



NH Supreme Court reversed this decision on October 27, 1995, Slip Opinion No. 94-305, 140 NH 343 (1995).

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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AFSCME COUNCIL 93 for NEWPORT	:	:
TOWN EMPLOYEES	:	:
	:	:
Petitioner	:	:
	:	:
v.	:	CASE NO. A-0560
	:	:
TOWN OF NEWPORT	:	DECISION NO. 93-42
	:	:
Respondent	:	(Supplemental Decision to
	:	Decision No. 91-76)
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BACKGROUND

On April 12, 1991, A.F.S.C.M.E., Council 93 (Union) filed a Petition for Certification (Petition) for "all full-time and part-time employees in the Highway, Cemetary [sic], Recreation, Water and Sewer, and Fire Departments" of the Town of Newport (Town). On April 23, 1992, the Town, by letter from Town Manager O'Neill, filed exceptions to that Petition alleging the Union's petition (1) would put supervisors and supervisees in the same unit and (2) failed to recognize alleged disparities in community of interest among the petitioned-for employees. Since the parties were unable to agree on the composition of the bargaining unit, a hearing was held on the pending petition on July 18, 1991.

On September 30, 1991, the PELRB issued Decision No. 91-76 creating a bargaining unit of:

All full-time employees of the Town of Newport namely: working foreman, head mechanic, mechanic, clerk, truck drivers/equipment operators, laborers, utility technician, sewage treatment operator, fire fighters, fire lieutenant, superintendent of water and sewer, and superintendent of cemetery and grounds.

Excluded were the Fire Chief, Deputy Fire Chief and Superintendent of Highways. In the meantime, the petitioner had withdrawn its request to include part-time employees. On October 11, 1991, the PELRB issued a corrected decision which eliminated the "fire fighter" position from the unit and added the position of Superintendent Sewage Treatment Plant to the unit. On October 15,

1991, the PELRB issued a Notice of Election. A bargaining agent certification election was conducted on October 25, 1991 with 20 of 21 eligible voters voting. Seventeen votes were cast for the union. Three were cast for No Representative. The bargaining agent was certified and an Order to Negotiate was issued October 25, 1991.

In the meantime, the Town prepared and sent a Motion for Rehearing under cover of a letter dated October 18, 1991, to the PELRB alleging certain errors and requesting reconsideration of Decision No. 91-76. There is no evidence that that letter and Motion were received by the PELRB prior to November 25, 1991 when a duplicate copy was provided. In the interim, on November 4, 1991, the Town filed a Motion to Stay Negotiations. On December 9, 1991, the PELRB denied both the Motion for Rehearing and the Motion to Stay Negotiations. Thereafter the Town appealed to the New Hampshire Supreme Court. The Court accepted the case and issued a decision on December 3, 1992 stating that the PELRB's "written decision does not include specific findings of fact sufficient to support its decision and order of September 30, 1991, as amended on October 11, 1991." The case was remanded to the PELRB "for proceedings at which it may further consider making findings to support its ultimate decision and order in this case." It is from that remand that we supplement our previous findings in Decision No. 91-76.

FINDINGS OF FACT

1. The Town of Newport is a "public employer" as defined in RSA 273-A:1 X.
2. AFSCME, Council 93 is a labor organization petitioning on behalf of certain employees of the Town of Newport.
3. Prior to or at the commencement of the unit determination hearing, the parties reached agreement on the exclusion of all part time positions (including on-call fire fighters) and exclusion of the Chief of the Fire Department, per the petition. Likewise, the parties agreed on the inclusion of the following positions: working foreman, head mechanic, mechanic, truck driver/equipment operator, laborers, utility technicians and sewage treatment operator (T-18)*
4. Contested positions at the unit determination hearing were the: Secretary (otherwise referred to as "clerk" or "Division Secretary" for the Public Works Department) (T-10,18), Fire Fighter Lieutenants (also

*"T" followed by dash and number denotes transcript and page.

known as "fire lieutenants" and "house men") (T-58), Deputy Fire Chief, (T-59), Superintendent of the Water and Sewer Department, Superintendent of Cemeteries and Grounds, and Superintendent of the Sewage Treatment Plant (T-19).

