

THE STATE OF NEW HAMPSHIRE
SUPREME COURT



In Case No. 2022-0603, Appeal of Town of Bedford, the court on December 2, 2022, issued the following order:

The Town of Bedford's assented-to motion to withdraw appeal by petition without prejudice is granted. The appeal is withdrawn without prejudice.

Appeal withdrawn.

This order is entered by a single justice (Donovan, J.). See Rule 21(7).

Timothy A. Gudas,
Clerk

Distribution:

New Hampshire Public Employee Labor Relations Board, G-0307-1
Nicholas J. Blei, Esq.
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Attorney General
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State of New Hampshire
Public Employee Labor Relations Board

The Professional Fire and Police Officers Association of Bedford

and

Town of Bedford

Case No. G-0307-1
Decision No. 2022-155

Order on Motion for Rehearing

The Town filed a motion for rehearing of PELRB Decision No. 2022-105, the board's prior order approving hearing officer Decision 2022-068 (May 3, 2022)¹ and denying the Town's Pub 205.01 motion for review. The Association has objected, and we review the Town's motion pursuant to RSA 541:3 and Pub 205.02, which provides in relevant part as follows:

Pub 205.02 Motion for Rehearing.

(a) Any party to a proceeding before the board may move for rehearing with respect to any matter determined in that proceeding or included in that decision and order within 30 days after the board has rendered its decision and order by filing a motion for rehearing under RSA 541:3. The motion for rehearing shall set out a clear and concise statement of the grounds for the motion. Any other party to the proceeding may file a response or objection to the motion for rehearing provided that within 10 days of the date the motion was filed, the board shall grant or deny a motion for rehearing, or suspend the order or decision complained of pending further consideration, in accordance with RSA 541:5.

The Town continues to argue that employees in the approved bargaining unit do not share a community of interest as required by RSA 273-A:8, I and N.H. Admin. Rules, Pub 302.02 (b).

The Town relies on *Appeal of Town of Newport*, 140 N.H. 343 (1995) and *Barnstead Police &*

¹ Hearing officer Decision 2022-068 determined that a proposed new bargaining unit comprised of employees of the fire department (Captains and Building/Health Code Official) and police department (Lieutenants) had the requisite community of interest.

Fire Employees v. Town of Barnstead, PELRB Decision No. 2006-227 (December 18, 2006).

The Town also contends that instead of evaluating community of interest factors consistent with precedent, the board appears to have improperly relied on approved bargaining units which included fire and police positions but which were the result of uncontested proceedings.

In *Newport*, AFSCME asked the PELRB to approve a bargaining unit comprised of employees from the Newport highway, cemetery, recreation, water & sewer, and fire departments in 1991. On appeal, the court concluded the *Newport* unit lacked the requisite community of interest. The current case involves public safety employees in the Bedford police and fire departments in 2022, over 30 years later. There is no credible argument that the *Newport* and Bedford bargaining units involve the same positions, job duties, or working conditions such that they are the equivalent for community of interest purposes, or that the outcome in *Newport* requires the same result in Bedford. As reiterated in *Appeal of Town of Newport*, "the principal consideration in determining an appropriate bargaining unit is whether there exists a community of interest in working conditions such that it is reasonable for the employees to negotiate jointly." *Id.* at 352 (quotations and citations omitted). In explaining its decision, the court stated that:

The PELRB made no express finding or conclusion of law with respect to the community of interest of the firefighters and the other employees, although it did conclude generally that "[a]ll employees share a similarity of benefits and work for the same employer." In addition, we note that the PELRB's original decision stated that "[i]n small towns, of which New Hampshire has many, all employees of the town have a self-felt community of interest, all work and are paid by the same employer...."

The record, however, reveals that other than sharing a common employer, the fire lieutenants have little in common with the other employees proposed for certification in the bargaining unit.

Id. at 354. Our approval of the hearing officer decision reflects the numerous findings of fact made by the hearing officer, which are demonstrative of a community of interest.² Our approval also recognized that the hearing officer considered, and appropriately evaluated, the principle of community of interest pursuant to RSA 273-A:8, I and N.H. Admin. Rules, Pub 302.02 (b).³ The proposed bargaining unit, the record for decision summarized in the hearing officer's findings of fact, and the hearing officer's cogent and relevant evaluation of the community of interest issue, clearly distinguish this case from *Newport*. In contrast to *Newport*, this is not a situation where the fire and police department employees in the proposed bargaining unit have "little in common" with each other, nor is this a decision that lacks express community of interest findings.

