



**State of New Hampshire**  
**Public Employee Labor Relations Board**

**Teamsters Local 633**

**v.**

**Town of Loudon**

**Case No. G-0273-1**  
**Decision No. 2018-209**

**Appearances:**

William R. Cahill, Jr., Esq., Manchester, NH, for the Teamsters Local 633

Nathan C. Midolo, Esq., and Barton L. Mayer, Esq., Upton & Hatfield,  
LLP, Concord, NH, for the Town of Loudon

**Background:**

On June 6, 2018, the Teamsters Local 633 (Union) filed a petition for certification seeking to represent certain employees of the Town of Loudon Police and Fire Departments (Town). The Union proposes the following bargaining unit: full time Police Sergeant (1), full time Police Corporal (1), full time Patrol Officers (4), part time Patrol Officers (5), full time Firefighters (3), full time Administrative Assistant (1), and part-time Firefighter (1). The petition for certification is supported by the requisite number of confidential authorization cards as reflected in the June 8, 2018 PELRB Report re: Inspection of Confidential Authorization Cards.

The Town objects to the petition on the grounds that the proposed unit (1) lacks a community of interest required under RSA 273-A:8; (2) does not include a minimum of ten employees as required under RSA 273-A:8; (3) inappropriately includes irregular or on-call employees (part-time Police Officers and Firefighter) in violation of RSA 273-A:1, IX (d); (4)

inappropriately includes a confidential employee (Administrative Assistant) in violation of RSA 273-A:1, IX (c); and (5) inappropriately includes supervisory employees (Police Sergeant and Police Corporal) in violation of RSA 273-A:8, II.

An adjudicatory hearing on the Town's objections was conducted on August 22, 2018 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 filed post-hearing briefs on September 24, 2018; and the decision is as follows.

#### **Findings of Fact**

1. The Town of Loudon is a public employer within the meaning of RSA 273-A:1, X.

2. The Union is an employee organization seeking to represent the proposed bargaining unit consisting of the following Town positions: full time Police Sergeant (1), full time Police Corporal (1), full time Patrol Officers (4), part time Patrol Officers (5), full time Firefighters (3), full time Administrative Assistant (1), and part-time Firefighter (1). The proposed bargaining unit contains sixteen employees. The Town does not currently have other certified bargaining units.

3. All employees in the proposed bargaining unit function within the same organizational unit, the Town of Loudon. Their benefits are determined by the Board of Selectmen. Their pay raises and promotions are approved by the Board of Selectmen.

4. Although day-to-day duties of the employees in the proposed unit may differ, all of them are public safety employees serving the residents of the Town of Loudon.

5. The terms and conditions of employment of all employees in the proposed bargaining unit are governed by the Town of Loudon Personnel Policies Manual (Manual), issued by the Town Board of Selectmen. This Manual covers, among other things, annual, sick, and other leaves, hours of work, FMLA, compensatory time, probationary period, holiday pay, call back pay, overtime, pay periods, medical and dental benefits, performance evaluations, personnel records, and promotions and transfers. Common work rules and personnel practices apply to all employees in the proposed bargaining unit.

6. The employees in the proposed bargaining unit frequently work side by side at the scene of an accident, fire and police emergency, or other event threatening the safety of the public; and they have a strong self-felt community of interest.

7. The Police Department employees have been on the majority of the calls attended to by Firefighters/Emergency Medical Technicians (EMTs)/paramedics. Police Officers help EMTs when necessary. For example, on cardiac arrest calls, Police Officers on the scene administer CPR before EMTs get to the scene. Fire Department employees work cooperatively with Police Department employees and the overall goal of employees of both Police and Fire Departments is public safety.

8. The Performance Evaluations provision of the Manual provides in part as follows:

All permanent full-time and permanent part-time employees shall be evaluated at least once annually. You will receive your performance evaluations from your immediate supervisor approximately thirty (30) to forty-five (45) days from the employee's anniversary date of employment or at the expiration of the probationary period. However, job coaching is a continuing process throughout the course of employment, and you may meet with your supervisor or department head to discuss performance more frequently...

Performance evaluations shall be completed in the prescribed time by the supervisor and/or department head on forms provided by the Selectmen's Office. A copy of the evaluation, signed by the supervisor/department head and the employee, shall be placed in the employee's permanent personnel file at the Selectmen's Office.

You and your supervisor will discuss your performance review, giving you the opportunity to understand the expectations of your supervisor and to examine your strengths, as well as areas in which you need to improve...

Selectmen. If the Selectmen determine that the evaluation contains errors or omissions, the Selectmen shall order that the supervisor/department head complete another evaluation.

*An evaluation is not a contract or a commitment to provide a compensation adjustment, a bonus or continued employment.* Evaluations are only one of several factors that the Town of Loudon uses in connection with compensation, promotion, and retention decisions.

See Town Exhibit W (emphasis added).

9. The Promotions, Transfers & Job Postings provision of the Manual applies to all employees in the proposed bargaining unit and provides in part as follows:

... In an effort to inform employees of promotion and transfer opportunities, we list vacancies for non-exempt positions on the bulletin boards... Generally, in order to maintain stability, employees who have been working in their current position for less than one year will not be considered for another position, unless the Town of Loudon in its discretion decides otherwise. However, a transfer or promotion initiated by the Town of Loudon may take place at any time regardless of the employee's length of service in their present position.

Employees may obtain addition information about open positions and request consideration for any opening by contacting their immediate supervisor. *The Board of Selectmen have [sic] final approval over all transfers and promotions.*

If a transfer or promotion is granted, the employee's pay rate in the new position will be determined at the time of the transfer or promotion. *The pay rate will be based upon the employee's qualifications, experience, job performance evaluations, and other considerations within the discretion of the Town of Loudon.*

See Town Exhibit W (emphasis added).

10. The Town Safety Program & Policies, including Section 4 Discipline Policy, apply to all employees in the proposed bargaining unit and provide in part as follows:

d) ... we use a progressive discipline model for handling disciplinary/performance issues. This model is designed to bring deficiencies to the attention of the employee in as non-confrontational a manner as possible.

1) Based on the severity of the offense, the *Board of Selectmen reserves the right to discipline employees up to and including termination at any time.*

2) Any discipline will be consistent with the appropriate bargaining agreement and or personnel policies.

3) The following disciplinary steps are a guideline to be following [sic] by department heads and supervisory staff:

- i) First Offense: Verbal warning (documented in file)
- ii) Second Offense: Written warning (documented in file)
- iii) Third Offense: Suspension without pay (documented in file)
- iv) Fourth Offense: Termination

...

e) Department Heads and/or supervisors are responsible for counseling employees as problems occur involving adherence to the policies, procedures and rules of the organization and work unit...

See Town Exhibit N (Emphasis added).

11. Kristoffer Burgess is the Police Chief. He has been employed in the Police Department since 2007 and was promoted to the Police Chief position in May of 2016.

