

_____)
TEAMSTERS UNION LOCAL 340,)
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Petitioner,)
))
and)
))
TOWN OF PARIS,)
))
Employer.)
_____)

UNIT DETERMINATION
REPORT

PROCEDURAL HISTORY

This unit determination proceeding was initiated on December 28, 2015, when Mr. Ed Marzano, Business Agent for Teamsters Union Local 340 ("Union"), filed a petition for unit determination with the Maine Labor Relations Board ("Board") requesting the creation of a bargaining unit of firefighters employed by the Town of Paris, consisting of "[a]ll Firefighter per diem employees, including the Captain; and excluding the "Fire Chief and all other positions." The petition was filed pursuant to § 966(1) and (2) of the Municipal Public Employees Labor Relations Law ("Act"), 26 M.R.S. § 961 et seq. The Town of Paris ("Town") filed a timely response to the petition on January 13, 2016. Pursuant to Chapter 11, § 11(1) of the Board's Rules, the Town challenged the adequacy of the showing of interest filed in support of the petition and included an alphabetical list of the employees in the classifications identified by the petitioner for inclusion in the proposed unit. The showing of interest was examined and found to be sufficient as to form, as required in Chapter 11, § 8(1) of the Rules, and sufficient in number to meet the requirement in Chapter 11, § &(11) of the Rules. In addition, the Town objected to the granting of the relief sought because the

"entire proposed unit is composed of per diem employees who work irregular 'on call' schedules, and are, therefore, excluded from the definition of public employee by virtue of §962(6)(G) of the Act and cannot be included in any bargaining unit, as provided in § 966(1). The Town further averred that the Captain position is a supervisory employee, within the meaning of § 966(1), and should not be included in the same bargaining unit as the other per diem firefighters.

Due notice having been given, an evidentiary hearing on the petition was held at the Board hearing room in Augusta, Maine, on March 30, 2016. The Union was represented by Mr. Marzano, who was accompanied by Union Business Agent Ray Cote; and Matt Tarasevich, Esq., accompanied by Ann Freeman, Esq., appeared on behalf of the Town. Prior to commencement of the formal hearing, the Town withdrew its objection to the Captain position being included in the proposed unit on the basis of an alleged supervisory status, but continued to maintain that the Captain classification, which is filled by a per diem employee, and the other per diem Firefighters are not public employees because they are "on call," within the exclusion set forth in § 962(6)(G) of the Act.

The parties then reviewed the exhibits each intended to offer and agreed to the following joint exhibits, which were admitted into evidence:

- Joint Exhibit 1, An organizational chart for the Paris Fire Department
- Joint Exhibit 2, Current job description for the Fire Captain position
- Joint Exhibit 3, Personnel Policy of the Town of Paris
- Joint Exhibit 4, Current job description for the Firefighter position
- Joint Exhibit 5, 15-month work schedule (January, 2015 through March, 2016)
- Joint Exhibit 6, Paris Fire Department Call List, with EMS

certification highlighted
Joint Exhibit 7, Work schedule for a per diem Firefighter, to be completed and turned in to the Fire Chief no later than the 15th of the preceding month
Joint Exhibit 8, Actual time worked by per diem Fire Department employees, Jan. 2016
Joint Exhibit 9, Actual time worked by per diem Fire Department employees, Feb. 2016
Joint Exhibit 10, Actual time worked by per diem Fire Department employees, Mar. 2016 to date of hearing

The final exhibit offered by the Union was marked Union 2¹ and is the same document as Joint Exhibit 6, except that the names of the individual per diem firefighters were highlighted and followed by "*" on this exhibit. Union Exhibit 2 was admitted without objection.

The Union presented two witnesses: Fire Captain Mark Blaquiére and Firefighter Zachary Creps. After the Town announced that it was not calling any witnesses, the hearing examiner called Fire Chief Brad Frost as a witness.² The parties filed simultaneous main briefs on May 25, 2016, and simultaneous reply briefs on June 1, 2016, which have been considered in reaching the instant decision.

JURISDICTION

The jurisdiction of the executive director to hear this matter and to make a determination lies in 26 M.R.S. § 966(1) and (2).

STIPULATIONS

The parties stipulated to the following facts:

¹ Union Exhibit 1, a compilation of hours worked by several of the per diem firefighters, was used to refresh a witness' recollection, but was not offered into evidence.

² Chapter 11, § 24 of the Board Rules provides that this is an investigatory proceeding, whose purpose is "to develop a full and complete factual record."

