



**State of New Hampshire**  
Public Employee Labor Relations Board

**AFSCME Council 93**

**and**

**Town of Hampstead**

**Case No. G-0298-1**

**Decision No. 2021-090**

**Appearances:**

Sean Cronin, Esq., AFSCME Associate General Counsel, Boston, Massachusetts, for the AFSCME Council 93

Peter C. Phillips, Esq., Soule Leslie Kidder Sayward & Loughman, PLLC, Salem, New Hampshire, for the Town of Hampstead

**Background:**

On December 14, 2020, the AFSCME Council 93 (Union) filed a petition for certification seeking to represent certain Town of Hampstead Fire Department employees. The petition was supported by the requisite number of confidential authorization cards as reflected in the PELRB December 16, 2020 Report re: Inspection of Confidential Authorization Cards.

The Town objects to the petition on the following grounds: (1) part-time per diem Firefighters are irregular and on-call employees within the meaning RSA 273-A:1, IX (d) and, therefore, are not public employees and cannot be included in the bargaining unit; (2) without part-time per diem Firefighters, the proposed unit does not satisfy a 10-employee minimum requirement under RSA 273-A:8, I; (3) the Firefighter Captain is a supervisory employee within the meaning of RSA 273-A:8, II and, therefore, cannot be included in the bargaining unit with employees he supervises; (4) the Firefighter Captain is a confidential employee within the

meaning of RSA 273-A:1, IX (c) and, therefore, is not a public employee and cannot be included in the unit; (5) the proposed bargaining unit lacks a community of interest as required under RSA 273-A:8, I; and (6) certification of the proposed bargaining unit will have a negative effect on the efficiency of governmental functions. The Town requests that the PELRB dismiss the petition.

A hearing was held on February 9, 2021. The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. During the hearing, it was discovered that Town Exhibit H contained incorrect information. The undersigned hearing officer asked the parties to submit a corrected exhibit. The corrected Exhibit H was submitted on February 26, 2021 and is admitted into the record replacing the previously submitted Exhibit H. The parties filed post-hearing briefs on March 17, 2021. The parties' Joint Statement of Stipulated Facts is incorporated in the Findings of Fact below and the decision is as follows.

#### **Findings of Fact**

1. The Town is a public employer within the meaning of RSA 273-A:I, X.
2. The Union is an employee organization seeking to represent a proposed bargaining unit consisting of the following Town of Hampstead positions:

**Unit:** Firefighter (full-time and part-time per diem), Firefighter Lieutenant, and Firefighter Captain.

**Excluded:** Fire Chief, Deputy Fire Chief, Firefighter (on call), and Administrative Assistant.

3. The Town Fire Department consists of a Fire Chief, one Deputy Fire Chief (on-call), one Fire Inspector (part-time), one full-time Captain, one "on-call" Captain, one full-time Lieutenant, two "on-call" Lieutenants, three full-time Firefighters, approximately 15 "per diem" Firefighters,<sup>1</sup> and approximately 10 "call" Firefighters. See Joint Statement of Stipulated Facts at

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<sup>1</sup> Although the December 15, 2020 employee list (Town Exhibit B), the proposed bargaining unit contained 15 per diem Firefighters, it appears from the Fire Chief's uncontested testimony that one of the per diem Firefighters,

2. This petition concerns only a full-time Captain, a full-time Lieutenant, three full-time Firefighters, and "per diem" Firefighters

4. Each day there is one full-time Firefighter and one per diem Firefighter on duty twenty-four hours. Additionally, the Captain, who is in charge of the day-to-day operations of the Department, works Tuesday-Friday with the following hours: Tuesday - 12 hours; Wednesday - Friday - 10 hours. "All hours equal an average of 42 hours per week over a four week cycle." There is an additional per diem Firefighter on duty for eight hours on Saturday, Sunday, and Monday. See Joint Statement of Stipulated Facts at 3.

5. The job description for full time Firefighter/EMT position provides in part as follows:

Labor Grade: 5

Job Summary: Performs responsible firefighter work for the Town, including fire suppression, fire prevention and emergency medical services.