12. The Police Department has five part-time Patrol Officers.

13. After the Police Sergeant sets a monthly schedule for full time Patrol Officers, he determines whether there is a need for part time Patrol Officers. He contacts part time Patrol Officers when there is a need for them to work. There is no guarantee that part time Patrol Officers will work any number of hours in a given month and part time Patrol Officers can, and sometimes do, decline to work when called. Based on 2017-2018 earning history, part time Patrol Officers do not work regular hours.

14. The job description for Police Sergeant provides in part as follows:

Summary: Performs responsible technical, administrative and supervisory police work participating in the activities of the Police Department on an assigned shift or assignment. Performs skilled work in gathering evidence and interviewing crime victims and suspects. Performs administrative work in maintaining Departmental operations. Performs all patrol and investigative procedures. In the absence of the Chief, may assume the powers, duties and responsibilities of the Chief, *within the limits established by Department policy.*

...

Supervision exercised: Exercises supervision over assigned officers. Assists with training, instruction, and guidance to Department personnel and evaluates quality of work performed.

General Duties and Responsibilities: (Any one position may not include all of the duties listed, nor do the listed examples include all duties which may be found in positions of this class).

1) Maintains contact with officers throughout the shift providing supervision and advice; assists officers with serving warrants, apprehending criminals, transporting prisoners and preparing court cases.

2) Provides guidance and direction to officers in dealing with such problems as discipline, assignments, progress of investigations, and report writing; makes recommendations to supervisor on performance evaluations and disciplinary actions.

3) Patrols in an assigned area of the Town in a police cruiser or on foot; checks overall security of vacant houses and buildings; periodically checks business establishments and public places for violations of the law and takes appropriate enforcement action; confronts suspicious persons and situations and determines appropriate action.

4) Receives dispatch orders and responds to emergency situations or serious crimes requiring supervision; takes charge of crime scene; assists in crime scene searches. ...

...

6) Prepares and maintains various reports, records and logs...

See Town Exhibit H (emphasis added). The Job Description for Police Sergeant has not been updated since 1999 and, according to the Police Chief, does not accurately reflect the Sergeant's current duties and responsibilities.

15. The job description for Police Corporal provides in part as follows:

Job Summary: Performs responsible technical, supervisory and administrative police work direction [sic], assisting in the direction of, or participating in the activities of the Police department on an assigned shift or assignment...

...

Supervision Exercised: Provides direct or general supervision to Police Officers or civilian personnel depending on the experience of the subordinate and the activity involved; gives advice and assistance when necessary; evaluated performance and recommends discipline.

Examples of Duties:..

1. Conducts daily roll call activities which include: instructing subordinates in modern police methods and techniques; familiarizing subordinates with recent changes in laws, ordinances and court decisions; inspecting the appearance of Police Officers and condition of all equipment to used [sic] during the shift; relaying and explaining new policies, orders and directives.
2. Assists superior officers in determining personnel and equipment needs and assignments; makes assignments and reassigns subordinates as warranted; develops, implements and supervises new programs; coordinates activities with other units; reviews the work product and efficiency of subordinates; periodically served in the capacity of the superior officer in the latter's absence.
3. Maintains contact with subordinates throughout the shift providing supervision, advice and assistance as necessary.
4. Responds to emergency situations or serious crimes requiring supervision and a superior officer's presence; takes charge of crime scenes; assists in crime scene searches...  
...
6. Ensures all reports submitted in accordance with department directives and statutory requirements are complete and accurate ... Ensures arresting officer knows all necessary information required for court and collects necessary evidence. Appears in court to testify in traffic and criminal cases.  
...
8. Provides guidance and direction to subordinates in such areas as discipline, assignments, progress of investigations and report writing.
9. Prepares and maintains various reports and records...  
...

See Town Exhibit I. The Job Description for Police Corporal has not been updated since 1997 and, according to the Police Chief, does not accurately reflect the Corporal's current duties and responsibilities.

16. The job description for Patrol Officer provides in part as follows:

Characteristic Duties and Responsibilities: Performs generalized law enforcement duties, usually in uniform. Includes patrolling an assigned area or sector on foot or in a radio car, answering calls for service, investigating traffic accidents and criminal offences, issuing citations and warnings, serving subpoenas, making physical custody arrests with an [sic] without a warrant, transporting prisoners, testifying in court and before administrative bodies, making applications for search warrants and arrest warrants, taking juveniles, intoxicated or mentally ill persons into protective custody, writing investigative reports,.. rendering emergency first aid to ill or injured persons,.. performing various rescue and lifesaving tasks ...

See Town Exhibit J.

17. The primary duty of a Police Sergeant, Police Corporal, and Patrol Officers is patrol.

18. Sean Nye is a Police Corporal. Corporal Nye has been working for the Loudon Police Department for four years and became a Corporal in September of 2017. His working hours are 3:00 p.m. - 1:00 a.m.

19. A Corporal is a senior officer who knows how the department functions and can educate and guide other Patrol Officers. Corporal Nye is a Taser instructor and active shooter instructor. Other senior Patrol Officers also instruct, train, and provide guidance to less experienced employees.

20. As a Police Corporal, Sean Nye has never issued written warnings or verbal reprimands to other employees in the proposed bargaining unit. According to the Police Chief, he does not have authority to issue written warnings or verbal reprimands and he provides no input into a decision to discipline an employee. Corporal Nye has not been in charge of the Police Department and does not recommend discipline or pay raises.

21. The Police Corporal does not evaluate other employees in the proposed bargaining unit. He does not attend disciplinary meetings and has no access to personnel files. He is not involved in policy making.

22. Neither the Police Chief nor Corporal Nye consider the Corporal a night-shift supervisor.

23. Police Sergeant Robert Akerstrom does not conduct performance evaluations. He has no authority to issue verbal or written warnings and provides no input into a decision to



discipline an employee. He does not recommend discipline or pay raises and is not involved in policy making.

24. Sergeant Akerstrom sets the schedule for Patrol Officers and provides advice or guidance when necessary.

25. Corporal Nye and Sergeant Ackerstrom attended a "supervisory training" class conducted by Primex, a risk management consultant to the Town. Performance issues was one of the subjects of the training. Employees from multiple Town departments attended the Primex training, and not all topics of the training were relevant to Police Corporal's or Police Sergeant's duties and responsibilities. The Primex training had no impact on, and is not evidence of, the Corporal's or Sergeant's authority, or lack thereof, to discipline or evaluate employees.

26. The Police Corporal and Police Sergeant have no discretion to send an employee home without first contacting the Police Chief.

27. Some shifts do not have a Sergeant or a Corporal on them. Any senior, i.e. more experienced, officer is in charge of the department in the absence of the Sergeant, Corporal or the Chief, but the senior officer is still required to contact the Chief before taking an action involving another employee.

28. The Police Chief sets the Police Department employees' duties and evaluates their performance. The Chief conducts disciplinary investigations in the Police Department and decides whether to discipline an employee and what type of discipline to impose.

