



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, COUNCIL 68

Complainant

v.

TOWN OF PLYMOUTH

Respondent

CASE NO. A-0477

DECISION NO. 85-39

APPEARANCES

Representing the American Federation of State, County and Municipal Employees, Council 68

James C. Anderson, Executive Director

Representing the Town of Plymouth

Daniel Crean, Esq., Counsel

Also present

Mark Halloran, Town of Plymouth

Henry C. Bird, Town of Plymouth

BACKGROUND

This matter comes before the Public Employee Labor Relations Board (hereinafter the "Board" or the "PELRB") on remand from the New Hampshire Supreme Court. See Appeal of the Town of Plymouth, November 30, 1984, No. 82-439. The PELRB made an initial determination of a bargaining unit in the Town of Plymouth combining non-supervisory employees of the police and fire department for collective bargaining under the terms of RSA 273-A. Despite the objections of the Town, after hearings and decisions by a hearing examiner and the full Board, an election was held and the employees selected AFSCME as the exclusive representative for collective bargaining. The Town appealed on several bases and the Supreme Court considered the matter. On remand, the issues to be considered by the Board are as follows:

- 1) Whether the terms of RSA 273-A:1 IX (b) which excludes "persons appointed to office by the Chief Executive or legislative body of the public employer" from the class of "public employees" eligible to organize under the chapter makes all other determinations and issues irrelevant since it disposes of the case? The Town asserts that all members of the established bargaining unit are so appointed by the selectmen so as to be excluded by the terms of the statute.

- (2) Whether as a matter of law police and fire department employees can be combined? The Town cites legislative history to back up its claim that as a matter of law police and fire departments cannot be combined.
- (3) Whether when considering the case on its facts and in light of the statute and rules under which the Board operates, the decision to combine the units made by the hearing examiner is appropriate or whether it should be reversed? The Town of Plymouth has also raised the issue as a sub-part of the third issue stated above as to what standard the PELRB uses in determining an appropriate bargaining unit.

As additional background, it should be noted that the matter initially came before the Board as a request from AFSCME for the formation of a unit of both police and fire departments. The Board determined that this was an appropriate request notwithstanding the fact that an earlier petition for establishment of a unit combining police, fire and highway departments had been rejected. The Board and subsequently the Court held that there was no collateral estoppel as to the combination of police and fire departments because of the finding that the three department unit was inappropriate. No further consideration of that matter will be made in this decision.

Neither the police or fire department alone had sufficient employees to be certified by itself as a bargaining unit under the terms of RSA 273-A:8 I which requires bargaining units have ten employees or more.

There was no history of collective negotiations in the Town of Plymouth at the time of the petition. The Town asserted that the departments should not be combined because they operated separately, had separate budgets, powers, work rules and existence. AFSCME asserted the departments should be combined because there was a self-felt community of interest, were similar work rules, salary structure, working conditions and other factors in the two "public safety" departments. AFSCME's position was sustained by the hearing examiner and appealed by the Town to the Board which upheld the hearing examiner.

At the Supreme Court and on remand at hearing, the Town of Plymouth cited extensive legislative history in which several legislators stated their opinion that police and fire departments could not be combined.

The Board held a hearing at its office in Concord on January 17, 1985.

FINDINGS OF FACT

The Board has considered all evidence put forth in the initial hearing and hearing on remand, has reviewed written submissions, hearing examiner's decision, Supreme Court decision and record and makes the following findings of fact on the issues which remain outstanding. No findings or decision will be made on issues concerning matters about the lack of prior consultation before petitioning for a unit since these are not raised on remand as an existing issue, were dealt with in the initial decision and found not to be required under the circumstances of the case. Likewise, there will be no additional consideration of the inclusion or exclusion of specific positions. The initial finding of the Board that sergeants in the police departments should be included but the ambulance director should be excluded were discussed thoroughly and found appropriate in the earlier decision.

The Board finds that there are separate police and fire departments in the Town of Plymouth. These two departments operate in similar fashion but separately, having separate supervisors. They have similar salary structures and personnel policies, they have related but not identical functions involving public safety, overlapping somewhat especially when considered in light of the fact that they operate in a small town. The departments operate from separate facilities, have separate shifts, supervision structures and personnel. There is no overlap or exchange of personnel between the departments.

Police officers and firefighters historically have separate functions, separate training and are covered by separate state statutes. Specifically RSA 105-A and 154-C cover the different types of public safety officials.

The Public Employees Labor Relations Act, RSA Chapter 273-A, recognizes a right of public employees to organize and bargain collectively. See Statement of Policy at I. By establishing this right, the Board interprets the legislative intent to support a presumption in favor of such right.

There does exist in the legislative history of the 1975 legislature, testimony and debate using police and fire departments as specific examples of those employees which would not be combined under the proposed statute which became RSA 273-A.

As far as the Board is aware, there is no joint police/fire department unit established or organized for collective bargaining with the State of New Hampshire.

Employees feel a community of interest notwithstanding departmental lines. Indeed, the employees perform public safety functions, as stated above, operate on 24-hour rotating shifts, and uniformed and have similar if not identical salary structures.

