



## State of New Hampshire

### PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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JAY HEATH

Complainant

v.

BRIAN BRALEY, In his capacity as  
Personnel Director, City of Concord

Respondent

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CASE NO. F-0101:11

DECISION NO. 87-19

#### APPEARANCES

##### Representing the Complainant, Jay Heath:

Robert T. Clark, Esquire

##### Representing Brian Braley, City of Concord:

Paul F. Cavanaugh, Esquire

##### Also appearing:

Brian Braley, Personnel Director  
Richard Judkins, Fire Chief  
Allan Hall, Asst. Fire Chief

#### BACKGROUND

Mr. Jay Heath filed a complaint of improper practices against Brian Braley in his capacity as Personnel Director for the City of Concord on November 6, 1986.

In his complaint, Mr. Heath charged that he was employed by the Concord Fire Department between July 3, 1984 and September 30, 1986 with two "intermittent" lay-offs:- May 1, 1985 and again on May 30, 1986; Mr. Heath claimed that he was employed as a "temporary full-time employee" of the Concord Fire Department and was denied rights, obligations and benefits as required under the collective bargaining agreement between the City of Concord and the Concord Firefighters Association. Mr. Heath charged that these actions violate RSA 273:A5, I, (g) and (h).

The City denied any breach of RSA 273-A claiming in its answer that Heath was employed in full compliance with the provisions of RSA 273-A and the collective bargaining agreement. The City maintained that Mr. Heath was hired on four separate occasions as "temporary maintenance worker" (July 3, 1984 to August 24, 1984); "temporary communications operator" (August 27, 1984 to May 1, 1985); and, as "temporary

communications operator" (June 31, 1985 to May 30, 1986); and again as "temporary communications operator" (July 6, 1986 to September 30, 1986). The City alleges that Mr. Heath knew he had no rights to a permanent position and signed documents to that effect. Further, the City alleges that Mr. Heath knew when permanent vacancies were available and did test for them but was not hired because he was not high enough on the eligible list. The City concluded that Mr. Heath was at all times a temporary employee and not a "public employee" as defined by RSA 273-A:1, IX and not covered by the collective bargaining contract either.

A hearing on this complaint was held on January 15, 1987 at the PELRB office in Concord with all parties represented.

#### FINDINGS OF FACT

1. The facts of Mr. Heath's employment with the City are agreed to by both parties:- he was employed as,
  - (a) "temporary maintenance worker" from July 2, 1984 to August 24, 1984;
  - (b) as "temporary communications operator" from August 27, 1984 to May 1, 1985;
  - (c) as "temporary communications operator" from June 21, 1985 to May 30, 1986;
  - (d) as "temporary communications operator" from July 6, 1986 to September 30, 1986.
2. Given the employment record of Mr. Heath, the threshold question for PELRB is whether he was a "public employee" under the statute. Mr. Heath argued that he should have become a permanent employee, at some point, and thus protected by both 273-A and the collective bargaining agreement and, was only prevented from doing so by a "subterfuge" carried on by the City.
3. City witnesses established that (a) the City Charter requires competitive examinations under a merit system for filling vacant positions and that those who are examined are placed on a list as a result and persons hired from the top three of the list. (Heath was not among the top three);
  - (b) the Fire Chief established that the former Chief left the Department in the summer of 1984 and that this initiated a series of openings up and down the chain of command in the Department;
  - (c) the Chief further established that he had authority to hire a temporary replacement for a vacant position for six (6) months and could extend that with the permission of the City Manager;
  - (d) the Chief established that Mr. Heath was laid off after eleven (11) months in a "temporary" position (June, 1985 to May, 1986) and had been hired as "temporary" and informed it was not permanent; again informed when extension granted for "temporary" position to May, 1986.

(e) The City Personnel Director testified that he sought the positions for good reason, that is because with a Chief position vacant, a new position of "Assistant Chief" was created (but not made permanent yet) and the Fire Alarm Superintendent moved into that position, creating a vacancy in the Fire Alarm Superintendent's position which was (at least temporarily) filled by a Fire Alarm division employee, creating thus another vacancy which was filled by a Communications Operator (at least temporarily) which created another vacancy which was filled by hiring a "temporary communications operator" (Heath).