29. The Town Police Department Rules address, among others, Internal Affairs investigations and discipline and provide in part as follows:

...The responsibility for overall supervision and control of the Loudon Police Department's Internal Affairs Investigation component shall reside with the Director of the Bureau of Support Services, who shall report directly to the Chief of Police on any matter relating to the investigation of Department members...

...

#### Department Initiated Investigations:

The need for disciplinary action may arise as a result of several types of action on the part of Department employees, including but not limited to violations of orders or Department directives; violation of City rules; criminal offenses; poor work quality; and inadequate job performance. Supervisory personnel becoming aware of such conduct are responsible for initiating appropriate disciplinary action.

#### VI. Procedure for Recommending Discipline:

A. A Personnel Incident Report (LID 97-2a) shall be completed by the supervisor whenever:

1. The supervisor believes the action of the member warrants disciplinary action more serious than an oral reprimand; or

2. The supervisor believes the member committed a violation or acted improperly in regards to:

- a. An accident involving a Department vehicle; or
- b. A motor vehicle pursuit; or
- c. A use of force incident

B. The completed Personnel Incident Report shall contain the employee's name; ID number; assignment; nature of the violation; and the details of the incident.

C. The supervisor shall sign the Personnel Incident Report and forward it to the involved member's Bureau Director, through the chain of command. Personnel Incident Reports shall not be given to the involved member.

...

The Patrol Bureau Director shall then forward the documents to the Director of Support Services, who has primary responsibility for the review and investigation of all Personnel Incidents.

#### VIII. Authority and Responsibility of Internal Component:

A. The Internal Affairs component shall consist of the Director of Support Services and the Commander and Supervisor of the Criminal Division.

B. The Director of Support Services shall report directly to the Chief of Police on matters relating to the investigation of Department members.

C. The Director of Support Services shall have primary supervisory responsibility for the review and investigation of all complaints against Department personnel.

D. The Commander of the Criminal Division shall be responsible for the Internal Affairs function in the Director's absence, at the direction of the Chief of Police...

...

G. The Internal Affairs component shall serve as a resource to line supervisors conducting Bureau Investigations.

IX. Investigation of Personnel Incidents:

...

C. Bureau Investigations:

Personnel Incidents involving minor violations of Department directives may be investigated at the Bureau level.

...

XV. Maintenance of Records and Files:

A. All reports pertaining to Internal Affairs Investigations and Bureau Investigations shall be maintained by the Director of Support Services in a secure area. These files shall be referred to as the Personnel Investigations File and shall be separate from the Personnel Files.

These files shall be kept secured at all times, except when using a particular file. No files shall be given or divulged to anyone without permission of the Chief of Police.

See Town Exhibit M (emphasis in original). Neither the Sergeant nor the Corporal is the Director of Support Services or a Bureau Director; and neither the Sergeant nor the Corporal is involved in Internal Affairs investigations.

30. Any Patrol Officer can come to the Police Chief with questions any time. Chief Burgess has an open door policy and is available to answer employees' question 24 hours a day, 365 days a year, even when he is away on vacation. Chief Burgess expects any senior employee on duty to report any disciplinary/performance issues to him; and he makes the decision as to the course of action.

31. Chief Burgess believes that the Sergeant and the Corporal are "glorified patrolmen" and that the inclusion of the Corporal and the Sergeant in the bargaining unit will not compromise their ability to perform their duties, will not cause the division of loyalties, or create a conflict among employees.

32. The Police Department positions Deputy Chief and Lieutenant are currently vacant. According to Chief Burgess, these positions, when filled, will have authority to discipline, and otherwise supervise, other employees.

33. The Fire Department has one Chief, one Deputy Chief, two Captains, three Lieutenants, full time and part time Firefighters/EMTs/paramedics, and paid on-call volunteer Firefighters/EMTs.

34. In addition to fire suppression, the Fire Department also handles ambulance, Emergency Medical Services (EMS), and fire/building code compliance.

35. Every full time Firefighter is also an EMT, Advanced EMT (AEMT), or paramedic.

36. The duties of Firefighters include, among others, fire suppression, ensuring public safety, getting people out of the buildings during fire emergencies, and loss mitigation. All Firefighters and EMTs go on fire, accident, ambulance, or other emergency calls on an as-needed basis. When full time Firefighters/EMTs are not on an incident-related call, they remain at the station.

37. The job description for Firefighter/EMT position provides in part as follows:

Job Title: Firefighter, Firefighter EMT, Emergency Medical Technician

General Purpose: Performs an active role of providing skilled medical care, rescue and fire suppression activities.

Supervision Received: Works under the direct supervision of Lieutenants and Captains and under the general supervision of other department officers.

Supervision Exercised: In the absence of an officer, the firefighter may direct use of apparatus and equipment at the emergency scene.

Essential Duties and Responsibilities: Responsible for the proper maintenance of all apparatus, equipment, and fire department properties as assigned. The firefighter is responsible for carrying

out all tasks assigned to him/her by a superior officer with safety of themselves and others always as a priority...

...

Participates in training activities and studies of modern firefighting, rescue and emergency medical care methods and techniques...

Required Minimum Qualifications: Graduation from a standard high school or equivalent ...

Firefighter I certification and/or EMT-B certification are required as set forth in Department Administrative Regulations. CPR certification is mandatory.

Town Exhibit K.

38. Todd Nicholson is a part time Firefighter/AEMT. Between June, 2017 and June, 2018, Mr. Nicholson worked a total of 87.75 hours as a Firefighter (paychecks were issued on June 15, 22, 29, July 06, 13, August 10, September 14, October 5 of 2017 and February 8, March 8, April 5, June 7 of 2018). During the same period of time, he also received compensation for 63 hours of special detail work (paychecks were issued on July 20 and September 28, 2017). During the same time period, Mr. Nicholson also worked for the Fire Department ambulance services for a total of 728 hours with the paychecks issued on the following dates: 2017 – June 22, June 29, July 6, July 13, July 27, August 3, August 10, August 17, August 24, September 5, September 21, October 5, October 12, October 19, October 26, November 9, November 22, December 14, December 21; 2018 – January 18, January 25, February 1, February 8, February 15, February 22, March 1, March 8, March 15, March 2, March 29, April 5, April 12, April 19, April 26, May 3, May 10, May 17, and June 7. He also was on ambulance standby for a total of 358 hours and on weekend ambulance standby for 76 hours. The Town Exhibit G is incorporated by reference.

39. Mr. Nicolson worked at least 45 weeks out of a total of 52 weeks, for a total of 1,312.75 hours (including fire, ambulance, standby, weekend standby, and special detail hours) between June, 2017 and June, 2018.

40. Mr. Nicolson is required to have the same training and maintains his AEMT certification in the same manner as full time Firefighters/EMTs. The Firefighter/EMT job description applies to both full time and part time Firefighters/EMTs. Both full time and part time Firefighters/EMTs are employed by the Town, work in the same geographic location, and report to the Fire Chief. Their pay rate is set by the Board of Selectmen. The same rules and procedures apply to part time and full time Firefighters/EMTs.