1. Fire Chief Brad Frost is the sole full-time employee of the Paris Fire Department.

2. The Deputy Chief of the Paris Fire Department is excluded from the proposed bargaining unit.

3. The Fire Captains are per diem employees and should be treated like the per diem Firefighters.

FINDINGS OF FACT AND DISCUSSION

The Town has not challenged Petitioner Teamsters Union Local 340's status as a public employee organization, within the meaning of § 962(2) of the Act. The Town of Paris is a public employer within the definition of § 962(7) of the Act. Like countless other Maine towns, the Town of Paris has historically relied on volunteer citizen-firefighters for its community fire suppression needs. As their forebears had done for generations, the citizen/volunteers, referred to as the "call company," turned out in response to alarms and worked to extinguish blazes in the Town.

Due to demographic and economic changes in recent years, the Town recognized approximately five years ago that they could no longer rely on "on-call" citizen/volunteers to respond to alarms during the normal workweek, 6:00 a.m. to 6:00 p.m., Monday through Friday. To fill the void, the Town started hiring per diem firefighters. At other times, a sufficient number of citizen/volunteers are generally available and respond to alarms to meet the Town's needs. All members of the fire department carry pagers and, except during the hours of 6:00 a.m. to 6:00 p.m., Monday through Friday, all may (but are not required to) respond to alarm calls. While the per diem firefighters can respond to pager calls when they are off-duty (and those who live in Paris often do so), per diems who live out of town often report to their own town's fire station to provide "mutual aid" to the Paris department.

The per diem Firefighter and Fire Captain positions are those at issue in this proceeding. Unless discussing differences between them, both classifications will be referred to as per diem firefighters in this decision. Section 966 (1) of the Act provides that "anyone excepted from the definition of public employee under section 962 may not be included in a bargaining unit." Section 962(6)(G) excludes from the statutory definition of "public employee" any person "[w]ho is a temporary, seasonal or on-call employee." The Town contends that the per diem firefighters are "on-call" employees and exempt from the coverage of the Act. The Board has held that, since the public policy reflected in the Act is to grant public employees the right to bargain collectively, the exceptions from the coverage of the Act must be narrowly construed. *Town of Topsham and Local S/89 District Lodge #4, International Association of Machinists and Aerospace Workers*, No. 02-UCA-01, at 12 (MLRB Aug. 29, 2002).

The most recent decision interpreting and applying the "on-call" exclusion is *Teamsters Union Local 340 and City of Westbrook*, No. 13-UD-01 (Feb. 13, 2013). The hearing examiner in *Westbrook* discussed the "on-call" exclusion as follows:

The MLRB has held that "[t]he point of the temporary, seasonal, or on-call' exclusion is to exclude those employees who, because they work irregularly or sporadically, 'do not have a community of interest with the permanent, full-time employees in the unit.'" *Council 74, American Federation of State, County and Municipal Employees, AFL-CIO and County of Knox*, MLRB 82-UD-17 (Jan. 18, 1982), citing *Town of Berwick and Teamsters Local Union No. 48*, MLRB No. [80]-A-05 at 3 (July 24, 1980). In *Council 74*, matrons served in the same capacity as corrections officers, but only if either a woman was arrested and detained at the jail pending bail, or was sentenced to serve a term of incarceration in that facility. In the first situation, the matrons were called in to work from a rotation list maintained at the jail; in the second situation, the

scheduling was on a temporary basis. In those instances, the hearing officer concluded, because the matrons' work duties were contingent on events beyond the control of the employer and their time worked "sporadic and intermittent," the work was "clearly an on-call system." *Council 74*, at 5.

City of Westbrook, at 10. The holding in *Knox County* was based on the distinction between the regularly-scheduled part-time employees in *Berwick* and the matrons at the *Knox County Jail*. Unlike the matrons, who only worked when there was a female in custody at the jail, the reserve police officers in *Berwick* supplemented the regular officers weekend nights and were scheduled for their shifts by the Police Chief, who posted the schedule by the month. 80-A-05 at 2. Since they worked closely with the full-time officers, the Board agreed with the hearing examiner that "traditional community of interest considerations control the determination whether an employee is a temporary, seasonal or on-call employee." 80-A-05 at 3.

In addition to citing *Westbrook* and *Knox County*, discussed above, the Town also cited *AFSCME Council 93 and Penobscot County Sheriff's Department*, No. 12-UC-03 (Aug. 20, 2013) for the proposition that the hours actually worked by the part-time employees at issue are important in "evaluating the status of public employees." Brief on behalf of the Town at 2. Like *Westbrook* and *Knox County*, *Penobscot County* was a case where the petitioner was seeking to include part-time employees in an existing unit exclusively consisting of full-time employees. The hours worked by the part-time employees was the focus of the analysis because an alleged increase in work hours of the part-time employees as a group was the basis of the petitioner's attempt to establish the substantial change in circumstances prerequisite for a unit clarification. 12-UC-03, at 9. Finding that the nature of the part-time employees work was unchanged in

the 30 years since the formation of the bargaining unit involved, the hearing examiner concluded that the petitioner had failed to establish the requisite substantial change to warrant a unit clarification, "notwithstanding fluctuation in the number of part-time employees and the total number of part-time hours worked per year." 12-UC-03, at 10.