Major Duties:

- Responds to assigned alarms and performs firefighter duties, including but not limited to driving and operating apparatus, advancing hose lines, raising and climbing ladders, wearing SCBA's, operating in and around burning structures, performing forcible entry, rescue, ventilation and salvage operations.
- Responds to assigned alarms and performs EMT duties limited to providing rapid emergency medical services, consistent with their level of training, standard operating procedures and protocols of the State of NH and the Fire Department....

\* \* \*

Minimum Qualifications:

Graduation from High School or equivalent. Possession of a New Hampshire Firefighter's Level I Certificate, an Emergency Medical Technician's certificate issued by the National Registry, ambulance provider's license issued by NH, and a valid NH CDL endorsement may be required.....

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Gregory Nichols, is no longer employed by the Hampstead Fire Department. See Findings of Fact, at 28. Consequently, the proposed unit has 14 per diem Firefighters.

See Town Exhibit D (incorporated by reference in full).

6. The job description for per diem Firefighter/EMT provides in part as follows:

Labor Grade: Hourly (currently \$13.50) as established by Board of Selectmen.

Job Summary: Performs responsible firefighter work for the Town, including fire suppression, fire prevention and emergency medical services. Responds on an on-call basis as determined by department policy. Works irregular shifts as determined by department policy.

Major Duties:

- Responds to assigned alarms and performs firefighter duties, including but not limited to driving and operating apparatus, advancing hose lines, raising and climbing ladders, wearing SCBA's, operating in and around burning structures, performing forcible entry, rescue, ventilation and salvage operations.
- Responds to assigned alarms and performs EMT duties limited to providing rapid emergency medical services, consistent with their level of training, standard operating procedures and protocols of the State of NH and the Fire Department....

\* \* \*

Minimum Qualifications:

Graduation from High School or equivalent. Possession of a New Hampshire Firefighter's Level I Certificate, an Emergency Medical Technician's certificate issued by the National Registry, ambulance provider's license issued by NH, and a valid NH CDL endorsement may be required.....

The duties, knowledge, skills, and abilities required by the position and minimum qualifications of per diem Firefighters/EMTs are identical to those of Firefighters/EMTs. See Town Exhibit E (incorporated by reference in full).

7. Newly-hired per diem Firefighters/EMTs sign a document titled Categories of Employees-Fire Department. This document provides the following description of full time and per diem employees promulgated by the Town:

Full-Time - Employees hired full time on a regularly scheduled work week of at least 42 hours, on average, are considered full-time employees for all compensation and benefit purposes, subject to the terms, conditions, and limitations of each benefit program. Additionally, full time employee shall meet all requirement set forth in Chapter Fire 700 Fire Fighter Mandatory Standards.

...

Per Diem – Employees hired on a Per Diem basis, and as needed, to work an irregular scheduled work-week, work month, duty week, etc., or a schedule that involves irregular or inconsistent hours, weeks, months, etc. These employees will not be allowed to work more than an average of 29 hours per week, over a 12-month period. If, however, under extenuating circumstances, these employees are asked or required to work more than 53 hours during a particular week, they will be compensated one and half times their hourly rate.

- a. Per Diem Employees are not required to meet Chapter Fire 700 Fire Fighter Mandatory Standards. Therefore these employees are considered Per Diem employees.

The Town of Hampstead, however, can require certain components/ sections/ paragraphs, etc. of Chapter Fire 700 Fire Fighter Mandatory Standards. These requirements do not constitute any change in an employee's status as a Per Diem employee.

- b. Per Diem employees will receive worker compensation coverage as established by state law. They are not eligible for any other town-provided benefits regardless of the number of hours or weeks worked.
- c. Per Diem employees are compensated at a rate determined by the Board of Selectmen.

This document also defines part time employees as those “hired on a Part-time basis who have a regularly scheduled work week and work a maximum of 35 hours per week. These employees are considered part-time for all compensation and benefit purposes.” See Town Exhibit G. The document also provides a definition for an on-call employee but the parties did not designate any of the employees in the proposed unit as an on-call employee. See Town Exhibit B (December 15, 2020 List of Employees).