41. Mr. Nicolson shares a community of interest with other public safety (Fire and Police) employees of the Town.

42. The Job Description for part time Office Staff provides in part as follows:

**General Purposes:**

Provide personal administrative support to management and the company through conducting and organizing administrative duties and activities including receiving and handling information.

**Supervision Received:**

Works under the general supervision of the Department Chiefs.

**Essential Duties and Responsibilities:**

Office Staff personnel must maintain effective flow of information and communication within the organization. The office staff person will need to assist with both daily tasks and long term projects. They may need to answer telephones or screen telephone calls, directing calls or visitors to appropriate office or staff member, taking and relaying messages or personally answering routine questions including requests for information concerning Department functions and referring more complex questions to an appropriate staff member. In absence of the Supervisor and in cases that would normally receive his/her personal attention, assumes responsibility for ensuring that requests for information or action are made known to other staff member(s) who can respond to the requests.... The office staff person may need to maintain records and file reports and handle client requests. Office staff personnel will need to use computers for many aspects of the job, including correspondence, desktop publishing, scanning information and internet research...

See Town Exhibit L. Despite the fact that this job description is for the "Part Time Office Staff" position, the Town submitted this exhibit as the job description for the position of full time Fire Department Administrative Assistant at issue in this case.

43. Kaitlin McDonough is the full time Administrative Assistant in the Fire Department. She has worked for the Town for 2 years and became a full time Administrative Assistant in April of 2018. Prior to that, she worked for the Town as a "per diem" AEMT. As an AEMT, she was called to staff the ambulance for a 12-hour period and respond to any medical and fire calls.

44. After the previous Administrative Assistant terminated her employment, Ms. McDonough was offered the Administrative Assistant position because she had ambulance billing and administrative assistance experience and because she was an AEMT. Since then, she has continued to go on ambulance runs.

45. The Administrative Assistant's primary duty is to provide administrative assistance to the Code Enforcement Officer. At the Fire Department, the Deputy Fire Chief is the Code Enforcement Officer. Only the Deputy Chief and Ms. McDonough are involved in code enforcement at the Department.

46. As a code enforcement administrative assistant, Ms. McDonough prepares paperwork required to process permit applications and submits it to the Deputy Chief. Permit application information is a public record. The Deputy Chief reviews the paperwork, signs it and gives it to the applicant. Ms. McDonough then schedules any further appointments for inspection; and the Deputy Chief conducts the inspections. She also answers phone calls on both the code enforcement line and fire line, answers the door for deliveries, and assists people requesting fire permits. She is also preparing to conduct ambulance billing in-house in the near

future, as opposed to using an outside billing contractor. She has not yet done any ambulance billing for the Town. She types "thank you" letters and code enforcement-related letters for the Chief.

47. Ms. McDonough works as an AEMT on an ambulance if the call for a second ambulance comes in during her working hours between 8:00 a.m. and 4:00 p.m., Monday through Friday; and she is required to maintain her AEMT certification. Sometimes, she goes on ambulance calls after her regular work hours. Some days, for example, during a major fire, she does not do any code enforcement related work because of her AEMT duties.

48. When attending an accident, Ms. McDonough often works closely with Police and Fire Department employees. Ms. McDonough has a self-felt community of interest with other employees in the proposed bargaining unit.

49. Ms. McDonough has no access to personnel files. Personnel files are kept in a locked cabinet and she does not have a key to this cabinet. Only the Chief and the Deputy Chief have access to personnel files.

50. The Administrative Assistant is not involved with employee discipline and has no access to the disciplinary decisions or letters. She does not discuss employee discipline or other significant personnel decisions, such as hiring, promotion, suspension, or termination, with the Fire Chief or the Deputy Chief.

51. Ms. McDonough does not attend the Board of Selectmen non-public meetings concerning Fire Department. Nor does she attend any budgetary or disciplinary meetings. She does not open mail addressed to the Fire Chief or Deputy Fire Chief and does not type letters concerning significant personnel decisions or disciplinary matters.



52. Ms. McDonough is not privy to the Chief's thoughts concerning labor relations, employee discipline, or other significant personnel decisions.

### **Decision and Order**

#### **Decision Summary**

The part time Patrol Officers are on call employees within the meaning of RSA 273-A:1, IX (d) and are, therefore, excluded from the bargaining unit. The part time Firefighter/EMT is not an irregular or on call employee within the meaning of RSA 273-A:1, IX (d) and is, therefore, included in the bargaining unit. The Police Corporal and Police Sergeant are not supervisory employees within the meaning of RSA 273-A:8 and are, therefore, included in the bargaining unit. The Fire Department Administrative Assistant is not a confidential employee within the meaning of RSA 273-A:1, IX and is, therefore, included in the bargaining unit. The employees in the proposed bargaining unit have a sufficient community of interest such that it is reasonable for them to negotiate jointly; and the bargaining unit satisfies the ten employee-minimum requirement under RSA 273-A:8.

#### **Jurisdiction**

The PELRB has jurisdiction to determine appropriate bargaining units pursuant to RSA 273-A:8 and Pub 302.

#### **Discussion**

The New Hampshire legislature has recognized the “right of public employees to organize and to be represented for the purpose of bargaining collectively with the state or any political subdivision thereof . . . .” Laws 1975, 490:1.” See *Appeal of International Brotherhood of Police Officers*, 148 N.H. 194, 196 (2002). RSA 273-A:8, I vests the PELRB with the authority to determine appropriate bargaining units and certify an exclusive representative

thereof.

RSA 273-A:1, IX defines a public employee as “any person employed by a public employer except....(d) [p]ersons ... employed seasonally, irregularly, or on call.” RSA 273-A:1, IX (d) does not exclude regularly scheduled part-time employees. See *Teamsters Local 633 of New Hampshire v. Town of Bow Police Department*, PELRB Decision No. 94-33 (April 6, 1994). Part time employees are “public employees” absent evidence that they are “. . . temporary status, or employed seasonally, irregularly or on call.” See RSA 273-A:1, IX (d). See also *State Employees’ Association of New Hampshire, Inc., SEIU Local 1984 v. State of New Hampshire, Liquor Commission*, PELRB Decision No. 2013-168. The Supreme Court has applied dictionary definitions for the terms “irregular” and “on call,” stating that “irregular” is defined as “lacking continuity or regularity of occurrence, activity, or function” and that “on call” means “ready to respond to a summons or command.” See *In re Town of Stratham*, 144 N.H. 429, 431 (1999). In *Stratham*, part time officers worked “substantial hours” but had no set day to work and only worked when a shift opened up because a full time officer was unavailable. See *id.* They were excluded from the bargaining unit under consideration because they were deemed “on-call employees who work on an irregular basis.” See *id.* Similarly, in *New England Police Benevolent Association and Town of Henniker*, PELRB Decision No. 2011-113, the part time patrol officers were excluded from the bargaining unit because they were irregular or on call employees. See also *Brentwood Police Union, NEPBA v. Town of Brentwood*, PELRB Decision No. 2008-247.