5. The Town has a unified personnel policy, created by management, which applies to all its employees, inclusive of positions under consideration herein, and which addresses a similarity of benefits covering probation, promotion, demotion, discipline suspension, overtime, attendance, vacations, sick leave, holidays, group health benefits, insurance, and employee conduct.
6. There is no evidence that the clerk (also referred to as "Secretary" and "Division Secretary" of Public Works in these proceedings) is involved in confidential matters related to labor relations although she does attend staff meetings and handle personnel matters. (T-54). The applicable job description calls for this employee to "perform highly responsible secretarial work, develop office procedures and answer routine inquiries." This employee is required to act independently, exercise judgment and utilize tact in matters requiring the department head's attention. (Job description, paragraph 2). This employee is not required to exercise any supervisory control over subordinates. (Job description, paragraph 3).
7. "Fire lieutenants" are permanent employees of the fire department. They are three in number and, along with the Deputy Chief, are known as "house men" and are the permanent, regular employees who lead each shift. All other fire fighters are on a call basis and, accordingly are not eligible for collective bargaining under RSA 273-A:1 IX (d). Thus, the fire lieutenants and deputy chief have no supervisees. Fire lieutenants complete a daily check list on the engine, clean the station, inclusive of windows and bathroom, run monthly training, and usually drive the truck to fire scenes. They work rotating schedules and have the same fringe benefits (vacations and insurance) as public works employees. (T-58 to 64) In the absence of a senior officer (Chief or Deputy Chief), the lieutenant runs the fire scene and directs post fire operations on scene and at the station. While the job description speaks to the lieutenant's evaluating performance and recommending hiring and discipline of assigned

personnel, we find that those subordinate personnel are not public employees within the meaning of RSA 273-A:1 X. Even if "assigned personnel" were "public employees," the lieutenant's role and function would be that of a working foreman under his responsibilities to 1) conduct training sessions, 2) conduct hose testing, 3) keep records, 4) formulate fire plans, 5) drive or direct others to drive or operate fire equipment, and 6) respond to fires and emergency calls. (Job description, paragraph 4)

8. The Deputy Fire Chief is a "house man" and supervises ("takes") a shift (T-58). When he works a shift, he does so alone, i.e., there are no other permanent employees assigned to the shift. (T-59). Thus, the Deputy Chief has no supervisees who are eligible for collective bargaining under RSA 273-A:1 IX. He works rotating shifts, as do the lieutenants. (T-59). Unlike the lieutenants who are elected (internally, not by popular vote), the Deputy Chief is appointed by the Chief, not by the legislative body of the public employer. RSA 273-A:1 IX (b) (T-60)

9. The Water and Sewer Superintendent is charged with administering and supervising all water and wastewater activities including the operation, maintenance, repair and construction of all municipal water and wastewater systems. He works under the general supervision of the Director of Public Works, an exempt position. (Job description, paragraph 1 and 2). In addition to supervising and scheduling the crew and offering instruction and training for them (Job description, paragraph 4, sections 1 and 2), he is actively involved in the "hands on" functions of the division. This includes inspecting contractors' work on town systems, installing, maintaining and repairing water and sewer lines, operating equipment (e.g., loader and back hoe) in construction projects, and reading, installing and repairing water meters. (Job description, para. 4, sections 3, 5 and 6). He assists the technicians, approves their time cards and schedules vacations. He is not replaced by another supervisor when he is on vacation. He makes recommendations as to hirings, firings and discipline, subject to the approval of the Director of Public Works or higher authority. (Job description, para 4 and T-21 to 29). He has authority to approve departmental purchases to \$1,000. (T-38).

