positions as "supervisory" within the meaning of RSA 273-A:8, II.

A. Team Leads and Public Information Officer.

In this case, the evidence is insufficient to prove that the circumstances have changed to a degree of warranting modification with respect to the Team Leads and Public Information Officer positions since the unit's modification in March of 2010. Based on the evidence, the Team Lead positions and the Public Information Officer position appear to have been created prior to March, 2010 bargaining unit proceedings. The evidence also reflects that whatever authority these positions might have, they have had for a long time. See e.g. NHRS Modification Petition, at No. 7 (NHRS admitted that the Team Lead positions "have long had supervisory duties listed in the associated position descriptions some of which have not been carried out in fact"). Although the HR Director initiated modifications/amendments of some of the existing job descriptions since her hiring in August of 2012, there is no evidence as to which job descriptions were modified and in what manner they were modified. Therefore the job description amendments provide insufficient evidence of a change in circumstances. Further, contrary to the NHRS' claim, the hiring of new management and the implementation of new managerial strategic plan are not material changes in circumstances warranting modification of an existing

bargaining unit. Based on the record, the NHRS failed to satisfy its burden of proving that, with respect to Team Lead positions and the Public Information Officer position, the circumstances have changed to a degree of warranting modification of the bargaining unit since the unit's modification in March of 2010. By requesting a removal of the positions that existed at the time of the prior representation proceedings, the NHRS is trying to undo an agreed upon unit composition without meeting its burden to prove a change in circumstances. Accordingly, the petitioner's request to remove the Team Lead positions and the Public Information Officer position as "supervisory" is denied.

B. Controller

The Controller position was established on October 25, 2011, i.e. after the March 2010 modification proceedings, and was last amended in 2011. It is unclear what the nature of the amendment was. The creation of a new position is a material change in circumstances that may warrant modification of an existing bargaining unit. In this case, the NHRS argues that the Controller is a supervisory employee within the meaning of RSA 273-A:8, II and should, therefore, be excluded from the bargaining unit containing employees the Controller allegedly supervises.

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." Statutory 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). 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; *New England Police Benevolent Association, IUPA, AFL-CIO v. Town of Hillsborough*; PELRB Decision No. 2010-112.

A supervisory relationship within the meaning of RSA 273-A:8, II exists "when the supervisor is genuinely vested with significant supervisory authority that may be exerted or withheld depending on his or her discretion." *International Chemical Workers Union Council and Hillsborough County Nursing Home*, PELRB Decision No. 1999-079. In determining whether an employee exercises supervisory authority involving the significant exercise of discretion, 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. at 432. See also *NEPBA, Inc. Local 40/NH Fish & Game Conservation Officers et al. v. SEA/SEIU Local 1984*, PELRB Decision No. 2006-174; *Teamsters Local/Plaistow Town Employees v. Town of Plaistow*, PELRB Decision No. 2010-062. 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. "[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 *Hampstead Police Union, NEPBA Local 37 and Town of Hampstead*, PELRB Decision No. 2008-071.

In this case, the evidence is insufficient to establish that the Controller exercises "supervisory authority involving the significant exercise of discretion." The NHRS did not submit any performance evaluation forms, redacted or otherwise, completed by the Controller, or any other employee, into evidence. Further, none of the disciplinary letters, submitted by the NHRS as Exhibit 4 were issued by the Controller and there was no evidence as to the Controller's role, if any, in hiring. The NHRS offered very general testimony as to responsibilities of employees the NHRS wants to exclude as "supervisory" and a boilerplate

statement in the job description. This evidence is not very probative. No specific evidence was offered as to the Controller's responsibilities. Based on the foregoing, the NHRS failed to satisfy its burden of proof with respect to its claim that the Controller is a supervisory employee within the meaning of RSA 273-A:8, II. Accordingly, the petitioner's request to remove the Controller position from the existing bargaining unit is denied.