In contrast, in *International Brotherhood of Teamsters, Local 633 of N.H. and State of New Hampshire, Administrative Office of the Courts*, PELRB Decision No. 2009-048, the PELRB found that not all per diem Court Security Officers (CSO) were irregular or on call

employees within the meaning of RSA 273-A:1, IX (d). The PELRB differentiated between per diem officers who were scheduled to work on regular basis and those who were away from employment for extensive period of time without explanation or justification. See *id.* The PELRB held that the designation of a part time employee as “per diem” “is not dispositive nor controlling of an individual employee’s status under RSA 273-A:1, IX (d).” *Id.* The fact that some employees worked as little as 1-2 days per week was also not determinative. See *id.* The PELRB explained that “[a] reduced work schedule is the sine qua non, or essence, of part-time employment, and the fact of part-time employment is not enough, by itself, to exclude an employee from a proposed bargaining unit.” *Id.* In *Administrative Office of the Courts*, the PELRB stated that:

whether per diem CSOs are “persons” employed irregularly or on call cannot be resolved by general conclusions about the per diem CSO position but must be determined on an employee by employee basis because of the varying degrees to which individual per diem CSOs are scheduled and employed. An employee by employee determination is also in accord with the statute given the legislature’s use of the term “person” in RSA 273-A:1, IX (d).

*Id.* The PELRB looked at several factors to differentiate between irregular and regular part time employees, including the total number of hours worked, the number of weeks worked during the year, using 44 weeks as benchmark, and the existence of extensive and unexplained gaps in the employment. See also *Teamsters Local 633 of New Hampshire v. Town of Bow Police Department*, PELRB Decision No. 94-33 (finding that part time police dispatcher who worked Sunday shifts for 35 weeks within twelve month period, in addition to other shifts, was regular part time employee). The PELRB found that the CSOs who worked at least 44 weeks a year and had not been away from employment for extensive period of time without explanation or justification were regular part time employees and therefore, “public employees” within the meaning of RSA 273-A.

Similarly, in *State Employees' Association of New Hampshire, Inc., SEIU Local 1984 v. State of New Hampshire, Liquor Commission*, PELRB Decision No. 2013-168, the PELRB found that non-seasonal part time retail employees working for the Liquor Commission were "public employees" within the meaning of the RSA 273-A:1, IX (d), as they were not irregular, temporary or on call employees. In *Liquor Commission*, the union filed a grievance on behalf of part time employees and the State refused to process the grievance on the ground that the part time employees were employed "irregularly" and were not in the bargaining unit. *Id.* The State argued that the part time employees worked "irregular" schedules; that, under the personnel rules, full time employees enjoyed certain rights and protections that were not extended to part time employees; and that, therefore, part time employees were "irregular" employees under the Act. *Id.* The State also argued that the part time employees were "temporary" employees within the meaning of RSA 273-A:1, IX (d) because they did not have a "reasonable expectation of continued employment." The PELRB disagreed with the State, reasoning as follows:

We are dealing in this case with state employees working in a retail environment ... Stores are now open weekends and holidays, and there are day shifts, night shifts, and weekend shifts. We conclude that variation in weekly work schedules for such employees is to be expected, particularly given the heavy reliance on a part time work force. We also note ... that the work schedules of both full time and part time employees are not consistent from week to week. More importantly, the fact that part time employees don't always work the same number of hours each week, or work on the same day, or work the same shift every week does not mean that their employment lacks "continuity or regularity of occurrence, activity, or function." Many part time employees are regularly scheduled to work on a year round basis, and not just during the busy seasons. It is clear the Liquor Commission could not staff its retail operations if this were not the case.

Also, the differing treatment of full time and part time employees under the personnel rules does not establish that part time employees are not public employees under the Act. There is nothing in the 1976 certification, the Act, or any court or PELRB decision which serves to exclude part time employees from the definition of public employee or from the certified bargaining unit on this basis. Further, part time employees have a "reasonable expectation of continued employment" and are not "temporary" employees excluded from the Act's definition of public employee. The fact that part time employees may be employees at will who are not entitled to any administrative review of a change in their employment status does not make them

temporary employees under the Act. There is otherwise a lack of evidence indicating that such employees are regularly or frequently terminated, or usually or typically only hired for a limited period of time, or other similar evidence which would support a finding that such employees are "temporary." This is not to say that part time employees are guaranteed employment of any particular duration, nor is to say that their employment can only be terminated for cause. However, we don't equate "at will employment" with "temporary" employment under the Act.

*Id.* The PELRB found that the State committed an unfair labor practice in violation of the provisions of RSA 273-A:5, I (a), (b), and (g) when it refused to recognize the union as an exclusive representative of non-seasonal part time employees of the Liquor Commission.

In this case, the evidence proves that the part-time Patrol Officers in the Police Department are on call employees. As was true with the disputed positions in the *Stratham* case, there are no shifts specifically assigned to the part-time Patrol Officers in Loudon. The part-time Officers may decline to work when requested and do decline to work. The part-time Patrol Officers are not the primary officers for any regular shift and their schedule depends upon whether shifts are open and upon their availability to fill those shifts. Under these facts, the part-time Patrol Officers employed by the Loudon Police Department qualify as on call employees within the meaning of RSA 273-A:1, IX (d) and are excluded from the bargaining unit on that basis.

However, the evidence is insufficient<sup>1</sup> to prove that the part time Firefighter/AEMT is an irregular or on call employee. Although the testimony regarding part time Firefighters/EMTs was unclear and often contradictory,<sup>2</sup> the documentary evidence shows that the part time Firefighter/AEMT, like full time Firefighters/EMTs, goes on fire or ambulance calls and that

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<sup>1</sup> Admin. Rule Pub 201.06 (c) provides that in all adjudicatory hearings the party asserting the affirmative of a proposition, like the Town here, "shall bear the burden of proving the proposition by a preponderance of the evidence."

<sup>2</sup> For example, it is unclear whether the statements (testimony) by Ms. McDonough and the Fire Chief were concerning what the Chief calls "per-diem" part time Firefighters or "on call" part time Firefighters who, according to the Chief, are part time paid volunteers. Although the Chief stated in his testimony that there are 40 people under his command, it is also unclear exactly how many of them are part-time Firefighters/EMTs as opposed to paid volunteer Firefighters.

when he is not on active fire or ambulance calls, he is frequently on standby. Like regular part time CSOs in *Administrative Office of the Courts*, the part time Firefighter/AEMT works over 44 weeks per year (he worked 45 weeks out of 52 between June, 2017 and June 2018) and has not been away from employment for extensive periods of time (the longest period was two weeks in May of 2018). Here, like in *Liquor Commission*, differing treatment of full time and part time employees under the personnel rules does not establish that the part time Firefighter is not a public employee. Furthermore, taking into consideration the inherent lack of predictability associated with the Firefighters' work (all Firefighters/EMTs go on calls only when an accident, fire, medical or other emergency occurs), the fact that the part time Firefighter does not always work the same number of hours each week, or work on the same day, or work the same shift every week does not mean that his employment lacks "continuity or regularity of occurrence, activity, or function." Based on the foregoing, the part-time Firefighter/AEMT is a regular part time employee and is, therefore, appropriately included in the proposed bargaining unit.

