



NH Supreme Court reversed this decision on 11-21-96, Slip Opinion No. 95-164, 141 NH 443 (1996)

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

ROBERT CUSHING

Petitioner

v.

HOUSE LEGISLATIVE FACILITIES
SUBCOMMITTEE AND LEE MARDEN,
CHIEF OF STAFF OF THE
NEW HAMPSHIRE HOUSE OF
REPRESENTATIVES

Respondent

CASE NO. M-0691

DECISION NO. 94-96

APPEARANCES

Representing Robert Cushing:

Mr. Robert Cushing

Representing House Legislative Facilities:

Loretta S. Platt, Esq., House Legal Counsel

Also appearing:

Ellen L. Arnold, Esq., N.H. Senate
John Ratoff, N.H.E.S.
Susan Marshall, Deputy Director, O. L. S.
Vincent Weners, Esq., UAW

BACKGROUND

This matter comes before the PELRB on a re-hearing of Case M-0691, Decision No. 94-19 in which a majority of the PELRB found that legislative employees as a class were subject to the jurisdiction of the PELRB and entitled to rights under RSA 273-A, the Public Employee Labor Relations Act. The House Legislative Facilities Committee and State Senate appealed that decision in a Motion for Rehearing and Motion to Intervene. On July 19, 1994 the petitions for intervention of the New Hampshire Senate and Mark

MacKenzie on behalf of the New Hampshire AFL-CIO were granted as was a petition for rehearing by the House Legislative Facilities Subcommittee and Lee Marden, Chief of Staff of the New Hampshire House of Representatives over the objections of Robert Cushing, International Union UAW and the New Hampshire AFL-CIO.

In its initial decision, the PELRB found jurisdiction over legislative employees, but did not determine a unit thereof finding no contest to the argument of the petitioner and intervenor (UAW) that the Legislature is a political subdivision of the State and that employees of the Legislature are employees of the State. In its motion for reconsideration, the respondent and intervenor (Senate) challenged the findings that the House of Representatives (and, by implication, the State Senate) are political subdivisions of the State within the meaning of that term as used in RSA 273-A and, hence a public employer under RSA 273-A. In addition, the decision of the PELRB was challenged because it was asserted that the employees of the Legislature are "appointed by the Senate, a legislative body, employed irregularly or on call," thus coming within exclusions for coverage contained in RSA 273-A:1 IV (b) and (D). Finally, it was asserted that the decision was incorrect because the Legislature in creating the Public Employee Labor Relations Act only intended to cover executive branch employees and not employees of the Legislative.

It was asserted that RSA 17-E was passed in the same year as 273-A creating a separate committee for the establishment of legislative facilities and that the Legislature could have made clear its intent to cover employees of the Legislature had that been its intent.

At the hearing, several witnesses testified as to the meaning of "political subdivision," both in the Public Employer Labor Relations Act and elsewhere in statute. Also, it was established that there are approximately 130 legislative employees, some with sensitive, political jobs serving either the majority or minority in operations of the Legislature and some working for Legislative Services, with full time jobs of a non-partisan nature such as attorneys hired to draft legislation and the like. Testimony at the hearing made clear that legislative employees are appointed under rules set forth in the Legislative Manual which sets forth terms and conditions of employment as a personnel manual does for other employees. It was also established that some employees are not employed only for legislative sessions and subject to discharge if leadership changes or if different legislators are elected while others are generally employed under such conditions, serving only when the Legislature is in session and subject to replacement if those politicians in power change. Further, evidence produced from questions and answers made it clear that the employees work "irregularly" or "on call" in that they are expected to work additional hours when the Legislature is in session and do not work sporadically.