8. The per diem shift requests are for specific days and per diem Firefighters are asked to provide as many shifts as possible. There is no minimum number of hours but generally per diem Firefighters are expected to work at least one 12-hour shift a month in order to remain familiar with the policies and equipment. The Fire Captain will generally schedule the per diem Firefighters with the least amount of hours available first and then tries to schedule as equal an

amount of hours as possible for the remaining per diems. See Joint Statement of Stipulated Facts at 5.

9. The full-time Fire Captain is responsible for the scheduling of all per diem Firefighters. The per diem Firefighters are scheduled on a month-to-month basis. Typically, per diem shift requests are due to be filed with the Captain by the middle of the preceding month for the following month. By way of example, per diem shift requests for February are due to be filed with the Captain by mid-January. Shifts are supposed to be scheduled in either eight, twelve, or twenty-four hour increments. See Joint Statement of Stipulated Facts at 4.

10. Per diem Firefighters “are not punished if they are unable to fulfill a shift.” See Joint Statement of Stipulated Facts at 6.

11. There is no set number of needed per diem Firefighters. The number of per diem Firefighters is based on the ability to fill shifts. See Joint Statement of Stipulated Facts at 7.

12. All per diem Firefighters’ hours are varied and depend on the hours they request and their placement on the schedule. Currently, there are 9,984 annual hours (192 per week) that are scheduled. This includes 24 hours each day (7 days a week, and 365 days a year), and 8 hours each day on Saturday, Sunday, and Monday. See Joint Statement of Stipulated Facts at 8.

13. The minimum certification to work as a per diem Firefighter for the Town is Firefighter Level 1/EMT. See Joint Statement of Stipulated Facts at 13.

14. Full-time Firefighters are required to have a Level 2/EMT certification, as well as CPAT (physical agility test). See Joint Statement of Stipulated Facts at 14.

15. Full-time Firefighters are paid as follows:

<u>Name</u>	<u>Title</u>	<u>Annual Salary</u>	<u>Hourly Rate</u>
Chris Dane	Captain	\$65,149	\$29.83
Ed Clark	Lieutenant	\$63,642	\$29.14
Ryan Erhardt	Firefighter	\$47,720	\$21.85
Joseph Luccisano	Firefighter	\$43,243	\$19.80

Jeffrey Saltalamacchia      Firefighter      \$41,976      \$19.22

See Joint Statement of Stipulated Facts at 15.

16. All per diem Firefighters/EMTs are paid \$13.50 per hour while at the station. If per diem Firefighters respond to incidents while working, their pay rate is based on their certification rate. This is established by the following schedule as approved by the Board of Selectmen (this is also the same pay scale used for call firefighters):

	<b>Support</b>	<b>Firefighter I</b>	<b>Firefighter II</b>	<b>Driver/Pump Operator</b>
Support	\$12.00	\$13.00	\$14.00	add \$0.50 per hour
EMT-B	\$13.00	\$14.00	\$15.00	add \$0.50 per hour
EMT - Advanced	\$14.00	\$15.00	\$16.00	add \$0.50 per hour
EMT - Paramedic	\$15.00	\$16.00	\$17.00	add \$0.50 per hour

See Joint Statement of Stipulated Facts at 9.

17. "Per diem" Firefighter Robert Beaulieu was hired in March, 2020. He worked the following total number of hours per month from April to December of 2020: April – 0 hours; May – 8 hours (1 day/shift); June – 8 hours (1day); July – 24 hours (1day); August – 8 hours (1 day); September – 8 hours (1 day); October – 16 hours (2 days); November – 8 hours (1 day); December – 0 hours. From March to December, 2020, firefighter Beaulieu worked a total of 80 hours (8 days/shifts in 8 weeks). See Town Exhibit H.