The Town also argues that the proposed unit inappropriately includes supervisory (Police Sergeant and Police Corporal) employees in violation of RSA 273-A:8, II. 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).

The Supreme Court has recognized that "[d]etermining where in the pyramid of administrative functions an employee becomes part of 'management' is not a simple task." *In re Nashua Association of School Principals*, 119 N.H. 90, 93 (1979). In determining whether an

employee exercises a “supervisory authority” within the meaning of RSA 273-A:8, II, important factors to consider include “the employee’s authority to evaluate other employees, the employee’s supervisory role, and the employee’s disciplinary authority.” *Appeal of Town of Stratham*, supra, 144 N.H. at 432. See also *Appeal of East Derry Fire Precinct*, 137 N.H. 607, 610 (1993). The fact that an employee has some authority in the areas of discipline, evaluation, and hiring “is the start, and not the end, of the analysis because positions possessing some authority in these areas are not per se supervisors within the meaning of the statute.” *Tilton Police Union, NEPBA Local 29 v. Town of Tilton*, PELRB Decision No. 2007-100. 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.” *Id.* 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 *Londonderry Executive Employee Association v. Town of Londonderry*, PELRB Decision No. 2001-118. See also *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*, supra, 137 N.H. at 611. See also *Hampstead Police Union, NEPBA Local 37 and Town of Hampstead*, PELRB Decision No. 2008-071. A supervisory relationship 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 (emphasis added).

In *Appeal of Town of Moultonborough*, 164 N.H. 257, 266-67 (2012), the Supreme Court found that the police corporal and sergeants were supervisory employees within the meaning of RSA 273-A:8, II. In *Moultonborough*, the corporal and sergeants were authorized to evaluate subordinate officers in the proposed unit and the evaluations were considered in determining step increases. *Id.* at 265-66. They were in charge of the department in the chief's absence and were involved in certain aspects of the hiring process. *Id.* at 266. They were authorized to issue verbal counseling and written reprimands. *Id.* The Supreme Court found that the corporal and sergeants had sufficient supervisory responsibility over subordinate officers so that the inclusion of them in the same unit was unreasonable. *Id.* at 266-67.

Similarly, in *Appeal of Town of Stratham*, *supra*, 144 N.H. at 432, the Supreme Court found, *inter alia*, that the PELRB erred in including a sergeant in the bargaining unit. In *Stratham*, the sergeant performed evaluations, assigned shifts, and had authority to discipline fellow employees in emergencies. *Id.* The Court found that the sergeant was a supervisory employee within the meaning of RSA 273-A:8, II. *Id.*

In contrast, in *Teamsters Local Union 633 of New Hampshire and Rockingham County*, PELRB Decision No. 2011-203, the corrections sergeants were included in the bargaining unit, over the employer's objection, because the extent to which the sergeants were involved in discipline, evaluation, and the hiring and termination processes, and the nature of their involvement did not rise to the level of the "significant exercise of discretion" that would create a conflict within the unit or warrant exclusion from the bargaining unit. *Id.* The sergeants in *Rockingham* did not have authority to issue written warnings, to conduct internal affairs investigations, or to recommend demotion or termination. *Id.* Although the Sergeants in *Rockingham* completed annual evaluation forms, the forms were then moved up the chain of



command and each superior officer in that chain, including the lieutenants, the major and, finally, the superintendent, had authority to override the evaluation prepared by a sergeant. *Id.* Also, there was insufficient evidence to prove that the evaluations prepared by the sergeants constituted a significant factor in determining pay increases, promotions, demotions, discipline, or terminations or that the sergeants played a significant role in hiring. *Id.* In *Rockingham*, the Sergeants supervisory role was relatively limited and was in nature of an employee performing some supervisory functions in accordance with professional norms, akin to a “working foreman.” *Id.* 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 they battalion chiefs exercise supervisory authority entailing significant discretion”); *University System of New Hampshire v. State of New Hampshire*, 117 N.H. 96, 102-103 (1977) (affirming board’s determination that department chairs, who acted as liaisons between faculty and dean, made recommendations as to performance, tenure and hiring and firing but did not possess final authority in these areas were not statutory supervisory employees).

Similarly, in a case involving the Tilton Police Department, the position of sergeant was included in the bargaining unit along with patrol officers over the public employer’s objection that sergeants were supervisory employees. See *Tilton Police Union, NEPBA Local 29 v. Town of Tilton*, PELRB Decision No. 2007-100. Although the sergeants in *Tilton* had authority to evaluate, the evaluations did not determine whether an employee would receive a salary increase, promotion, demotion, or termination. *Id.* In addition, the sergeants had authority to issue verbal warnings but did not have authority to recommend suspension, promotion, demotion, or termination. *Id.* See also *Hampstead Police Union, NEPBA local 37 and Town of Hampstead*,

PELRB Decision No. 2008-071 (including sergeant position in same bargaining unit with police officers over employer's objection); *American Federation of State, County and Municipal Employees, Council 93 v. Town of Litchfield, New Hampshire, Police Department*, PELRB Decision No. 90-91 (same); *American Federation of State, County and Municipal Employees, Council #68, AFL-CIO and Town of Hudson, New Hampshire, Police Department*, PELRB Decision No. 81-22 (same).

In this case, the Police Sergeant and Police Corporal do not exercise "supervisory authority involving the significant exercise of discretion." The Sergeant's and the Corporal's main duty is patrol. Unlike a sergeant in *Stratham* and a corporal and a sergeant in *Moultonborough*, the Sergeant and Corporal here do not conduct evaluations, and have no authority to discipline Patrol Officers, either verbally or in writing, or to recommend discipline, suspension, or termination. Further, the evidence is insufficient to show that they are involved in any way in hiring, promotion, or pay raise determination processes. Although they have authority, like any other senior Patrol Officer in the Department, to provide an advice or guidance to less-experienced employees, this authority does not rise to the level of discretion contemplated by the statute. They, like any other employee in the Police Department, have an obligation to report an incident or occurrence to the Police Chief, but only the Chief has authority to impose discipline. Only the Board of Selectmen can make a final decision on pay raises, promotions, and terminations. Only the Chief evaluates Police Department employees and, under the Town's rules, employee evaluations do not guarantee a pay increase. Further, the Chief, and not the Corporal or the Sergeant, conducts Internal Affairs investigations. Neither the Corporal nor the Sergeant has any input into the policy making. Moreover, even when the Chief is absent, e.g. on vacation, the Corporal and Sergeant are required to contact him regarding any

incident and the Chief then makes the appropriate decision. Furthermore, the Chief believes that the inclusion of the Corporal and the Sergeant in the bargaining unit will not compromise their ability to perform their duties, will not lead to the division of loyalties, and will not create a conflict within the group. Based on the foregoing, under RSA 273-A:8, II, the Police Sergeant and Police Corporal are not persons "exercising supervisory authority involving the significant exercise of discretion" and are appropriately included in the bargaining unit.