Barnstead Police & Fire Employees v. Town of Barnstead, PELRB Decision No. 2006-227 (December 18, 2006) was a hearing officer decision that was not subject to review by the PELRB under Pub 205.01.⁴ As such, *Barnstead* does not have the precedential value claimed by the Town. *See, e.g. Appeal of Hillsborough County Nursing Home*, 166 N.H. 731, 736 (2014). Moreover, the Town otherwise misapprehends *Barnstead* and overstates its relevance. The *Barnstead* hearing officer dismissed a petition seeking to establish a bargaining unit consisting of certain police and fire department employees due to insufficient evidence of a community of interest:

The *Barnstead* hearing officer did not dismiss the petition to form the proposed bargaining unit because municipal police and fire employees cannot, as a matter of law, have a sufficient community of interest; the hearing officer dismissed the petition because of the union's failure to present adequate evidence on community of interest. *Barnstead* did not obligate the hearing officer in the pending Bedford case to reach the same conclusion on the community of interest issue...

² See, for example, findings of fact 3 and 5-18.

³ See Hearing Officer Decision 2022-068 at 5-9.

⁴ See index of decisions on PELRB Website at <https://www.nh.gov/pelrb/decisions/index.htm>.

PELRB Decision 2022-105 at 4 (order on Town's motion for review of hearing officer Decision 2022-068). *Barnstead* resolved the petition in that case, not the issue of community of interest in all subsequent petitions involving police and fire employees.

Finally, the Town complains that we approved a hearing officer decision that improperly used examples of existing bargaining units containing police and fire personnel to decide the community of interest issue, instead of applying RSA 273-A:8, I and N.H. Admin. Rules, Pub 302.02 (b). However, as discussed, the hearing officer's decision cites and applies the relevant legal criteria in the statute and rule in deciding whether there is a sufficient community of interest. The references to other approved bargaining units, four of which were decided or affirmed by the PELRB (not a hearing officer) after a contested hearing,⁵ are probative of whether or not it is reasonable for police and fire employees to negotiate jointly. These citations complemented, but did not replace, an evaluation of the community of interest issue under the statute and rule.

The Town's motion for rehearing is denied.

So ordered.

September 28, 2022


Andrew B. Eills, Esq., Chair

By unanimous vote of Chair Andrew Eills, Esq., Board Member James M. O'Mara, and Board Member Richard J. Laughton, Jr.

Distribution: John Krupski, Esq.
Anna B. Cole, Esq.
Mark T. Broth, Esq.

⁵ See order on Town's motion for review, PELRB Decision 2022-105, p. 3, n1. Decisions 1981-019, 1990-033, and 1990-092 were PELRB decisions. Decision 1981-013 was decided by Russell F. Hilliard, Esq., sitting as a hearing officer, and affirmed by the PELRB in Decisions 1982-054 and 061. N.B. There are currently more than 600 PELRB approved bargaining units, many of which include personnel from different departments or include a variety of positions within a single unit. Visit <https://www.nh.gov/pelrb/certifications/index.htm>.



State of New Hampshire
Public Employee Labor Relations Board

The Professional Fire and Police Officers Association of Bedford

and

Town of Bedford

Case No. G-0307-1
Decision No. 2022-105

Order

On June 2, 2022, the Town filed a motion for review of hearing officer Decision 2022-068 (May 3, 2022), which approved a new bargaining unit comprised of Bedford Fire Captains, Police Lieutenants, and the Building/Health Code Official. We evaluate the Town's motion pursuant to 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 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.

(c) Absent a request for review, the decision of the hearing officer shall become final in 30 days.

(d) The request for review of the hearing officer's decision shall precede, but shall not replace, a motion for rehearing of the board's decision pursuant to Pub 205.02 and RSA 541-A:5.

The Town argues the hearing officer's approval of the proposed bargaining unit is error because the employees do not share the requisite community of interest, as required by RSA 273-A:8, I. In particular, the Town contends the decision is contrary to relevant court decisions, such as *Appeal of Town of Newport*, 140 N.H. 343 (1995); is inconsistent with *AFSCME Local 3657, Barnstead Police & Fire Employees v. Town of Barnstead*, PELRB Decision No. 2006-227 (December 18, 2006)(a hearing officer decision which dismissed a petition seeking to establish a bargaining unit consisting of certain police and fire department employees); improperly relies on ten existing bargaining unit certifications which include police and fire department employees and which, according to the Town, were the result of uncontested proceedings; and disregards relevant evidence. The Union objects to the Town's motion and cites testimony of different witnesses and exhibits, which support the hearing officer's findings of fact, and argues the hearing officer appropriately, applied the applicable law.