18. Per diem Firefighter Dominic Dominijanni was hired in 2011 and in 2020 he worked the following total number of hours per month from January to December: January – 48 hours (2 days); February – 84.5 hours (5 days); March – 72 hours (3 days); April – 84 hours (4 days); May - 72 hours (3 days); June – 72 hours (3 days); July – 120 hours (5 days); August – 0 hours; September – 72 hours (4 days); October – 72 hours (3 days); November – 48 hours (2 days); December – 48 hours (2 days). In 2020, Firefighter Dominijanni worked a total of 792.5 hours (36 days/shifts in 33 weeks).

19. Per diem Firefighter Conner Lonergan was hired in 2019 and from January to December, 2020, he worked the following total number of hours per month: January – 181 hours (9 days); February – 72 hours (3 days); March – 69 hours (4 days); April – 72 hours (3 days); May – 120 hours (5 days); June – 88 hours (5 days); July – 150 (8 days); August – 104 (7 days); September – 60 hours (3 days); October – 36 hours (2 days); November – 72 hours (3 days); December – 72 hours (3 days). In 2020, Firefighter Lonergan worked a total of 1,096 hours (55 days/shifts in 37 weeks). The number of shifts per months varied significantly, from 9 shifts in January (181 hours) to 2 shifts in October (36 hours). Firefighter Lonergan also works for the Town of Plaistow.

20. Per diem Firefighter David Florin was hired in 2018 and from January to December, 2020, he worked the following total number of hours per month: January – 11.5 (1 day/shift); February – 12 hours (1 day); March – 12 hours (1 day); April – 16 hours (2 days); May – 18 hours (2 days); June – 14 hours (2 days); July – 0 hours; August – 0 hours; September – 12 hours (1 day); October – 24 hours (2 days); November – 36 hours (2 days); December – 40 hours (3 days). In 2020, Firefighter Florin worked a total of 135.5 hours (17 days/shifts in 17 weeks). Mr. Florin has an unexplained gap in his employment in July and August and he only worked one 11.5 hour-shift in January.

21. Per diem Firefighter William Cousins was hired on March 1, 2020 and from March to December, 2020, he worked the following total number of hours per month: March – 20 hours (2 days); April – 48 hours (6 days); May – 71 hours (6 days); June – 104 hours (5 days); July – 120 hours (5 days); August – 112 hours (6 hours); September – 120 hours (5 days); October – 110 hours (6 days); November - 120 hours (5 days); December – 167 hours (8 days). From March to December, 2020, Firefighter Cousins worked a total of 992 hours (54 days/shifts in 38 weeks).

22. Per diem Firefighter Joshua Houle was hired in November, 2020 and worked 32 hours (4 days) in November and 19 hours (2 days) in December, 2020.



23. Per diem Firefighter Katie Lacasse was hired in 2017 and from January to December, 2020, she worked the following total number of hours per month: January – 0 hours; February – 0 hours; March – 8 hours (1 day); April-September – 0 hours; October – 8 hours (1 day); November – 32 hours (2 days); December – 56 hours (4 days). In 2020, Firefighter Lacasse worked a total of 104 hours (8 days/shifts in 8 weeks). Firefighter Lacasse chose not to work as a per diem Firefighter from April to September, 2020. She also works as a nurse for a different employer which, due to the Covid pandemic-related professional demands on her as a nurse, contributed to her inability to work as a Hampstead Firefighter from April to September of 2020. She is still on the Town's "per diem roaster." No additional evidence of her Firefighter working schedule was offered.

24. Per diem Firefighter Stephanie Lovett was hired in 2017 and from January to December, 2020, she worked the following total number of hours per month: January – 91 hours (5 days); February – 41 hours (2 days); March - 16 hours (2 days); April – 72 hours (5 days); May – 54.5 hours (3 days); June - 24 hours (1 day); July – 0 hours; August – 47 hours (2 days); September – 48 hours (3 days); October – 48 hours (3 days); November – 0 hours; December – 24 hours (1 day). In 2020, Firefighter Lovett worked a total of 465.5 hours (27 days/shifts in 21 weeks). It is unclear why Firefighter Lovett did not work in July and November of 2020.