The Town also seeks to exclude the Administrative Assistant from the proposed bargaining unit on the ground that this position is confidential within the meaning of RSA 273-A:1, IX, (c). 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." However,

Confidential employees, in terms of a labor relations statute, are not those who merely deal with sensitive material or confidential matters, such as tax returns, 'state secrets', financial or personal matters which might be deemed 'confidential' in the sense that they should not be divulged to the general public. Indeed, most state employees (teachers, policemen, and others) have access to and are familiar with 'confidential' information and the drafters of the statute could not have intended that they be excluded from bargaining units.

*State of New Hampshire, Department of Revenue Administration v. State Employees' Association*, PELRB Decision No. 78001. Rather, 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*, supra, 164 N.H. at 262 (emphasis added).

In *Appeal of Town of Moultonborough*, supra, 164 N.H. at 263-64, 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. The Court stated as follows:

[T]he 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. 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... 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 (citations omitted). In *Moultonborough*, the executive assistant's responsibilities included answering all phone calls, including calls directed to the police chief, entering payroll information into computer system, conducting billing, handling worker's compensation reports, sending bills to the finance department for payments, and opening departmental mail unless it was marked "confidential." See *NEPBA, Moultonborough Police Association and Town of Moultonborough*, PELRB Decision No. 2011-039, aff'd in part, rev'd in part, *Appeal of Town of Moultonborough*, supra, 164 N.H. at 264. However, the executive assistant did not file anything into the personnel files, had no access to the locked cabinet containing personnel files without the Chief's permission, did not open confidential mail, and did not attend non-public meetings between the chief and the Board of Selectmen. See *id.*

Likewise, in *University System of New Hampshire v. State of New Hampshire, et al.*, 117 N.H. 96, 101 (1977), the Supreme Court agreed with the PELRB that department chairs were not confidential employees despite the fact that they had access to personnel files. See also *I.U.O.E. Local 08 v. Town of Pembroke*, PELRB Decision No. 2006-205 (finding that public works secretary was not confidential employee because evidence was insufficient to prove that she was

involved with personnel or other confidential labor relations matter in any meaningful way). See also *Keene State College Directors and Supervisors Association, NEA-NH and Keene State College*, PELRB Decision No. 2016-115; *State Employees' Association of New Hampshire, SEIU Local 1984 v. Plymouth State University*, PELRB Decision No. 2013-133; *NEPBA, Inc. Local 40 (NH Fish & Game Conservation Officers) and SEA/SEIU Local 1984 and NEPBA, Inc. Local 45 (NH Fish & Game Supervisory Officers) and SEA/SEIU Local 1984*, PELRB Decision No. 2006-174, *aff'd, Appeal of State Employees' Association of New Hampshire, Inc.*, 156 N.H. 507 (2007).

In contrast, in *Appeal of City of Laconia*, the Supreme Court concluded that the administrative secretary was a confidential employee because she “was privy to the personnel director’s personal thoughts, strategies, and notes about the collective bargaining process. Moreover, the administrative secretary opened all inter-departmental communications, including those involving labor negotiation strategies between the city manager and the personnel director.” *Appeal of City of Laconia*, *supra*, 135 N.H. 421, 423 (1992). See also *Appeal of Town of Newport*, 140 N.H. 343, 354 (1995). Similarly, in *Hooksett Police Supervisors, NEPBA Local 38 and Town of Hooksett*, the executive secretary was excluded from the proposed bargaining unit because she took and typed the minutes of the Police Commission’s meetings, both public and non-public, typed the chief’s letters, including budgetary and labor related letters, maintained all personnel files and performance evaluations, and was privy to the chief’s ideas regarding collective bargaining negotiations with the exclusive representative of an existing bargaining unit. See PELRB Decision No. 2010-182. See also *Teamsters Local 633 of NH/Newmarket Public Works Employees and Town of Newmarket*, PELRB Decision No. 2008-127; *Rochester Municipal Employees Association and City of Rochester*, PELRB Decision No.

2009-150; *Northfield Police Union, New England Police Benevolent Association and Town of Northfield*, PELRB Decision No. 2009-030.

In the present case, the evidence is insufficient to prove, by a preponderance of the evidence, that the Fire Department/Code Enforcement Administrative Assistant is a confidential employee within the meaning of RSA 273-A:1, IX (c). Unlike the secretary in *Hooksett*, the Administrative Assistant here does not open Fire Chief's mail, does not type or edit/proofread disciplinary letters, and does not attend, or type the minutes of, budgetary meetings between the Chief and the Board of Selectmen. She does not discuss pay raises, discipline or significant personnel decision, such as hiring, suspension, promotion or termination, with the Chief. She does not have access to personnel files and does not have a key to the cabinet where personnel files are kept.<sup>3</sup> The evidence here is insufficient to establish that the Administrative Assistant types or maintains the Chief's confidential communications or is privy to his thoughts regarding discipline, significant personnel decisions, or other labor relations matters. The Administrative Assistant's responsibilities here are more akin to those of the executive assistant in *Moultonborough* and *Pembroke*. Further, like in *Moultonborough*, the Town's objection here is premature, as until now, the Town did not have a bargaining unit and the Fire Chief has not yet been involved in collective bargaining or union-related activities. Based on the foregoing, like the executive assistant in *Moultonborough* and the secretary in *Pembroke*, the Administrative

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<sup>3</sup>The Fire Chief's testimony that the Administrative Assistant has access to personnel files is not credible as, when cross-examined, he contradicted his earlier testimony by stating that the Administrative Assistant did not have access to personnel files, that personnel files were kept in a locked cabinet, and that only the Chief and the Deputy Chief had access to the files. Furthermore, Ms. McDonough credibly testified that she did not have access to personnel files, salary or disciplinary information. The Chief's testimony regarding the Administrative Assistant's access to the employees' social security numbers is irrelevant, as this is not a confidential information contemplated by the 273-A:1, IX (c) because this information is not a "confidential information with respect to labor relations, negotiations, significant personnel decisions." The same is true with respect to any ambulance billing related information. The Chief's testimony concerning "confidential conversations" is likewise not credited, because, when examined by the undersigned, the Chief testified that these conversations did not involve employee discipline, internal investigations, or significant personnel decisions (e.g., promotions, suspensions, terminations).

Assistant here is not involved with significant personnel decisions or other confidential labor relations matter in any meaningful way. Accordingly, the position of Administrative Assistant is a not a confidential position within the meaning of RSA 273-A:1, IX (c) and is eligible for inclusion in the bargaining unit.

Lastly, the employees in the bargaining unit have a sufficient community of interest.