Although we allowed the Town to file a hearing transcript after the deadline to file a motion for review had passed, it has not shown that the hearing officer made findings of material fact that are unsupported by the record. We also conclude the hearing officer considered, and appropriately evaluated, the principle of community of interest consistent with RSA 273-A:8, I; N.H. Admin. Rules, Pub 302.02 (b); and *Appeal of Town of Newport*. See Hearing Officer

Decision 2022-068 at 5-9. Of the ten existing bargaining units that combine police and fire personnel cited by the hearing officer, the PELRB approved five after contested proceedings.¹ Additionally, it was not otherwise improper for the hearing officer to reference all ten of these bargaining units, contested and uncontested, as examples that include police and fire employees in the same unit. This is probative of whether or not it is reasonable for police and fire employees to negotiate jointly. See *Appeal of Town of Newport*, 140 N.H. 343, 352 (1995). As to *Barnstead*, the hearing officer's decision in that case provides, in relevant part, as follows:

...[N]either the statute, nor PELRB decisions, nor New Hampshire Supreme Court decisions bar, as a matter of law, the combination of employees from different departments (such as police and fire) provided the other requirements of the statute are met.

The decisions cited establish that the community of interest showing is a fact intensive process and must be determined on a case-by-case basis. As evidenced by the previously cited decisions, testimony from competent witnesses can be particularly important to the process when evaluating community of interest. A recent PELRB decision illustrates the point. In *AFSCME Council 93, Local 1444 v. Town of Lancaster*, PELRB Decision No. 2004-159, the hearing officer stated, concerning the record, that:

The record in this case indicates that the only evidence presented by the Union consisted of testimony from the Union representative who filed the instant petition, as well as the Town's personnel policy. The Union offered no testimony from actual employees in the various job classifications. As a result, the Hearing Officer is limited in his ability to assess the various work functions and working conditions of each position in the proposed unit, and the extent to which their work is integrated in service to the Town. The Hearing Officer also has insufficient evidence before him as to the level of "self-felt" community of interest, if any, that exists between employees, given that such evidence is most appropriately presented through testimony of the employees themselves.

In the present case the only evidence submitted to support the requisite community of interest is the September 29, 2006 Joint Stipulation...AFSCME's reliance on the 1982 Plymouth case (PELRB Decision No. 82-13)² is misplaced. The Plymouth decision is not controlling for the reasons already discussed. Each case must be decided on its own merits and the requisite community of interest

¹ See PELRB Decision No. 1981-019 (Claremont); 1982-013 (Plymouth); 1990-033 (Derry); 1990-92 (Gilmanton); and 1996-065 (Lebanon).

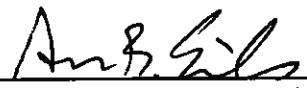
² Plymouth was an AFSCME bargaining unit established in 1982, which included police and fire personnel.

must be proven. Unlike the Plymouth (and similar) cases, AFSCME did not present any testimony on the issue. This is not to say that testimony is always required in cases involving community of interest or that community of interest will always be proven in the event testimony is given. However, in this case the stipulated record is insufficient to prove the requisite community of interest. (Footnote added)

The *Barnstead* hearing officer did not dismiss the petition to form the proposed bargaining unit because municipal police and fire employees cannot, as a matter of law, have a sufficient community of interest; the hearing officer dismissed the petition because of the union's failure to present adequate evidence on community of interest. *Barnstead* did not obligate the hearing officer in the pending Bedford case to reach the same conclusion on the community of interest issue. As reflected in Decision 2022-068, the hearing officer in the Bedford case considered and weighed the evidence submitted in accordance with applicable community of interest criteria. Upon review, we approve the hearing officer's decision. The Town's motion is denied.

So ordered.

July 13, 2022


Andrew B. Eills, Esq., Chair

By unanimous vote of Chair Andrew Eills, Esq., Board Member James M. O'Mara, and Board Member Richard J. Laughton, Jr.

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