Appeal to NH Supreme Court withdrawn on 10-06-2014
NH Supreme Court Case No. 2014-069

State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Professional Firefighters of Newington, IAFF Local 4104

and

Town of Newington, Fire Department

Case No. G-0213-1
Decision No. 2014-069

Order

On November 14, 2013 the Professional Firefighters of Newington, IAFF Local 4104 (Union) filed a petition pursuant to the Public Employee Labor Relations Act, seeking the Public Employee Labor Relations Board's (PERLB) certification of a bargaining unit comprised of certain employees of the Town Fire Department and a representation election per RSA 273-A:8, A:10 and N.H. Admin. Rule Pub 301-302. The petition lists the Town Board of Fire Engineers (BFE) as the public employer. The BFE agrees to the unit composition and the BFE signed the petition per Pub 302.01. The Union requests that the PELRB issue an order approving the agreed upon bargaining unit and conduct a secret ballot representation election to determine the bargaining unit's exclusive representative, if any.

The Town of Newington Board of Selectmen (BOS) filed a petition to intervene pursuant to N.H. Admin. Rule 301.01 (p). The BOS maintains that pursuant to RSA 273-A:1, II the BOS, and not the BFE, is the board of the public employer of the proposed bargaining unit for purposes of these representation proceedings. The BOS argues that on this basis the PELRB should 1) grant the petition to intervene; 2) disregard the purported agreement of the "public employer" to the proposed bargaining unit set forth in the certification petition; and 3) hold a hearing on the BOS objections to the proposed bargaining unit.

On January 13, 2014 the undersigned conducted a limited hearing at the PELRB offices in Concord as per PELRB Decision No. 2013-267 (December 23, 2013) to decide whether the BFE or the BOS is the board of the public employer for purposes of RSA 273-A.

Findings of Fact

1. On March 15, 1980 Newington Town Meeting adopted a Fire Department Ordinance (Ordinance) which established the Town fire department. *See* Joint Exhibit 2.

2. Ordinance Section 1, Article 1 provides as follows:

> Control of all apparatus designed, used for, or incident to the extinguishment of fires in the Town, and all persons whose duty it is to aid in extinguishing fires shall be vested in a Board of three persons, to be known as the Board of Fire Engineers. The Board shall promulgate rules and regulations as necessary.

3. BFE board members are elected to a 3 year term at town meeting. The BFE appoints the department Chief, and the Chief and the BFE jointly appoint other department members. Ordinance Section 1, Article 2; Section 2, Article 1 and 2.

4. Ordinance Section 2, Article 3 provides as follows:

> The chief shall be held responsible to the Board of Fire Engineers only, and shall make written and verbal reports thereto as the Board of Fire Engineers may require. All other Department and Company officers shall be accountable to the Chief only.

5. Ordinance Section 3, Duties of the Chief, Article 1 and 2 provide as follows:

> Article 1. The Chief shall be responsible to the Board of Fire Engineers for the personnel, morale, and general efficiency of the Department.
>
> Article 2. The chief shall determine the number and kind of companies of which the Department is to be composed, and shall determine the response of such companies to alarms.

6. Ordinance Section 5, Equipment, Article 1 and 2 provide as follows:
> Article 1. The Department shall be equipped with such apparatus and other equipment as may be required from time to time to maintain its efficiency and properly protect life and property from fire.

> Article 2. The Board of Fire Engineers, consulting with the Chief, shall prepare an annual budget by categories of expense for the ensuing year. Such report to be submitted to the Budget Committee no later than 25 days after the close of the fiscal year.

7. The Town personnel plan acknowledges that the BFE, like the Town Police Commission and Library Trustees, has the authority to oversee its personnel, including the authority to hire and fire. Joint Exhibit 1.

8. The Fire Chief sets wages for fire department personnel, although the current BOS chair questions the Chief's authority to do so. The BOS chair maintains that fire department employees are subject to the Town's personnel plan and in fact receive benefits contained in that plan.

Decision and Order

Decision Summary

The BFE is the board of the public employer for purposes of the Union's certification petition and collective bargaining under RSA 273-A. The BOS petition to intervene is denied.

Jurisdiction

The PELRB has jurisdiction over all petitions to determine bargaining units and certify the exclusive representative of an approved bargaining unit through the process of a representation election pursuant to RSA 273-A:8, 273-A:10, and Pub 300.

Discussion:

The Union maintains the BFE is legally responsible for fire department operations, including personnel and budget preparation, that it should be recognized as the "board of the public employer" in this case, and that the BOS may not intervene to raise objections to the agreed upon bargaining unit. The BOS argues that its authority extends to fire department personnel matters that involve formation of RSA 273-A bargaining units and the collective bargaining process. The BOS also complains that one member of the BFE is also a member of the proposed bargaining unit, which the BOS argues is

another reason to disregard the BFE's unit composition agreement and allow the BOS to present its objections. The BOS requests that the PELRB grant its petition to intervene and conduct a hearing on the BOS objections to the proposed bargaining unit.

The Public Employee Labor Relations Act provides the following definition of the "Board of the Public Employer" and "Public Employer:"

> "Board of the public employer" means the executive body of the public employer, such as the city council, board of selectmen, the school board or the county commissioners.
>
> "Public employer" means the state and any political subdivision thereof, the judicial branch of the state, any quasi-public corporation, council, commission, agency or authority, and the state university system.