“The principal consideration in determining an appropriate bargaining unit is whether there exists a community of interest in working conditions such that it is reasonable for the employees to negotiate jointly.” *Appeal of Town of Newport*, supra, 140 N.H. at 352. RSA 273-A:8, I provides that:

[T]he community of interest may be exhibited by *one* or more of the following criteria, although it is not limited to such:

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

(Emphasis added).

The PELRB rules provide additional criteria for determining whether a community of interest exists:

- (1) A common geographic location of the proposed unit;
- (2) The presence of:
  - a. Common work rules and personnel practices; and
  - b. Common salary and fringe benefit structures; and
- (3) The self-felt community of interest among employees.

Pub 302.02 (b). “[T]he statutory framework which guides PELRB decisions is flexible, and gives much discretion to the PELRB’s expertise. The statute and regulation require only that certain factors *may* be considered in determining whether a community of interest exists.” *Appeal of University System of New Hampshire*, 131 N.H. 368, 374 (1988) (emphasis in original). Under

the statute and regulations, “the PELRB need not find each criterion satisfied in order to find that a community of interest exists.” *Appeal of Town of Newport*, supra, 140 N.H. at 352. Furthermore, the clear and unambiguous statutory language indicates that satisfaction of just one of the criteria listed in RSA 273-A:8, I may be sufficient to establish a requisite community of interest.

Furthermore, when determining a community of interest, the focus must necessarily be on similarities, not the differences, between the positions in a proposed bargaining unit. See RSA 273-A:8, I and Pub 302.02 (b). The differences in bargaining unit positions’ training requirements or specific job duties do not preclude a formation of a cohesive bargaining unit that is otherwise appropriate under RSA 273-A:8, I and Pub 302.02 (b). For example, although there are differences in training/certification requirements and job descriptions of police and fire department employees, there are numerous public safety, or general municipal, bargaining units containing both police and fire employees. See e.g. *Pittsfield Town Employees, AFT #6214, AFT-NH, AFL-CIO and Town of Pittsfield*, PELRB Decision No. 2017-191 (containing police chief, lieutenants, sergeants, EMS captain, EMS/FF lieutenant, EMTs, paramedics, firefighters, AEMTs, administrative assistant, and public works employees); *Town of Belmont and AFSCME Council 93, Local 3657*, PELRB Decision No. 2011-131 (containing patrolmen, police corporal, firefighters, EMTs, fire lieutenant, secretary); *AFSCME Local 3657, Hollis Police and Fire Employees and Town of Hollis*, PELRB Decision No. 2006-059 (containing police and fire employees); *American Federation of State, County and Municipal Employees, Council 93, Local 3380 and Town of Plymouth*, PELRB Case No. A-0477 (March 13, 1998) (containing employees of police and fire departments); *Gilmanton Town Employees Association and Town of Gilmanton*, PELRB Case No. M-0629 (October 30, 1990) (containing full time and part time



police officers, firefighters, EMT, secretaries, and highway dept. employees). See also *City of Lebanon and Teamsters Local 633, Lebanon Professional Administrative Salaried Employees*, PELRB Decision No. 2018-026 (containing deputy fire chief, police lieutenant and captain among others); *Town of Derry and Professional, Administrative and Technical Employees of Derry, SEIU Local 1984*, PELRB Decision No. 2017-060 (containing among others assistant fire chief and police captain); *Londonderry Administrative Employees Association Affiliated with AFSCME Council 93 and Town of Londonderry*; PELRB Decision No. 2011-321 (containing police captain, lieutenant, fire and police secretaries, fire Marshall, fire captain); *AFSCME Council 93, Local 3657 and Town of Merrimack*, PELRB Decision No. 2010-014 (containing fire deputy chief, captain, lieutenant inspector, police lieutenants, captains, communications supervisor); *Claremont Association of Professional and Management Employees and City of Claremont*, PELRB Case No. M-0541 (December 2, 1981) (containing among others police captain, lieutenant, assistant fire chief). There are also numerous public safety bargaining units that contain administrative secretaries, clerks and other administrative employees. See e.g. *Professional Firefighters of Newington, IAFF Local 4104 and Town of Newington Fire Department*, PELRB Decision No. 2014-157 (part time secretary in same unit with fire lieutenant, firefighters EMTs); *Hillsborough County Sheriff's Office & Hillsborough County*, PELRB Decision No. 2004-143 (deputy sheriffs in same unit with secretaries and clerk typists); *Dover Police Association & City of Dover*, PELRB Decision No. 2004-013 (clerk-typists and secretary in same unit with police officers); *Somersworth Police Union, NEPBA Local 19 & Somersworth Police Dept.*, PELRB Decision No. 2006-087 (secretaries in same unit with police officers); *Teamsters Local 633, UNH Police Officers & UNH Police Dept.*, PELRB Decision No. 2006-076 (administrative assistants in same unit with police officers); etc.

In the present case, all employees in the proposed bargaining unit, except part time Patrol Officers excluded as on call employees (see above), function within the same organizational unit, the Town of Loudon. Both police and fire department employees provide public safety services to the residents of Loudon. Furthermore, the terms and conditions of employment of the employee in the proposed bargaining unit are governed by the Town Personnel Policies Manual, issued by the Board of Selectmen, which covers, among other things, annual, sick, and other leaves, hours of work, FMLA, compensatory time, probationary period, holiday pay, call back pay, overtime, pay periods, medical and dental benefits, performance evaluations, personnel records, and promotions and transfers. Common work rules and personnel practices apply to all employees in the bargaining unit. In addition, there is strong self-felt community of interest between employees of the Fire and Police Departments. Furthermore, the evidence in this case is insufficient to prove that the creation of the proposed bargaining unit will have a negative effect on government operations. Therefore, the employees in the proposed bargaining unit, with the exception of part time Patrol Officers, as discussed above, share a community of interest in working conditions such that it is reasonable for the employees to negotiate jointly.

Based on the foregoing, the following bargaining unit is approved: full time Police Sergeant, full time Police Corporal, full time Patrol Officers, full time Firefighters, full time Administrative Assistant, and part-time Firefighter. The proposed bargaining unit contains 10 employees with the same community of interest as required under RSA 273-A:8, I.<sup>4</sup> Accordingly, the PELRB will conduct a secret ballot election pursuant to RSA 273-A:10 to determine the exclusive representative of the approved unit, if any. "Teamsters Local 633" and

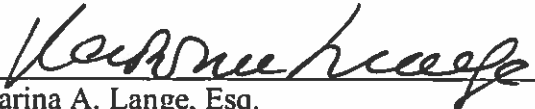
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<sup>4</sup> RSA 273-A:8, I provides in relevant part that "[i]n no case shall the board certify a bargaining unit of fewer than 10 employees with the same community of interest."

“No Representative” will appear as choices on the ballot. An Order for Election shall issue in due course and a pre-election conference shall be conducted pursuant to Pub 303.02.

So ordered.

Date: 12/4/2018

  
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