25. Per diem Firefighter Michael LaPrade was hired on March 19, 2020 and from April to December, 2020, he worked the following total number of hours/shifts per month: April – 12 hours (1 day); May – 97 hours (4 days); June – 72 hours (3 days); July – 8 hours (1 day); August – 48 hours (4 days); September – 32 hours (2 days); October – 32 hours (2 days); November – 0 hours; December – 0 hours. From April to December, 2020, Firefighter LaPrade worked 301 hours (17 days/shifts in 15 weeks). Mr. LaPrade chose not to work for the Fire Department in November and December, 2020 partly because he obtained a job in another department.

26. Per diem Firefighter Nicolas Genthner was hired at the end of February, 2020 and from March to December 2020, he worked the following total number of hours per month: March –

44 hours (4 days); April – 164 hours (8 days); May – 140.5 hours (10 days); June – 112 hours (8 days); July – 154 hours (8 days); August – 117 hours (6 days); September – 84 hours (4 days); October – 72 hours (3 days); November – 84 hours (4 days); December – 120 hours (5 days). From March to December, 2020, Firefighter Genthner worked a total of 1392.5 hours (48 days in 37 weeks).

27. Per diem Firefighter Joseph LaCarbonara was hired in 2018 and from January to December, 2020, he worked the following total number of hours per month: January – 79 hours (6 days); February – 44 hours (5 days); March – 0 hours; April - 8 hours (1 day); May – 0; June – 77 hours (4 days); July – 0 hours; August – 40 hours (3 days); September-December – 0 hours. In 2020, Firefighter LaCarbonara worked a total of 248 hours (19 days in 14 weeks). Mr. LaCarbonara chose not to work as a Hampstead per diem Firefighter for several month in 2020 in part because he works full time for the Town of Salem. He is still on the Town’s “per diem roaster.”

28. Per diem Firefighter Gregory Nichols was hired in 2019 and from January to December, 2020, he worked the following total number of hours per month: January – 30 hours (3 days); February – 44 hours (5 days); March – June - 0 hours; July – 8 hours (1 day); August – 56 hours (5 days); September – 61.5 (7 days); October – 55 hours (6 days); November – 53.5 hours (7 days); December – 19.5 hours (3 days). In 2020, Firefighter Nichols worked the total of 327.5 hours (37 days in 25 weeks). According to the Fire Chief, Mr. Nichols is no longer employed by the Town Fire Department.

29. Per diem Firefighter Zacharia Sylvester was hired on May 15, 2020 and from June to December, 2020, he worked the following total number of hours per month: June - 0 hours; July – 31 hours (2 days); August – 71 hours (5 days); September – 110 hours (6 days); October – 80 hours (6 days); November – 109 hours (5 days); December – 80 hours (4 days). From June to December, 2020, Firefighter Sylvester worked a total of 481 hours (28 days in 20 weeks). Although, Mr. Sylvester was hired in May, he chose not to work until July.

30. Per diem Firefighter Ashton Rome was hired in 2018 and from January to December, 2020, he worked the following total number of hours per month: January – 70 hours (3 days); February – 72 hours (4 days); March – 24 hours (1 day); April – 0 hours; May – 83 hours (4 days); June - 72 hours (3 days); July – 0 hours; August – 46.5 hours (2 days); September – 24 hours (1 day); October – 72 hours (3 days); November – 32.5 hours (2 days); December – 24 hours (1 days). In 2020, Firefighter Rome worked a total of 520 hours (24 days in 23 weeks). It is unclear why Firefighter Rome did not work in April and July of 2020.

31. Per diem Firefighter Catherine Warnock was hired in 2017 and from January to December, 2020, she worked the following total number of hours per month: January – 40 hours (3 days); February – 52 hours (4 days); March – 28 hours (3 days); April – 108 hours (5 days); May – 107.5 hours (5 days); June - 96 hours (4 days); July – 48 hours (4 days); August – 104 hours (5 days); September – 68 hours (4 days); October – 92 hours (5 days); November – 105 hours (5 days); December – 72 hours (3 days). In 2020, Firefighter Warnock worked a total of 920.5 hours (50 days/shifts in 37 weeks).