See RSA 273-A:1, I and X.

The form of the Town's fire department is restricted to one of the options set forth in RSA 154:1, I (a) – (e) and III:

> I. All town and city fire departments, and fire departments of village districts or precincts organized pursuant to RSA 52:1, I(a), *shall be organized according to one of the following forms*, chosen by vote of the local legislative body:
>
> (a) A fire chief appointed by the local governing body, or by the town or city manager, if any, with firefighters appointed by the fire chief;
>
> (b) A fire chief appointed by the local governing body, or by the town or city manager, if any, with firefighters appointed by the local governing body or manager, upon recommendation of the fire chief;
>
> (c) A fire chief elected by the local legislative body pursuant to RSA 669:17, with firefighters appointed by the fire chief;
>
> (d) Firewards of any number, as determined by the local legislative body, either elected pursuant to RSA 669:17 or appointed by the local governing body, with a fire chief appointed by the firewards and firefighters appointed by the fire chief; or
>
> (e) Firewards of any number, as determined by the local legislative body, either elected pursuant to RSA 669:17 or appointed by the local governing body, with a fire chief and firefighters appointed by the firewards.
>
> (emphasis added)

III. A municipality may choose a form of fire department organization different from those set forth in paragraph I, including the election of fire chief, fire officers or firefighters, or all such persons, by the firefighters.

Additionally, certain organizational and operational authority of the Town's fire department is addressed in the following RSA 154:1 sub-sections:

V. Further fire department organizational provisions, including, but not limited to the manner of appointment and promotion of firefighters and officers, may be set forth in a municipal charter or local ordinance, if such provisions conform to this chapter.

VI. Subject to statute, charter, or local ordinance, and subject to such written formal policies or guidelines as may be adopted or approved by the appointing authority, the fire chief shall have the organizational and administrative control of the fire department.

VII. For purposes of this chapter the term "firewards" includes fire engineers and fire commissioners, where applicable.

VIII. *The firewards, if any, shall constitute a board*, and shall take actions by majority vote. They shall elect a clerk, and may adopt a badge of office.

(emphasis added). Wages are addressed in RSA 154:15, "[t]he chief fireward or fire chief shall be paid for services such compensation as the council, aldermen, or town meeting shall think reasonable" and in RSA 154:16 "[t]he firefighter shall be paid for their services such compensation as the council, aldermen or town meeting shall think reasonable."

Based upon the provisions of RSA 154 and the Ordinance, the BFE is a board which functions independently of the BOS. Its members, like members of the BOS, are elected by town meeting. Town meeting could have adopted an Ordinance which placed the authority to appoint members of the BFE with the BOS per RSA 154:1, I (d) but did not do so, thereby making the BFE directly accountable to town meeting. With respect to the nature and extent of the BFE's authority over fire department operations and personnel, the weight of the evidence and the applicable law leads to the

conclusion that the BFE, assisted by the Fire Chief, has broad oversight and control over fire department operations, inclusive of matters like daily department operations, hiring and oversight of personnel, and budget preparation. The wages of fire department employees are set by the Chief, and not the BOS. The BFE is required to submit its budget directly to the budget committee and it is ultimately subject to approval by town meeting. Nothing in the Ordinance or in RSA 154 requires or calls for interim BOS review and/or approval of the BFE's budget. The fact that the BFE and the Chief accept and follow the personnel plan does not override the provisions of RSA 154 and the Ordinance, and it does not otherwise mean the BFE is not the "board of the public employer" for purposes of RSA 273-A. Additionally, the BOS has not cited any persuasive authority establishing that, notwithstanding all the duties and authority conferred upon the BFE to act as a board independent of the BOS with respect to fire department operations, personnel, and budget, the PELRB should nevertheless recognize the BOS as the board of the public employer with respect to issues relating to bargaining unit certification and collective bargaining under RSA 273-A.

The BOS also complains that its intervention in this case is justified because a BFE member also holds a position in the proposed bargaining unit. As to this argument, it should first be noted that the PELRB's jurisdiction to assess matters relating to the composition of the BFE is fairly limited. Unlike, for example, the superior court the PELRB does not have general "equitable" powers. Whether the employee in question is eligible for continued service on the BFE is beyond the scope of this decision. However, it is clear that in these circumstances nothing in the provisions of RSA 273-A "disqualifies" a board of a public employer, invalidates a unit composition agreement like the one filed in this case in such circumstances, or requires the allowance of a petition to intervene like the one filed by the BOS in this case. The BOS has otherwise failed to submit sufficient evidence relating to this issue to justify further consideration or action. Consistent with the foregoing I find that this particular

BOS argument is not persuasive and is not grounds for granting the BOS petition and allowing the BOS to proceed as the "board of the public employer" in this case.

In conclusion, the BFE is the board of the public employer in these certification proceedings and for all other purposes under RSA 273-A with respect to fire department employees, including the negotiation of collective bargaining agreements. The BFE has the responsibility and authority pursuant to N.H. Admin. Rule Pub 302 to confer with the Union about the composition of the proposed bargaining agreement and signify its agreement to same, if any, by signing the certification petition with an appropriate statement. It has done so in this case. The BOS Petition to Intervene is therefore denied. The PELRB will process the certification petition as a request for a representation election to determine the exclusive representative of an agreed upon unit and will issue such further orders as necessary and appropriate.

So Ordered.

Date: 3-21-14

Doug Ingersoll

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