



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

International Chemical Workers Union Council
UFCW, Local 1046C

Petitioner

v.

Merrimack County Nursing Home

Respondent

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Case No. M-0806

Decision No. 2004-176

APPEARANCES

Representing the International Chemical Workers Union Council/UFCW Local 1046C:

Russell F. Hilliard, Esq.

Representing Merrimack County Nursing Home:

Warren D. Atlas, Esq.

BACKGROUND

The International Chemical Workers Union Council/UFCW Local 1046-C (hereinafter "the Union") filed a Petition for Certification with the Public Employee Labor Relations Board ("PELRB" or "Board") on October 2, 2003 seeking to establish a bargaining unit consisting of all "Registry Nursing Assistants" employed by the Merrimack County Nursing Home (hereinafter "the County"). The County filed its exceptions to the Union's petition on October 16, 2003.

Hearings were scheduled for December 18, 2003, January 21 and April 13, 2004, all of which were continued at the request of a party, with the assent of the opposing party, and upon consideration by the Board. A hearing was held on June 21, 2004 before the undersigned hearing officer at the offices of the Board in Concord, New Hampshire. Both parties were represented by counsel at the hearing, and had the opportunity to present witnesses for examination, to undertake cross-examination, and to offer exhibits into evidence. At the

conclusion of the hearing, the record was closed subject to the filing of post-hearing briefs by August 6, 2004, which was subsequently extended to August 11, 2004. Upon review of all filings submitted by the parties and consideration of all relevant evidence, the hearing officer determines the following:

FINDINGS OF FACT

1. The Merrimack County Nursing Home ("the County") is a public employer within the meaning of RSA 273-A:1, X.
2. The International Chemical Workers Union Council/UFCW Local 1046C ("the Union") has petitioned to become the exclusive bargaining representative of a bargaining unit consisting of all "Registry Nursing Assistants" employed by the County.
3. The County objects to the Union's petition on the grounds that the registry nursing assistants are in fact "irregular" or "on call" employees, within the meaning of RSA 273-A:1, IX (d). As a result, the County claims that registry nursing assistants are excluded from the definition of "public employee" under the law and therefore are ineligible to form a bargaining unit.
4. The County employs certified nursing assistants ("CNA's"), also referred to as licensed nursing assistant's (LNA's) in the operation of the Merrimack County Nursing Home. The Union currently represents, among other employees, all full-time regular and part-time regular CNA.'s. (See Joint Exhibit No. 5, p. 4, referencing PELRB Case No. M-0738, dated June 18, 1997, amended April 24, 2001). Pursuant to Article 1 of the parties' collective bargaining agreement (CBA), entitled "Recognition," the parties have agreed that certain positions and employees are specifically excluded from recognition or coverage under the agreement, including "per diem employees, temporary employees, probationary employees [and] persons employed seasonally, irregularly or on call." (Joint Exhibit No. 5, p. 4).
5. On June 5, 1997, the Merrimack County Board of Commissioners established a "C.N.A. Registry" for the Merrimack County Nursing Home. (Joint Exhibit No. 1).
6. The C.N.A. Registry is utilized by the County to fill temporary vacancies created by the absence of full-time regular or part-time regular C.N.A.'s. According to the "C.N.A Registry" document (Revised 7/16/00), "all C.N.A. Registry staff hired after July 16, 2000 will be required to work a minimum of one weekend per month." (Joint Exhibit No. 1). However, as testified to by Lori Brown, the Assistant Administrator and Director of Clinical Services at the Merrimack County Nursing Home, the only scheduling requirement for registry nursing assistants is that they must indicate their availability to work at least two (2) weekend days per calendar month. If the County determines that there is adequate coverage for those days, the registry nursing assistants do not work. In this regard, registry nursing assistants only work on days in which they have indicated they are available to work. Registry

nursing assistants are otherwise not required to work any particular hours, or number of hours, in order to be retained on the County's registry.

7. On a bi-weekly basis, registry nursing assistants fill out a sign up sheet indicating which days during the upcoming two (2) week period they are available to work. (Union Exhibit No. 1; Employer Exhibit No. 1, pp. 2-6). Registry nursing assistants may sign up for any number of work days or shifts, or none at all – provided they meet the monthly availability minimum. Regular full-time and regular part-time nursing assistants also indicate their availability to work overtime for the same period by signing an overtime sign up sheet. (Union Exhibit No. 2). The County then evaluates the staffing levels of regular full-time and regular part-time nursing assistants for the same period, some of whom may be out of work due because of vacation time, sick leave, a work-related injury, family medical leave or some other circumstance. The County thereafter prepares a registry schedule based upon the registry nursing assistants' expressed availability on the registry sign up sheet and the need for coverage during the two (2) week period. (Union Exhibit No. 2; Employer Exhibit No. 1, p. 1)
8. During the last quarter of 2003 (October, November, December), registry nursing assistants worked over 13,000 hours. During the first quarter of 2004 (January, February, March), registry nursing assistants worked over 14,000 hours. (Joint Exhibit No. 2). A review of the registry schedule for the calendar week of June 13, 2004 to June 19, 2004, the County confirmed upwards of seventy-one (71) work shifts for registry nursing assistants. Included among these were four (4) or more shifts each for eight (8) individual nursing assistants. (Employer Exhibit No. 1, p. 1).
9. The County maintains a seniority list for all C.N.A.'s, in which both registry C.N.A.'s and regular full-time and part-time C.N.A.'s are listed. (Joint Exhibit No. 4).