32. Per diem Firefighter Kenneth Scipione was hired in 2013 and from January to December, 2020, he worked the following total number of hours per month: January – 104 hours (5 days); February – 110 hours (5 days); March – 168 hours (7 days); April – 116 hours (6 days); May – 68 hours (4 days); June - 80 hours (4 days); July – 116.5 hours (7 days); August – 73.25 hours (4 days); September – 120 hours (6 days); October – 120 hours (5 days); November – 60 hours (3 days); December – 92 hours (6 days). In 2020, Firefighter Scipione worked a total of 1227.75 (62 days/shifts in 44 weeks).<sup>2</sup>

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<sup>2</sup> The Town also provided 2020 work schedules for Chris Schofield and James Marron. However, these employees are not on the December 15, 2020 Town employee list, to which the Union did not object, and therefore, are not part of the proposed bargaining unit under consideration. See Town Exhibit B. Furthermore, Mr. Schofield's schedule shows unexplained gaps in employment in 2020 (January - 0 hours; August-November – 0 hours; only 1 shift in April and 1 shift in December). Likewise, Mr. Marron's schedule shows gaps in employment – he worked only 1 shift in May and he did not work from June to December of 2020 due to injury.

33. Although per diem Firefighters are expected to work at least one 12-hour shift per month in order to remain familiar with the policies and equipment, many of the per diem Firefighters do not fulfill this expectation. In 2020, some worked only 8 hours per month, while others did not work for a month or several months. However, the Town does not terminate their employment for failing to work at least one 12-hour shift per month. There is no minimum number of hours per diem Firefighters are required to work per day, per week, or per year.

34. The number of hours each per diem Firefighter works varies significantly, e.g. from 8 hours per month to 167 hours per month. See Town Exhibit H.

35. At least four of per diem Firefighters work full time for other Towns.

36. The job description for the Fire Captain position provides in part as follows:

**General Summary**

This position is responsible for day-to-day activities of the department, firefighting, emergency medical services, rescue and fire prevention activities of the Town; in the absence of the Chief or Deputy Chief, takes command at the scene of an emergency and directs and coordinates operations consistent with Department standard operating procedures and safe operating practices.

**Essential Duties and Responsibilities**

Performs fire prevention, fire suppression, rescue and emergency medical services...

...

Meets with the Fire Chief to discuss situations, progress and/or concerns.

...

Meets with full-time and on-call personnel to provide instruction, suggestions, encouragement and positive feedback.

Supervises personnel by scheduling, assigning work, instructing, evaluating, and disciplining.

Assumes the responsibility for the safety and conduct of personnel under his/her supervision.

....

**Guidelines:** Guidelines are available but are not completely applicable to the work or have gaps in specificity. The employee uses judgement in interpreting and adapting guidelines such as agency policies, regulations, precedents and work directions for application to specific cases or problems. The employee analyzes results and recommends changes.

...

**Supervisory and Management Responsibility:** First line supervisors at this level are usually responsible for the work performance of a small group of employees or a larger group with a homogeneous objective, i.e. employees all perform the same basic type of work. They are responsible for planning, organizing and monitoring day-to-day work on a short-term cycle. They assign work to subordinates, adjust workflow to maintain balance among positions and meet priorities or deadlines and make minor changes in structure, methods or procedures as necessary to accommodate changes in work pattern, emphasis or capability. They may recommend major changes for higher-level action. They usually counsel employees, hear and resolve minor complaints and grievances, participate in performance evaluations and personnel management recommendations.

See Town Exhibit C (incorporated by reference in full).

37. The Fire Captain manages the hiring process for per diem Firefighters. Per diem Firefighters are hired following either referrals or advertisements, and a meeting with the Captain. See Joint Statement of Stipulated Facts at 10.