Despite concluding that no substantial change had been established, the hearing office in *Penobscot County* went on to discuss the lack of community of interest between the part-time employees and the full-time employees in the bargaining unit at issue. The work schedules in *Penobscot County* were established weekly and were not finalized until two days before taking effect; therefore, the hearing examiner concluded that the part-time employees' schedules were "more akin" to the matrons' schedules in *Knox County* and should not be included in the bargaining unit with the full-time employees. 12-UC-03, at 11-12. On appeal, the Board concluded:

We find no error in the Hearing Examiner's legal conclusion that the changes in the hours worked by part-time employees during this period were not a sufficient change in circumstances to warrant proceeding with the unit clarification.

AFSCME Council 93 and Penobscot County, No. 14-UCA-01, at 8 (Dec. 17, 2013). The Board's holding reduces the hearing examiner's community of interest discussion to dicta.

The Board went on to state:

AFSCME further argues that the unique circumstances of the case justify granting the unit clarification petition, as the hearing examined did in *AFSCME Council 93 and State of Maine*, No. 89-UC-07 (Aug. 10, 1990) *aff'd* No. 91-UCA-02 (Feb. 12, 1991), *aff'd sub nom Bureau of Employee Relations v. MLRB*, 611 A.2d 59 (Me. 1992). Reliance on that case for the proposition that a

remedy should be made available is misplaced, as it involved the denial of the protections of the statute through improperly classifying employees as temporary, seasonal or on-call, that is, employees who are excluded from coverage of the collective bargaining statute. In the present case, the part-time employees have not been denied any protections of the Act. The part-time employees are free to organize themselves into a bargaining unit by filing a unit determination and election petition. As they are not part of an existing bargaining unit, there is no contract bar to the creation of their own bargaining unit. They may wish to be a separate bargaining unit, or they may wish to eventually merge with the bargaining unit of the Line Unit Corrections Division through the process in § 966 (4).

Id. at 8-9 (footnote omitted). The Board went on to clarify that, while the community-of-interest test is applied when the issue is whether to assign a part-time classification to an existing bargaining unit, the test is different when dealing with an exclusionary designation.

In a line of cases that examined exclusionary designations pursuant to the "temporary, seasonal or on-call" provision itself, the Board has focused on the meaning of the statutory provision, rather than relying on comparisons between the employees at issue and the employer's regular work force. This precedent incorporates the critical elements from the analysis in the Board's prior cases, but provides an over-arching approach to the "temporary, seasonal or on-call" statutory exclusion. The Board has held that exclusionary designations under this provision should be based on "the objective standard of determining, in the totality of the circumstances, whether the employee involved may be said to have a reasonable expectation of continued employment." *Council 93, AFSCME v. Town of Sanford*, No. 90-07, at 14 (MLRB

June 15, 1990). Among the factors to be considered in the determination are:

- 1) the degree of control the employer has over events surrounding the hiring of the employee in question;
- 2) the existence of a definite termination date or an event that will trigger termination;
- 3) the employer's past experience with hiring similarly situated employees into permanent positions (that is, the employer's hiring preference policy);
- 4) what employees are told regarding future employment when they are hired;
- 5) the stability of the employer's labor requirements and the extent to which the employer is dependent on the employees at issue on a continuing basis; and
- 6) the duration of the fixed-term appointment and/or whether employees are hired for successive fixed-term appointments.

AFSCME Council 93 and State of Maine, No. 89-UC-07, at 39 (Aug. 10, 1990), aff'd, 91-UCA-02 (MLRB Feb. 12, 1991), aff'd sub nom Bureau of Employee Relations v. Maine Labor Relations Board, 611 A.2d 59 (Me. 1992). Since the Town of Paris has no full-time firefighters, except the Fire Chief, this analysis is more appropriate in the instant situation.

The difference between the Town's call company firefighters and the per diem firefighters is a good example of the first criterion in the reasonable expectation test. Members of the call company respond to an alarm (pager) call when there is an emergency situation--a structure fire, motor vehicle collision, or medical event--that is beyond the Town's control. The per diem firefighters, on the other hand, are assigned to work specific 12- or 10-hour shifts, with the staffing determined exclusively by the Fire Chief and published at least two weeks before the schedule takes effect.