DECISION AND ORDER

JURISDICTION

In accordance with RSA 273-A:8 I, "the board or its designee shall determine the appropriate bargaining unit and shall certify the exclusive representative thereof when petitioned to do so under RSA 273-A:10." N.H. REV. STAT. ANN. 273-A:8 I (1999). Moreover, "the PELRB is given broad subject matter jurisdiction to determine and certify bargaining units to enforce the provisions of that chapter." *Appeal of University System of New Hampshire*, 131 N.H. 368, 370 (1988)(citation omitted). Since the instant matter concerns a petition for certification, filed pursuant to RSA 273-A:10, and presents an issue of bargaining unit determination under RSA 273-A:1, IX (d) and RSA 273-A:8, PELRB jurisdiction is appropriate under the circumstances.

SUMMARY OF DECISION

Based upon the evidence presented, the registry nursing assistants employed by the County are “irregular” or “on call” employees, within the meaning of RSA 273-A:1, IX (d) and therefore are not “public employees” under the law. As a result, the Union’s petition must be denied.

DISCUSSION

RSA 273-A:1 IX provides, in relevant part, that a “‘public employee’ means any person employed by a public employer except... (d) [p]ersons in a probationary or temporary status, or employed seasonally, irregularly or on call.” N.H. REV. STAT. ANN. 273-A:1 IX (d) (1999). In the case of *Appeal of Town of Stratham*, the New Hampshire Supreme Court addressed the issue of whether certain part-time police officers, who worked substantial hours and were essential to the operation of the town’s police department, were employed “irregularly” or “on call.” *Appeal of Town of Stratham*, 144 N.H. 429 (1999). It held that the part-time officers were “on call employees who work on an irregular basis” based on the fact that they worked “only when a shift opens because a full-time officer is unavailable and no other full-time officer chooses to work it...” *Id.* at 431. As a result, the Court found that the Board had erred by including the part-time officers in the bargaining unit. *Id.* at 431.

In applying the Court’s ruling in *Appeal of Town of Stratham* to the instant case, I must conclude that the registry nursing assistants are similarly “on call employees who work on an irregular basis.” The record in the case at hand reflects that the registry nursing assistants work a substantial amount of hours and that they clearly perform a vital role in the operation of the Merrimack County Nursing Home. Moreover, the amount of work assigned to registry nursing assistants is contingent upon temporary vacancies created by the absence of regular full-time and regular part-time nursing assistants.

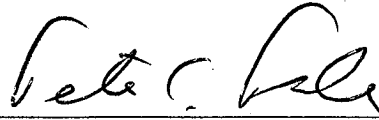
It is by the very nature of the sign up sheet system that registry nursing assistants work irregularly or on call. Although they may actually work on a “regular” basis, their work is still contingent upon their own availability, as expressed on the registry sign up sheet, and the County’s need for coverage. There is no dispute that registry nursing assistants have a great level of flexibility in determining when they are available to work and that the County itself does not ask or require them to work a certain number of days or hours. The fact that registry nursing assistants must indicate that they are *available* to work at least two (2) weekend days per month, does not confer upon them “public employee” status, within the meaning of RSA 273-A:1 IX, as “regular” employees. Indeed, making oneself available to work for a certain period of time can reasonably be described as being “on call.” This is consistent with the Court’s holding in *Appeal of Town of Stratham*, wherein it defined “on call” as meaning “ready to respond to a summons or command.” *Id.* at 431 (citation omitted).

If registry nursing assistants worked a fixed schedule over a specific period of time, and said schedule was not contingent upon the temporary vacancies of other employees, then they would reasonably be classified as regular part-time or regular full-time employees. As it stands, registry nursing assistants work only when they indicate they are available to work and the

County determines that their coverage is needed due to the absence of regular staff. Under the circumstances, I find that the registry nursing assistants are not "public employees" within the meaning of RSA 273-A:1 IX (d) and that the Union's petition must therefore be denied.

So ordered.

Signed this 4th day of November, 2004.



Peter C. Phillips, Esq.
Hearing Officer

Distribution:
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