38. The Fire Captain completes all performance evaluations of subordinate Firefighters. The Fire Captain makes a recommendation for an annual salary increase as part of the evaluation. See Joint Statement of Stipulated Facts at 11. See also Town Exhibits I & K.

39. The Fire Captain has authority to issue verbal and written warnings and to recommend suspension.

40. The Fire Captain reviews and signs off on time sheets for the per diem Firefighters. See Joint Statement of Stipulated Facts at 12.

## **Decision and Order**

### **Decision Summary**

The majority (at least 10 out of 14) of the per diem Firefighters in the proposed bargaining unit are irregular employees within the meaning of RSA 273-A:1, IX (d) and are, therefore, excluded from the bargaining unit. After the exclusion of the per diem employees, the proposed bargaining unit contains fewer than 10 employees and, therefore, does not satisfy the statutory 10-employee minimum requirement. The Union's petition is dismissed.

## **Jurisdiction**

The PELRB has jurisdiction to determine the appropriate bargaining unit and to certify the exclusive representative thereof. See RSA 273-A:8, RSA 273-A:10, and Admin. R. Pub 302.

## **Discussion**

The Town argues that “per diem” Firefighters should be excluded from the proposed bargaining unit because they are not “public employees” under RSA 273-A:1, IX. Under this provision a public employee is defined as “any person employed by a public employer except... (d) [p]ersons in a probationary or temporary status, or employed seasonally, irregularly, or on call.” “Irregular” employees are those “lacking continuity or regularity of occurrence, activity, or function;” and “on call” employees are employees “ready to respond to a summons or command.” See *In re Town of Stratham*, 144 N.H. 429, 431 (1999).

In *Stratham*, the Supreme Court found that part time police officers were on-call employees who worked on an irregular basis. *Id.* In that case, the evidence showed that “the part time officers work[ed] substantial hours and indeed may be essential to the functioning of the police department,” however, they had no set day to work; they only worked when a shift opened up because a full time officer was unavailable; and in any given month, they could have been as few as two or as many as twenty openings available for part-time officers. See *id.* The Court excluded the part time police officers from the bargaining unit as on-call employees working on irregular basis. See *id.* See also *Teamsters Local 633 v. Town of Loudon*, Decision No. 2018-209 (excluding part time patrol officers from unit because they were on call employees working only if shift opened up due to absence of other patrol officers). Similarly, in *New England Police Benevolent Association and Town of Henniker*, PELRB Decision No. 2011-113, the part time patrol officers were excluded from the bargaining unit because they were irregular or on call employees. See also *Brentwood Police Union, NEPBA v. Town of Brentwood*, PELRB Decision

No. 2008-247; but cf. *State Employees' Association of New Hampshire, Inc., SEIU Local 1984 v. State of New Hampshire, Liquor Commission*, PELRB Decision No. 2013-168 (finding non-seasonal part time Liquor Commission retail employees, whose schedules were not consistent from week to week, were not irregular or on call employees); *Teamsters Local 633 of New Hampshire v. Town of Bow Police Department*, PELRB Decision No. 94-33 (finding part time police dispatcher, who worked Sunday shifts for 35 weeks within twelve month period was regular part time employee).

Furthermore, in *International Brotherhood of Teamsters, Local 633 of N.H. and State of New Hampshire, Administrative Office of the Courts*, PELRB Decision No. 2009-048, the PELRB excluded per diem Court Security Officers (CSOs) who worked fewer than 44 weeks per year and were away from employment for extensive periods of time without explanation or justification, finding, however, that not all per diem CSOs were irregular or on call employees within the meaning of RSA 273-A:1, IX (d). The PELRB differentiated between per diem officers who were scheduled to work on regular basis and those who were away from employment for extensive period of time without explanation or justification. See *id.* The PELRB held that the designation of a part time employee as "per diem" "is not dispositive nor controlling of an individual employee's status under RSA 273-A:1, IX (d)." *Id.* The fact that some employees worked as little as 1-2 days per week was also not determinative. See *id.* The PELRB explained that "[a] reduced work schedule is the sine qua non, or essence, of part-time employment, and the fact of part-time employment is not enough, by itself, to exclude an employee from a proposed bargaining unit." *Id.* In *Administrative Office of the Courts (AOC)*, the PELRB stated that:

whether per diem CSOs are "persons" employed irregularly or on call cannot be resolved by general conclusions about the per diem CSO position but must be determined on an employee by employee basis because of the varying degrees to which individual per diem CSOs are scheduled

and employed. An employee by employee determination is also in accord with the statute given the legislature's use of the term "person" in RSA 273-A:1, IX (d).