John Ratoff, Commissioner and Employment Security for the last eleven years and from 1977-1983 State Negotiator, testified that during the period 1969 to 1977 as a Liquor Commissioner he was involved in the drafting of the statute which proceeded RSA 273-A and in trying to design a statutory scheme for collective bargaining rights for public employees which resulted in RSA 273-A. Under questioning, he recounted the process which resulted in RSA 273-A. It was clear that in those days, there were few legislative employees and, Ratoff testified, the right of legislative employees to organize "wasn't even a consideration" when RSA 273-A passed. He further testified that there was not a legislative office building, research staff or team and that the work presently done by Legislative Services was done by the Attorney General's office.

FINDINGS OF FACT AND RULES OF LAW

1. The Board has considered its original decision and finds that its language which can be read to suggest that the Legislature is a "political subdivision" of the state is inappropriate and incorrect. The Legislature is, by constitutional provision, the state itself as one of the three co-equal branches of government. Therefore, any reference in the original decision suggesting that the Legislature is a political subdivision of the state is hereby revoked. However, as employees of a co-equal branch of the state itself, unless exempted, legislative employees are state employees.
2. Certain legislative employees are clearly political appointees of the Legislature employed during the legislative session and at the will of the politically selected leadership, whether majority or minority. As such, they may not be covered by RSA 273-A and a unit determination hearing as to which positions are covered and which are excluded should deal with such questions.
3. The testimony and all evidence at the hearing indicated that there are "permanent" employees of the Legislature who have an expectation of continuing employment, are covered by rules and regulations contained in the Legislative Manual, who are state employees and therefore covered by RSA 273-A since there is no exemption as to them in the statute. The fact that the nature of government and its organization have changed and there are certain categories of employees or types of employers not clearly contemplated by the passage of RSA 273-A does not mean that a separate statute would have to be passed to cover such employees. Indeed, this Board has dealt with such employers as the Manchester Transit Authority, boards, commissions and authorities in the past although it was not clear

that they were specifically referenced or considered by the authors of the statute. In the statement of policy, the preamble to the Public Employee Labor Relations Act, the 1975 Legislature stated, "the Legislature declares that it is the policy of the state to foster harmonious and cooperative relations between public by encouraging the employees and to protect the public employees and their employees and to protect the public by encouraging the orderly and uninterrupted operation of government. This can best be achieved by:

- I. Acknowledging 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, and with the University System.
- II. Requiring public employers to negotiate in good faith and reduce to writing any agreements reached with employee organizations which have been certified as representing their public employees..."

It is difficult for this Board to conclude that the Legislature meant to exclude itself as part and parcel of the State, if it did not clearly do so. Now that it has many permanent, non-partisan employees, absent a specific exemption, the Board finds that such employees are entitled to the rights the Legislature intended to grant to other public employees. Indeed, there are many employees throughout the State's system who are "appointed" and this Board has found on many occasions that such "appointment" does not exclude them from rights afforded public employees or the statute would have no meaning and huge gaps would be created by the use of the term "appointment."

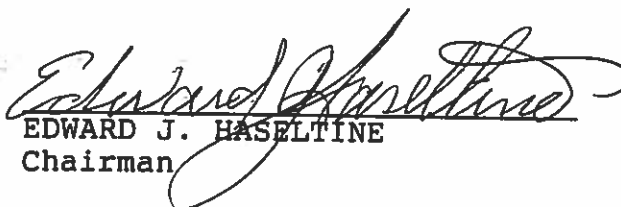
4. The Board further finds that if the Legislature wishes to clarify the statute to exclude its employees, it has the opportunity to do so. Absent such clarification, however, there is no present exclusion and the Board cannot find a clear intent to exclude employees not even contemplated at the time of the passage of this statute.

ORDER

Therefore, subject to the modifications noted herein, the Board confirms its findings and conclusions in Case No. M-0691, Decision No. 94-19 issued on May 20, 1994. These findings and conclusions shall now apply both to the original parties and parties participating herein as intervenors.

So Ordered.

Signed this 10th day of February, 1995.


EDWARD J. HASELTINE
Chairman

By majority vote

Members Seymour Osman and E. Vincent Hall voting in the majority. Chairman Edward J. Haseltine again dissents for the reasons set forth in his dissent in the original decision 94-19.