



State of New Hampshire
Public Employee Labor Relations Board

AFSCME Council 93

and

Town of Hampstead

Case No. G-0298-1

Decision No. 2021-150

Order

Background:

This is an order on the Union's motion for review of a hearing officer decision. The case involves a petition for approval of a new Hampstead Fire Department bargaining unit consisting of one full-time Captain, one full-time Lieutenant, three full-time Firefighters, and approximately fifteen "per diem" Firefighters. The hearing officer concluded that while four of the "per diem" firefighters (Cousins, Dominijanni, Scipione, and Warnock) "might arguably be classified as regular part-time employees," at least ten of the other per diem firefighters were persons employed irregularly within the meaning of RSA 273-A:1, IX (d) and could not be included in the proposed bargaining unit. As a result, the proposed unit did not meet the ten employee requirement imposed by RSA 273-A:8, I, and the hearing officer dismissed the case on this basis. See PELRB Decision No. 2021-090 (May 20, 2021).

The gist of the union's motion for review is that three of the excluded "per diem" firefighters (Genthner, Lonergan, and Sylvester) work enough to avoid classification as persons employed irregularly, as is evident when they are compared to the four per diem firefighters

(Cousins, Dominijanni, Scipione, and Warnock) whom the hearing officer found might arguably be classified as regular part-time employees.¹ The Town has objected to the Union's motion. The Town maintains the hearing officer did not actually find that Cousins, Dominijanni, Scipione, Warnock were not "irregular" employees under the statute, and in any event the hearing officer properly concluded that Genthner, Lonergan, Sylvester must be excluded as persons employed irregularly under RSA 273-A:1, IX (d).

For ease of reference we have created and attached, as Appendix One, a spreadsheet derived from and summarizing data referenced in the hearing officer's decision about per diem firefighter work activity in 2020. Cousins, Dominijanni, Scipione, and Warnock are the first four employees listed on Appendix One. Genthner, Lonergan, and Sylvester are the next three.

Motions for review of hearing officer decisions are governed by N.H. Admin. Rules, Pub 205.01, Review of a Decision of Hearing Officer, which provides:

(a) Any party to a hearing or intervenor with an interest affected by the hearing officer's decision may file with the board a request for review of the decision of the hearing officer within 30 days of the issuance of that decision and review shall be granted. The request shall set out a clear and concise statement of the grounds for review and shall include citation to the specific statutory provision, rule, or other authority allegedly misapplied by the hearing officer or specific findings of fact allegedly unsupported by the record.

(b) The board shall review whether the hearing officer has misapplied the applicable law or rule or made findings of material fact that are unsupported by the record and the board's review shall result in approval, denial, or modification of the decision of the hearing officer. The board's review shall be made administratively based upon the hearing officer's findings of fact and decision and the filings in the case and without a hearing or a hearing de novo unless the board finds that the party requesting review has demonstrated a substantial likelihood that the hearing officer decision is based upon erroneous findings of material fact or error of law or rule and a hearing is necessary in order for the board to determine whether it shall approve, deny, or modify the hearing officer decision or a de novo hearing is necessary because the board concludes that it cannot adequately address the request for review with an order of approval, denial, or modification of the hearing officer decision. All findings of fact contained in hearing officer decisions shall be presumptively reasonable and lawful, and the board shall not consider requests for review based upon objections to hearing officer findings of fact

¹ If all seven are included the proposed bargaining unit the ten employee minimum is satisfied.

unless such requests for review are supported by a complete transcript of the proceedings conducted by the hearing officer prepared by a duly certified stenographic reporter.

Under RSA 273-A:1, IX, "public employee" means any person employed by a public employer except:

- (a) Persons elected by popular vote;
- (b) Persons appointed to office by the chief executive or legislative body of the public employer;
- (c) Persons whose duties imply a confidential relationship to the public employer; or
- (d) *Persons in a probationary or temporary status, or employed seasonally, irregularly or on call.* For the purposes of this chapter, however, no employee shall be determined to be in a probationary status who shall have been employed for more than 12 months or who has an individual contract with his employer, nor shall any employee be determined to be in a temporary status solely by reason of the source of funding of the position in which he is employed. (Emphasis added)

As stated in the hearing officer decision, every 24 hour shift is staffed by one full-time firefighter and one part-time firefighter. An additional 8 hour shift on Saturday, Sunday, and Monday is also filled by a part-time firefighter. Simple math reveals that per diem firefighters are scheduled to work 192 hours per week, more than the full-time firefighters.