*Id.* The PELRB looked at several factors to differentiate between irregular and regular part time employees, including the total number of hours worked, the number of weeks worked during the year, using 44 weeks as benchmark, and the existence of extensive and unexplained gaps in the employment. The PELRB found that the CSOs who worked at least 44 weeks a year and had not been away from employment for extensive period of time without explanation or justification were regular part time employees and therefore, "public employees" within the meaning of RSA 273-A. However, the PELRB excluded the CSOs who worked fewer than 44 weeks per year and were away from employment for extensive periods of time without explanation or justification.

In this case, the evidence shows that at least 10 out of 14 of the Town's per diem Firefighters are irregular employees within the meaning of the statute. Based on their 2020 work schedules, only four per diem Firefighters might arguably be classified as regular part-time employees (Cousins, Dominijanni, Scipione, and Warnock) under the *AOC* standard, even though only one employee, Firefighter Scipione, reached the *AOC* threshold of 44 weeks per year. The rest of the per diem Firefighters work on irregular basis. For example: Firefighter Beaulieu worked only 8 days/shifts from March to December of 2020 with no shifts in April & December of 2020; Firefighter Lonergan worked 55 days/37 weeks in 2020, but the number of shifts per months varied significantly, from 9 shifts in January to 2 shifts in October (the same is true for Firefighter Gentner, whose shifts varied from 1-hour shift to 24-hour shifts and from 10 shifts in May to 3 shifts in October); and Firefighter Florin had unexplained gaps in employment in July and August, 2020 and only worked one shift in January. Likewise, Firefighters Lacasse, Lovett, LaPrade, LaCarbonara, Rome, and Sylvester had significant gaps in their employment including gaps caused by alternative full time employment. See Findings of Fact 17-32. As was

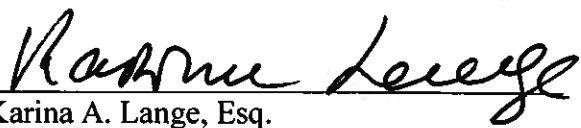


true with the disputed positions in the *Stratham* case, there are no shifts specifically assigned to each per diem Firefighter. The per diem Firefighters may decline to work when requested. Additionally, they are not disciplined when they are unable to work the shifts for which they have signed up. Although per diem Firefighters are expected to work at least one 12-hour shift per month in order to remain familiar with the policies and equipment, many of the per diem Firefighters do not fulfill this expectation. Utilizing the *AOC* analysis, including the total number of hours worked, the number of weeks worked during the year, and the existence of extensive gaps in the employment, I find that at least 10 out of 14 per diem Firefighters in the proposed bargaining unit are irregular employees within the meaning of RSA 273-A:1, IX (d). These irregular employees are excluded from the bargaining unit.

RSA 273-A:8, I provides that “[i]n no case shall the board certify a bargaining unit of fewer than 10 employees with the same community of interest.” After the exclusion of the per diem Firefighters, the proposed bargaining unit contains fewer than 10 employees and, therefore, does not satisfy the statutory 10-employee minimum requirement. Accordingly, the Union’s petition is dismissed. Because the petition is dismissed pursuant to RSA 273-A:1, IX (d) and RSA 273-A:8, I, it is unnecessary to address the other objections raised by the Town.

So ordered.

Date: May 20, 2021

  
Karina A. Lange, Esq.  
Staff Counsel/Hearing Officer

Distribution: Sean Cronin, Esq.  
Peter C. Phillips, Esq.