(f) The City Personnel Director testified that the hiring of a new Chief and the making permanent certain positions and the filling of those positions took the major portion of the two (2) years from Summer, 1984 to Summer, 1986, so that the permanent replacement for Communications Operator was not authorized until July of 1986. (See also documents appended to City's answer to the charge.) Mr. Heath applied but was not appointed because someone higher on the eligibility list took the job when offered.

#### RULINGS OF LAW

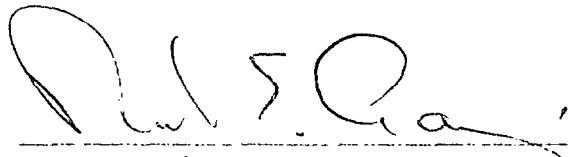
1. Mr. Heath is permitted to bring this action to PELRB in order to address the threshold question of whether or not he is a "public employee" under the Act. Since his is not represented by a union until he is a public employee, this Board is not violating any rights accorded to the exclusive representative by granting Mr. Heath standing in this case.
2. RSA 273-A clearly means to prohibit "probationary" status from extending beyond twelve (12) months (RSA 273-A:1, IX (d) and this Board has ruled that on becoming a permanent employee, a person can then be placed on probation (see #86-41) and that the limit for probation is twelve (12) months. This Board has also ruled that persons held unfairly in temporary status must be made permanent (see #77-57) yet the law is also clear in its intent generally to exclude "persons in a probationary or temporary status"... (273-A, 1, IX (d)) from the definition of "public employee" for purposes of collective bargaining.
3. We are asked here to rule whether the pattern of decision-making and position filling in the Concord Fire Department was in some way a "subterfuge" to avoid the requirements and the protection of RSA 273-A. We think not.

Although the City's personnel system in this instance was surely cumbersome and time-consuming, and although the City's actions to dismiss Mr. Heath prior to any twelve (12) month employment may appear suspicious, the procedures governing the City's actions are reasonable. The employee was informed of the temporary nature of his appointment on more than one occasion and still felt the position was of value to him. The City had need of a temporary

replacement and could not decide to hire a permanent replacement because it did not know if the person who normally held that position would return to it. The same situation might present itself due to illness of a valued employee or parental leave, etc. We are loathe to allow employees to be held in an employment "limbo" but we believe the act recognizes that there are valid reasons to have an employee in "temporary status" and the length of time depends on the circumstances in each case.

DECISION

We find that the City of Concord has not committed any unfair labor practice and the complaint is hereby dismissed.



ROBERT E. CRAIG, Chairman  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Signed this 6<sup>th</sup> day of April, 1987

Split decision. Chairman Robert E. Craig presiding. Members Seymour Osman and Richard W. Roulx voting for dismissal; member Daniel Toomey dissenting. Also present, Executive Director Evelyn C. LeBrun

DISSENT

I must dissent from the majority opinion for the following reasons:

RSA 273-A, IX states that a "public employee is a person employed by a public employer except:.....(d) Persons in a probationary or temporary status,.....nor shall any employee be determined to be in a temporary status solely by reason of the source of the funding of the position in which he is employed."

"The terms of an employment contract alone does not determine whether one is a temporary employee. To hold otherwise would permit the employer to determine the membership of a bargaining unit." (University System of N.H. v. State, 117 NH 96, 369 A.2d 1140).

"the .....administrative structure is a matter of managerial prerogative and that the system is not under a duty to bargain over the decision to alter that structure."

"But an employer may not use managerial prerogative as a shield to hide violations of RSA 273-A:5, I (a) or (c)." (Keene State College Education Association, NHEA/NEA v. State of N.H. and PELRB, January 31, 1980)

"The test generally applied by the NLRB to determine the permanence of an employee's status is whether the employee has a reasonable expectation of continued employment."