10. The Superintendent of Cemeteries and Grounds is responsible for the management of six town cemeteries, 21 1/2 acres of grounds and parks, and four ball fields

(Job Description, para 1 and T-49). He is required to plan, organize and make work assignments for staff personnel consisting of one full time employee and welfare recipients assigned by the town. (Job Description, para. 4 section 3 and T-48). He is responsible for equipment maintenance, preparation of the division's budget, requisitioning supplies and equipment, and maintaining records of purchases, burials, foundations and entombments. (Job description, para. 4 and T-50).

11. The Superintendent of the Sewage Treatment Plant, also known as the Wastewater Treatment Plant Superintendent, is responsible for directing and supervising the operation and maintenance of the municipal wastewater treatment plant. (Job description, para. 1) There are two employees at the plant, the Superintendent and an operator both of whom possess the same qualifications as operators. (T-52). He is responsible for collection and testing (bacteriological and chemical) of samples, recording results, and forwarding reports to state and federal authorities (Job description, para. 4, sec. 2) As such he is more of a technician than the two previous superintendents and deals with the "actual operation of the facility." (T-52 and Job description, para. 6). He is responsible for preparing and submitting a budget and has limited spending authority. (Job description, para. 4 and T-52). He works along with other employees, supervising the "servicing and repair of plant equipment and machinery, and ensures that safety regulations are followed." (Job description, para. 4, section 4).
12. There is no history of any of the employees annotated in Findings 6 through 11, inclusive, being involved in the collective bargaining process. Existing collective bargaining efforts in the Town have been conducted by the Town Manager (e.g., for police and dispatch personnel). Any secretarial support required for those negotiations comes from the Town Manager's secretary who is privy to that process. The Police Department secretary neither attends nor has a role in negotiations involving that department. (T-56, 57).

DECISION AND ORDER

After revisiting the record in this case, inclusive of the transcript and exhibits, it appears that all six contested positions are eligible for inclusion in the bargaining unit. All employees share a similarity of benefits and work for the same employer. RSA 273-A:8 I.

The secretary/clerk has no privy or confidential relationship to the public employer (RSA 273-A:1 IX) nor any supervisory authority under RSA 273-A:8 II. The Town is not prejudiced or inconvenienced by this position being in the unit since the Town Manager's secretary is responsible for all clerical functions associated with collective bargaining. The position is INCLUDED.

The fire lieutenants/Deputy Chief are full time line employees of the fire department. Both job titles function in a similar capacity as "house men" and lead employees on each of four rotating shifts. Neither has any supervisees who are public employees. Both positions are INCLUDED.


All three superintendent positions under consideration function in the role of a lead employee within their respective divisions. All three are responsible for the functioning of their divisions and devote a significant portion of their work time to the actual performance of functions or "hands on" tasks associated with the operation of those divisions. They do the work of their divisions with administrative duties being an extra responsibility of the job title. None exercises the "significant exercise of discretion" referenced in RSA 273-A:8 II to make them exempt as a supervisor. That level of authority is reserved to the Director of Public Works or higher. There is no justification to exempt any of them from the unit. The Water and Sewer Superintendent, Cemetery and Grounds Superintendent and Sewage Treatment Plant Superintendent positions are INCLUDED.

Thus, the bargaining unit is established to include all full-time employees of the Town of Newport, namely, Working Foreman, Head Mechanic, Mechanic, Clerk, Truck Drivers/Equipment Operators, Laborers, Utility Technicians, Sewage Treatment Operator, Fire Lieutenants, Deputy Chief of the Fire Department, Superintendent of Water and Sewers, Superintendent of Cemeteries and Grounds and Superintendent of Sewage Treatment Plant.

EXCLUDED: Fire Chief and Director of Public Works.

So ordered.

Signed this 27th day of April, 1993.


 EDWARD J. HASELTINE
 Chairman

By unanimous vote. Chairman Edward J. Haseltine presiding. Members Seymour Osman and E. Vincent Hall present and voting.