II. NHRS' request to exclude Process Improvement Manager, Project Manager, Public Information Officer, and Regulatory Compliance Officer/Staff Attorney as confidential employees within the meaning of RSA 273-A:1, IX.

The NHRS also argues that the positions of Process Improvement Manager, Project Manager, Public Information Officer, and Regulatory Compliance officer/Staff Attorney should be excluded from the bargaining unit because they are confidential positions within the meaning of RSA 273-A:1, IX.

RSA 273-A:1, IX (c) defines "public employee" as "any person employed by a public employer except ... [p]ersons whose duties imply a confidential relationship to the public employer." "Confidential employees" are "those employees who have access to confidential information with respect to labor relations, negotiations, significant personnel decisions and the like." *Appeal of Town of Moultonborough*, 164 N.H. 257, 262 (2012).

In *Appeal of Town of Moultonborough*, the Supreme Court agreed with the PELRB that the executive assistant to the police chief was not a confidential employee within the meaning of RSA 273-A:1, IX:

> In *Appeal of City of Laconia*, the PELRB ruled that an administrative secretary did not act in a confidential capacity. *City of Laconia*, 135 N.H. at 423. The PELRB's decision rested upon evidence that the administrative secretary was responsible for preparing wage and benefit surveys and for requesting information from other communities regarding the types of employment contracts. *Id.* Our review of the record, however, indicated that the administrative secretary was privy to the personnel director's personal thoughts, strategies, and notes about the collective bargaining process. *Id.* Moreover, the administrative secretary opened all inter-departmental communications, including those involving labor negotiation strategies between the city manager and the personnel director. *Id.* Accordingly, we concluded that it was unreasonable to require the personnel director, as the city's chief labor negotiator, to work under circumstances in which

> he must keep secrets from his secretary regarding a significant part of his work, and concluded that the position was confidential. *Id.*
>
> We reached a similar conclusion in *Appeal of Town of Newport*. In *Newport*, the department secretary worked under the general supervision of the director of public works, an administrative superior who outlined departmental policy, made work assignments, and evaluated work in terms of effectiveness of results. *Town of Newport*, 140 N.H. at 346-47. Moreover, she maintained personnel records, was privy to disciplinary actions taken, and attended staff meetings at which confidential matters were discussed. *Id.* at 347. In addition, the director of public works testified that if a proposed bargaining unit was created, the department secretary might be put in a situation in which her loyal-ties would be divided between the union and the town. *Id.* Based upon this evidence, we concluded that the department secretary position was not sufficiently distinguishable from the administrative secretary position that we found confidential in *Laconia* and, therefore, should be excluded from the proposed unit. *Id.* at 348.
>
> *Laconia* and *Newport*, however, are distinguishable from this case. Unlike in *Newport*, in which the department secretary maintained personnel records, *Newport*, 140 N.H. at 347, here, the executive assistant does not maintain personnel files and only the chief has a key to the locked cabinet containing personnel files. Additionally, she does not attend staff meetings or non-public meetings between the chief and board of selectmen. See *id.* Moreover, although she receives all of the department mail, she does not open mail marked 'confidential.'
>
> The Town's objection to the inclusion of the executive assistant position in the proposed bargaining unit rests largely upon conjecture regarding her role after the unit is certified. Whatever her potential role may be with regard to labor negotiations, the objection is premature. See *Plainfield Support Staff/NEA-New Hampshire v. Plainfield School District*, SAU #32, PELRB Decision No. 94-48, at 3 (PELRB June 21, 1995). Accordingly, we concur with the PELRB's conclusion that 'the Executive Assistant is not involved with personnel or other confidential labor relations matter[s] in any meaningful way,' and, therefore, should be included in the bargaining unit.

Appeal of Town of Moultonborough, supra, 164 N.H. at 263-64.