"The NLRB looks to all applicable factors to ascertain an employee's reasonable expectancy, including the length of employment, work assignments, and the work history of other employees. Similarity of fringe benefits and pay scale among employees in a unit is not required." (Keene State College Education Association v. State of N. H. and PELRB, January 12, 1979)

The City of Concord has an elaborate and well thought out personnel system. In brief, it states that all appointments and promotions shall be made solely on the basis of merit and fitness demonstrated by examination or other evidence of competency. It further states that the City Manager shall be the personnel director, who shall administer the personnel system of the City. The City Manager prepares the rules which include the policies of determining merit and fitness of candidates for appointment, and the policies and procedures regulating reduction in force and those governing persons holding provisional appointments. Concord's policy for temporary employment has a 6-month limitation, however, there is a procedure extending that time which includes the signing of a form by the employee in question from time to time stating his or her understanding that he is on temporary status.

Mr. Heath was given the opportunity to sign these forms and his employment as a fire dispatcher was terminated twice for roughly a month's time during the more than two years he was employed at the Concord Fire Department. There's no question of the fact that the City of Concord made it plain to Mr. Heath that he was considered by them to be a temporary employee, however, Mr. Heath was not given the opportunity of having an advocate to dispute this and the Union chose to ignore the situation. Nevertheless, the position of Dispatcher was and is not a temporary position. It was and is funded permanently. It was and is a part of the bargaining unit.

The City has a right to promulgate personnel policies, however, this managerial prerogative should not be used as a shield to hide violations of RSA 273-A. In this case, the violation wasn't malicious but it still had the effect of holding the position out of the bargaining unit for two years time and denying the individual involved his right to fruits of the collective bargaining agreement. It would be hard to match the professionalism and the thoroughness of the City of Concord's personnel management, however, in their zeal to implement a promotion and recruitment system free of the taint of favoritism or nepotism, they seem to have lost sight of the impact of that system.

While the City claimed that this was an "unusual occurrence", the same two year "limbo period" will occur any time a Fire Chief leaves the Department. I can think of a number of ways in which the City could maintain their standards for appointment on the basis of merit and fitness and still fall within the framework of the 6-month limit on temporary employment. However, they could have also hired a dispatcher permanently and then laid him off if someone above him didn't make the grade in his promotion and, in turn had to return to his original position. The effect in this case would have been the same. The individual would have lost his job but at least he would have been under the layoff and recall provisions of the working agreement and would have had the rights and benefits of a permanent employee and

a bargaining unit member during the time of his employment.

I think Concord's personnel policies interfered with Mr. Heath's rights under RSA 273-A. I believe that these personnel policies had the effect of discouraging his membership in an employee organization and permitted the employer, by use of its personnel policies, to determine the membership of an employee organization.

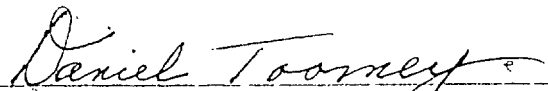
Mr. Heath's supervisors testified that he was competent in his job as dispatcher, however, he didn't finish in the top three candidates in a written test for the position so he was terminated.

Mr. Braley, the Personnel Director, testified that a test protected against any possible nepotism that could be caused by the hiring of a friend or relative on a temporary basis and then slipping him, or her, past the requirement for appointment by merit and fitness. However, that wasn't the case here. The City's Personnel System under 5.1 Merit Plan (A), "Appointments allows merit and fitness to be demonstrated by examination or other evidence of competence (emphasis added).

Mr. Heath proved his competence. He, in fact, performed satisfactorily in the position for a period of time longer than that required for probation. Mr. Heath had a reasonable expectation that he would keep the job, after all he had performed it for two years, most of the time without supervision. His expectations weren't unreasonable, a test being given after all that time was.

This was a case of a permanent vacancy in a permanent position, not a vacancy of temporary duration as would be the case when the permanent employee assigned to the job was sick or out on workmen's compensation. The fact that there is a possibility of the position being bumped, if one of the promotions which created the opening didn't work out, has no bearing on the fact of its permanence.

The City should change its personnel policies so that something like this doesn't happen again, and I feel before of the above, Mr. Heath should be rehired as a permanent employee.



DANIEL TOOMEY, Labor Representative  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Signed this 6th day of April, 1987