Appendix One reflects that there is a clear difference in terms of hours, months, weeks, and shifts worked between the first seven employees listed on Appendix One and the remaining employees. However, the same is not true with respect to the first four (Cousins, Dominijanni, Scipione, Warnock) and the next three (Genthner, Lonergan, Sylvester). When Sylvester, who started work on July 1, is credited with a full year's work based on the rate Sylvester worked from July 1 to year end, the average hours, months, weeks, of Genthner, Lonergan, Sylvester are the same or greater than Cousins, Dominijanni, Scipione, Warnock. Further, as a group, these seven employees, on average, each work the equivalent of almost three 8-hour shifts per week over a 48 week period.²

² These seven per diem firefighters, like the full time firefighters they are scheduled with, mostly work 24 hour shifts.

Part-time employees who work a variety of hours and shifts can be included in bargaining units and are not automatically excluded as “persons employed irregularly” under RSA 273-A:1, IX (d). This is a question that is resolved on a case by case basis. See, e.g., *International Brotherhood of Teamsters, Local 633 of N.H. and State of New Hampshire, Administrative Office of the Courts*, PELRB Decision No. 2009-048 (March 10, 2009)³ and *State Employees’ Association of New Hampshire, Inc., v. State of New Hampshire Liquor Commission*, PELRB Decision No. 2013-168 (September 23, 2013).⁴ The seven per diem firefighters under consideration in this case are not “filling in” or serving in an “on call” status, as was the situation with part-time police officers in *Appeal of Town of Stratham*, 144 N.H. 429 (1999). In *Stratham*, part-time police officers worked substantial hours but only “when a shift opens because a full-time officer is unavailable and no other full-time officer chooses to work it.” They were deemed “on-call employees who work on an irregular basis.” *Id.* at 431. Based on the record, Cousins, Dominijanni, Scipione, Warnock, Genthner, Lonergan, Sylvester are not persons employed irregularly within the meaning of RSA 273-A:1, IX (d) and are all eligible for inclusion in the proposed bargaining unit, which in turn means the ten employee minimum is satisfied. The Union’s motion is granted, and the hearing officer’s decision is modified accordingly.

The hearing officer must still decide the Town’s other objections listed at the outset of the hearing officer’s decision, such as whether the Captain is a supervisory employee within the meaning of RSA 273-A:8, II or a confidential employee within the meaning of RSA 273-A:1, IX (c), and the hearing officer shall accordingly issue a supplemental order forthwith.

³ *International Brotherhood of Teamsters* stated that “the fact that some per diem CSOs work as little as 1-2 days per week is not determinative. 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.”

⁴ In the *Liquor Commission* case, the board reviewed that the typical schedule over a two week period at state liquor stores involved 2 full time employees and as many as 6 part-time employees. From week to week they worked different days and shifts, with part-time employees working up to 28 hours per work, and at times working as many as 35 hours per week.

So ordered.

September 8, 2021



Andrew Eills, Esq., Chair

By unanimous vote of Alternate Chair Andrew Eills, Esq., Board Member Carol M. Granfield, and Board Member Richard J. Laughton, Jr.

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

Appendix One to PELRB Decision No. 2021-150.

	Employee	Hire Date	2020 Total Hours	2020 Total Months	2020 Total Weeks	2020 Total Shifts	24 Hour Shifts	12 Hours or Less Shifts	Comment
1	Cousins	Mar-20	992	10	38	54	33	21	Hired March 1, 2020
2	Dominijanni	2011	792.5	11	33	36	30	6	
3	Scipione	2013	1227.75	12	44	63	44	19	
4	Warnock	2017	920.5	12	37	50	31	19	
5	Genthner	Feb-20	1392	10	37	60	36	24	Hired end Feb, 2020
6	Loneragan	2019	1096	12	37	55	39	15	
7	Sylvester	May-20	481	6	20	28	16	12	Hired 5-15-20 started July 1
8	Beaulieu	Mar-20	80	7	8	8	1	7	
9	Florin	2018	135.5	10	17	17	2	15	
10	Houle	Nov-20	51	2	5	6	0	6	
11	Lacasse	2017	104	4	8	8	2	6	
12	Lovett	2017	465.5	10	21	27	14	13	
13	LaPrade	Mar-20	301	7	15	17	8	9	
14	LaCarbonara	2018	248	5	14	19	6	13	
15	Nichols	2019	327.5	8	25	37	0	37	
16	Rome	2018	520	10	23	24	20	4	