



State of New Hampshire
Public Employee Labor Relations Board

AFSCME Council 93

and

Town of Hampstead

Case No. G-0298-1

Decision No. 2022-047

Order

The question before me is whether the Certification of Representative and Order to Negotiate (Certification) can issue based upon the December 29, 2021 election, which resulted in a majority vote for AFSCME Council 93 as the bargaining unit representative. Per previous scheduling orders, in February of 2022 the parties filed stipulations, exhibits, and briefs on this question.

By way of background, during the conduct of the election held last December, the Town challenged part-time per diem firefighter Nicholas Genthner's ballot. As grounds, the Town claimed he had not worked since approximately mid-August, 2021, and he therefore should be considered a former employee and/or an irregular employee under RSA 273-A:1, IX (d). Resolution of this challenge was not required in order to complete the tally of ballots and certify an election result (AFSCME Council 93 prevailed). At this juncture, the next step is normally the issuance of the Certification. However, there is authority indicating the PELRB may need to confirm, following the election and before issuance of the Certification, and in appropriate

circumstances,¹ that the new bargaining unit still meets the RSA 273-A:8, 1 ten employee minimum. See *Appeal of Town of Deerfield*, 162 N.H. 601 (2011) and *State Employees Association of N.H., Local 1984 v. Town of Ashland*, PELRB Decision No. 1999-120 (November 23, 1999).

In an earlier decision issued in this case, the board reviewed the interplay, and distinction between, part-time employees and RSA 273-A:1, IX (d) “irregular” employees:

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)² and *State Employees’ Association of New Hampshire, Inc., v. State of New Hampshire Liquor Commission*, PELRB Decision No. 2013-168 (September 23, 2013).³ 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.

See PELRB Decision No. 2021-150 and Appendix One to the decision, summarizing the 2020 work history of Hampstead per diem firefighters.

As reflected in the prior decisions issued in this case,⁴ Genthner, along with Cousins, Dominijanni, Scipione, Warnock, Lonergan, and Sylvester are the part-time per diem firefighters who were included in the approved bargaining unit. The rest of the unit consisted of Lieutenant Clark and three full-time Firefighters (Erhardt, Luccisano, and Saltalamacchia), for a total of 11

¹ Without Genthner, the number of employees could fall below ten.

² *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.”

³ 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.

⁴ See PELRB Decisions 2021-150 and 156.

employees in approved bargaining unit positions: Lieutenant (1), full-time Firefighter (3), and part-time per diem Firefighter (7).

By the time of the December 2021 election, part-time per diem firefighter Cousins and full-time firefighter Saltalamacchia were no longer employed by the Town, part-time per diem firefighters Lonergan and Sylvester had become full-time firefighters as had Beaulieu, a former “per diem” firefighter previously excluded from the unit under RSA 273-A:1, IX (d). With these changes, the number of employees in the approved bargaining unit positions had dropped to ten: Lieutenant (1), full-time Firefighter (5), and part-time per diem Firefighter (4).

Genthner became a full-time firefighter with the Manchester fire department in February, 2021 and has since worked only 3 shifts as a Hampstead firefighter: 1 shift in April (24 hours), 1 shift in June (5 hours), and 1 shift in August (12 hours). He apparently remains on the list of Hampstead per diem firefighters, but given his change in employment status and the fact that he has only worked 3 shifts for Hampstead since February, 2021, he is now employed irregularly within the meaning of RSA 273-A:1, IX (d).

The Union argues that notwithstanding the change in Genthner’s status, there are still enough employees in the approved bargaining unit because several other per diem firefighters, most notably Houle and Lacasse, worked at a high enough level in 2021 in terms of hours, weeks, months, and shifts worked such that they cannot be excluded as persons employed irregularly under RSA 273-A:1, IX (d).

The PELRB’s prior order⁵ records that per diem firefighter Rome worked, in 2020, 520 hours over 10 months and 23 weeks but was excluded under RSA 273-A:1, IX (d), along with the other per diem firefighters who worked even less. It also reveals that Dominijanni, the part-time per diem firefighter who had the least amount of hours among the part-time per diem

⁵ PELRB Decision No. 2021-150.

firefighters who were included in the bargaining unit, worked 792 hours in 2020 over 11 months and 33 weeks.

In 2021 Houle worked 544 hours, 11 months, and 27 weeks. Although Lacasse attended the New Hampshire Fire Academy during October and November at the Town's expense, in 2021 she worked 656 hours, 11 months, and 28 weeks. The Town clearly relied upon Houle and Lacasse to provide a significant amount of firefighter coverage throughout 2021. The value to the Town of such part-time employees is reflected in part by the fact that the Town even paid the cost of training Lacasse received at the New Hampshire Fire Academy during October and November, an unlikely arrangement for someone who is truly a person employed irregularly under RSA 273-A:1, IX (d). It also suggests that had Lacasse not attended the Academy, she might have worked even more hours in 2021.

However, by the time of the December 2021 election, the number of full-time firefighters in the Hampstead fire department had increased from three to five following the appointment of two former per diem firefighters to full-time status in October of 2021. As referenced by the Town, full-time firefighters work 2,184 hours per year (or approximately 168 hours a month). This means that in 2022 the five full-time firefighters will work approximately 10,920 hours. This staffing change needs to be factored into the current assessment of Houle and Lacasse's work profile.

Using the total hours per diem firefighters worked during November and December, 2021 as a guide to project likely per diem firefighter hours in 2022 (five full-time firefighters were in place in November and December, 2021), per diem firefighters will collectively work approximately 344 hours per month in 2022, for a total of approximately 4,128 hours in 2022. After deducting from this total the likely hours which Dominijanni, Scipione, and Warnock will work (based on the average of their total 2020-21 hours of 2,617 hours), the remaining hours

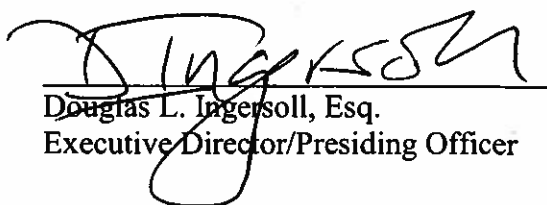
available for per diem firefighters to work in 2022 is in the range of 1,511. The 2021 per diem work history, including the months of November and December 2021, indicate that Houle and Lacasse will, together, likely work approximately half of these hours, and the remaining per diem firefighters will work the rest. This means the projected hours for Houle and Lacasse for 2022 is 375 hours each, more or less, unless shifts worked by the other remaining per diem firefighters are reduced, but there is no basis in the record to find that this is likely to happen. Even if Houle and Lacasse each work an additional 250 hours in 2022 (because other per diem firefighters work less, or more hours become available), they will not reach the 2020 work level of Dominijanni.

Based on the foregoing, the two additional full-time firefighter positions added in October, 2021 have reduced the amount of hours available to per diem firefighters to the point where all per diem firefighters, with the exception of Dominijanni, Scipione, and Warnock, should be considered persons employed irregularly within the meaning of RSA 273-A:1, IX (d). Accordingly, the Certificate of Representative and Order to Negotiate for a newly formed bargaining unit cannot issue because the new bargaining unit does not meet the RSA 273-A:8, I ten employee minimum, and the proceedings in this case are concluded on this basis.

So ordered.

Date:

3/24/2022


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