A. Process Improvement Manager, Project Manager, and Public Information Officer

In this case, the evidence is insufficient to establish that the Process Improvement Manager, the Project Manager, and the Public Information Officer are confidential employees. None of these employees are involved in collective bargaining, discipline, or other confidential labor relations matters. The evidence is insufficient to show that these employees are privy to the HR Director's or the Executive Director's personal thoughts, strategies, and notes about the

collective bargaining process. Similarly to the town's objection in *Moultonborough*, the NHRS' request to exclude the Process Improvement Manager rests largely upon conjecture regarding the potential role this employee might have in personnel related matters if and when the Process Improvement Manager recommends a reduction in staff at some time in future. This alone is insufficient to establish confidential status of this employee. Similarly, the evidence that the Process Improvement Manager and Project Manager might have access to personnel files is not sufficient to establish that they are involved in confidential personnel or labor relations matters in any meaningful way.

The NHRS requests the exclusion of the Public Information Officer as a confidential employee on the ground that the Public Information Officer is privy to the information as to how press releases are created and has access to the NHRS press releases before they are issued. The parties stipulated that the NHRS press releases are posted on its website and that none of the 100 press releases dating back to 2005 concern contract negotiations. Based on the foregoing, the evidence is insufficient to establish that the Public Information Officer is a confidential employee within the meaning of RSA 273-A:1, IX.

Accordingly, the NHRS' request to exclude the positions of Process Improvement Manager, Project Manager, and Public Information Officer from the bargaining unit on the ground that they are confidential employees is denied.

B. Regulatory Compliance Officer/Staff Attorney.

The position of Regulatory Compliance Officer has been modified into a position of Regulatory Compliance Officer/Staff Attorney (Staff Attorney) in January of 2013.[5] As opposed to the previous Regulatory Compliance Officer position which did not require a law degree, the new Staff Attorney position requires the employee to hold a JD degree from a recognized law

[5] As set forth above, the creation of a new position is a material change in circumstances that may warrant modification of an existing bargaining unit.

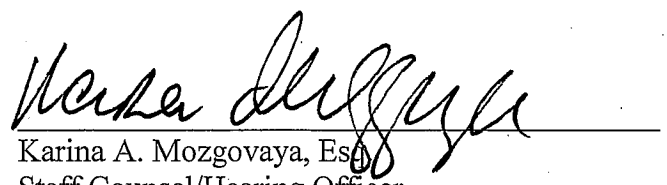
school and be a member in good standing in the New Hampshire Bar Association. The Staff Attorney reports to the NHRS Chief Legal Counsel. Staff Attorney's responsibilities include representing NHRS staff in administrative hearings under the direction of the Chief Legal Counsel and assisting the Chief Legal Counsel with special projects as requested. The Chief Legal Counsel has authority to delegate any case, including personnel and labor related cases, to the Staff Attorney. Based on the foregoing, the Staff Attorney position is a confidential position within the meaning of RSA 273-A:1, IX and is, therefore, excluded from the bargaining unit.

Accordingly, the NHRS' request to exclude the positions of Retiree Services Team Lead, Employer Auditing Team Lead, Employer Reporting Team Lead, Member Accounts Team Lead, Controller, Public Information Officer, Process Improvement Manager, and Project Manager is denied. The NHRS' request to exclude the position of Regulatory Compliance Officer/Staff Attorney is granted. A Modification of Certified Bargaining Unit shall be issued and shall contain the following unit description[6]:

> Employees of the NH Retirement System, with the exception of those employees excluded from the definition of public employees under the provisions of RSA 273-A:1, IX.
>
> The following positions are specifically excluded: executive director, chief legal counsel, director of investments, business and financial operations director, employer services director, information technology director, human resources director, internal auditor, hearings examiner, director of member services, human resources coordinator, administrative coordinator, and regulatory compliance officer/staff attorney.

So ordered.

December 20, 2013



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[6] The parties do not dispute that the Human Resources Manager position is a confidential position and should be excluded from the bargaining unit.