The Police Sergeant and Deputy Fire Chief are in essence working foremen and certain patrolmen and firefighters on certain shifts assume the same duties and responsibilities when those individuals are not available. The ambulance service director has supervisory responsibilities.

RULINGS OF LAW

Primarily, the issues presented by this case on remand are matters of law.

First, the issue arising under RSA 273-A:1 IX (b) which excludes from the term "public employee" those who are appointed by the chief executive, is raised. The Town of Plymouth asserts that this statute is dispositive of the entire case because the Board of Selectmen function as the chief executive in the Town of Plymouth and appoint the employees sought to be included in the unit in this case. The Board believes that this argument is without merit. First, the Board finds that the mere ministerial appointing function is not meant to exclude employees but that the appointment by the chief executive of those in "office" is what was designed to be excluded, namely state department heads, constitutional officers and the like. Were this not been the case, huge numbers of public employees would have been excluded because of accidental or circumstantial appointment processes which may or may not involve chief executives or legislative bodies. The employees in the Plymouth unit are not occupants of the kind of "office" contemplated by the statute and their appointment process is not that which was anticipated.

On the issue of legislative history, while it is helpful to know the intent and background of statutes, the opinions or interpretations presented by one or two legislators in debating a bill is not binding. The critical evidence is the statute passed by the legislature and the interpretation by the courts since passage. In the case of the statute on unit determination, RSA 273-A:8, the Board has been given the authority to determine an appropriate bargaining unit when it has considered the "principle of community of interest". This may be exhibited by "one or more of the following criteria...employees with the same conditions of employment;...employees with a history of workable and acceptable collective negotiations;...employees in the same historic craft or profession;...employees functioning within the same organizational unit." The courts have long recognized the ability of the Board to make initial determinations under the provisions of RSA 273-A. There is no prohibition in the statute nor any absolute intent demonstrated in legislative history which would require dismissal of a petition which sought to combine a police department with a fire department for collective bargaining.

The primary issue before the Board in this case is whether the community of interest required by statute was demonstrated. The Board believes and finds that as a matter of law the criteria for community of interest are satisfied and present. Employees testified at hearing that they had a self-felt community of interest and while not dispositive in and of itself, this is an important element because the employees consider themselves to be similar. Likewise, as found in the findings of fact, there are similar personnel policies, salary structures, schedules, public safety functions (especially relevant in a small town) and other functions and factors which allow and support combining the units. While it is true that the supervisors are different, the departments' work hours are not identical and different state statutes regulate police and fire functions, the Board finds based on a preponderance of the evidence that in Plymouth, New Hampshire the units should be combined.

Admittedly, the facts of this case present a close question on this issue. However, even if the evidence were precisely balanced, the Board would certify the unit. The legislative presumption recognizing the right to organize and collectively bargain dictates the placement of the risk of non-persuasion on the public employer.

While not specifically required by the facts of this case or the Supreme Court decision remanding the matter to the Board, the Town of Plymouth has requested the Board state its standard for establishing units. Indeed, the Town has requested specific rulings of law in connection with this. The Board is required to evaluate each factor raised by its inquiry, by the parties or by other evidence coming before it in its application of its rules and RSA 273-A. Nevertheless, there may be a case in which the evidence on one item may outweigh all others and that item or factor may represent the "preponderance of the evidence" in that case. Indeed, the statute states that "a community of interest may be exhibited by one or more of the following criteria, although it is not limited to such:" (emphasis added) RSA 273-A:8 I.

The Board has set forth many of the factors in its rules. The factors set forth in the rules and statute are those which should primarily be examined by the Board although no list can be exhaustive. The procedure and test used by the Board can most distinctly be stated as:

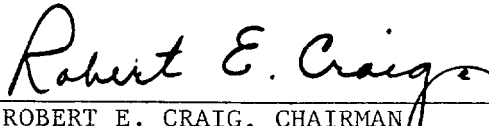
- (1) The review of all evidence presented in the light of the statutory and rule criteria.

- (2) A determination of whether one or more of the elements are established with enough weight to allow the creation of a unit as "the appropriate unit" when weighed against all other factors, including efficiency of government operations. If the determination is made that the criteria are met, the Board shall find that unit to be the appropriate unit. This is not a numerical test since there may be more factors arguing against creation of a unit than arguing in favor of but the Board may find that those in favor carry more weight, or vice versa.

Obviously, the Board does not have unlimited discretion to define and interpret the statute or the rules and has the responsibility to enforce its rules and regulations consistently and prudently to carry out all of the purposes of the statute, whether it be the right of employees to organize, the requirement that the efficiency of government operations be protected or the responsibility to determine the appropriate bargaining unit whether or not that leads to organization. The Board's function is neutral in this regard.

DECISION AND ORDER

Because the Board has found that there is sufficient community of interest to combine the employees of the police and fire departments in the Town of Plymouth composed of those members as determined in the hearing officer's decision, that decision is affirmed, the results of the election are adopted and the parties are ordered to begin collective bargaining as required by statute.



ROBERT E. CRAIG, CHAIRMAN

Signed this 20th day of May, 1985.

Split decision. Chairman Robert E. Craig and Member Russell F. Hilliard voting in favor; Member Robert D. Steele voting in opposition. Also present, Evelyn C. LeBrun, Executive Director and Bradford E. Cook, Board Counsel.