During the first 6 months of using per diem firefighters approximately five years ago, Chief Frost scheduled the per diems

manually. Then, the current "Fire Manager" computer program was adopted. The per diem firefighters access the "Fire Manager" program, each with a user name and password, and employees put in their availability a month at a time. The Fire Chief schedules each month in advance and issues the schedule on the afternoon of the 15th of the month preceding the month covered by the schedule.³ Captain Blaquiére usually offers the Paris Department his availability for all shifts, Monday through Friday, each month. Depending on his wife's schedule, Mr. Creps typically offers availability for 3-4 days per week in Paris and works there approximately 2 days per week. Most of the per diem firefighters work full- or part-time for one or more other employers.

The Fire Chief has sole discretion in scheduling the per diem firefighters; in doing so he applies the following criteria that he established:

1) Since the Fire Department is the first responder for the Town of Paris for medical emergencies, under PACE, the Chief's top priority is to have an EMT on each shift;

2) The next priority is to have someone on each shift who is qualified to drive all the vehicles in the department, including the tank truck and the ladder truck; and

3) There should be a firefighter, with at least a Firefighter 1 qualification.

Three per diem firefighters are scheduled for each 12-hour shift -- 6 a.m. to 6 p.m., Monday through Friday, and two per diem firefighters are scheduled for each 10-hour shift -- 7 a.m. to 5 p.m. on Saturdays and Sundays. In selecting persons to fill each shift, the Chief aims to equalize the assignments, as nearly as he

³ Approximately 6 Paris firefighters, including Captain Blaquiére and Firefighter Zachary Creps, also work as per diems at the Oxford Fire Department, which also uses Fire Manager. Since the Oxford schedule is finalized on the 20th of the month preceding the month being scheduled, the Paris per diem firefighters know their Paris work schedule when they enter their availability for Oxford.

can. He does this by assigning shifts to those who offer the least availability first, then assigning shifts in inverse proportion to the number of shifts offered by each individual, until he completes the schedule with those who offer the greatest availability. As the Chief schedules individuals to particular shifts, the computer program keeps track of the total number of hours assigned to each employee.

The balance of the time is covered by call company firefighters exclusively, weekday and weekend nights, or supplementing the assigned per diem firefighters, weekend days. The call company includes those per diem firefighters who live in Paris who are not on scheduled duty. Call company firefighters do not have access to the Fire Manager program. They do not respond to alarms weekdays when the per diem firefighters are scheduled to work. Call company firefighters work weekdays only when a scheduled per diem firefighter cannot work a scheduled shift and are unable to locate another per diem to fill in. This occurs rarely.

The facts relating to the fifth reasonable expectation criterion were discussed above. About 5 years ago, the Town recognized that they could no longer rely on call company firefighters to respond to alarms weekdays between the hours of 6:00 a.m. and 6:00 p.m. and required the per diem firefighters for community fire suppression and emergency medical response services. Several per diem firefighters submit their availability several months in advance, indicating the stability of the Town's requirement for per diem firefighters on a continuing basis. The sixth factor, the recurrent employment of the same people by an employer, is met here by the Fire Chief assigning weekday and weekend shifts exclusively from the pool of per diem employees.⁴

⁴ No evidence was presented at the hearing regarding the second, third, fourth and sixth reasonable expectation criteria. The second factor, a fixed

Applying the Board's reasonable expectation of continued employment test, I conclude that the per diem Firefighters, including the Fire Captains, are regularly-scheduled part-time employees of the Town of Paris and are public employees within the definition of 26 M.R.S. § 962 (6).

While they are public employees with collective bargaining rights under the Act, the question remains whether the per diem firefighters, as a group, share the requisite community of interest to constitute an appropriate bargaining unit. 26 M.R.S. § 966(2). The Board has codified its traditional 11-point community of interest analysis in Chapter 11, § 22(3) of its Rules.

The first factor is the "similarity in the kind of work performed." All of the per diem firefighters perform the same work, responding to fire and emergency medical calls and engaging in fire suppression activities in the Town of Paris. Outside of these high-visibility activities, the three per diem firefighters on-duty are expected, on a day-to-day basis, to undertake the various chores that are listed in the "man" box at the fire house. All three on-duty firefighters are expected to work on completing these chores and the senior person on duty is responsible to make sure the work is done. In addition, the Fire Chief assigns a crew to each particular vehicle in the department. The highest ranking person on that crew is responsible for monthly inspection and

termination date or event that will trigger termination, is particularly significant in assessing whether an employee is temporary, particularly when the triggering event is something beyond the control of the employer. The third factor, the employer's hiring preference, is important when considering the status of persons serving as replacements for regular employees, as was the subject of the acting-capacity Mental Health Worker I employees in the *State of Maine* case cited above. The fourth factor, what the employee is told when hired, can be important when, for example, a permanent regular employee accepts a temporary assignment, after being told that she could return to her regular position when the grant that funded the temporary position expired. *Teamsters Local 340 and City of Presque Isle*, No. 92-UD-10, at 33 (Aug. 18, 1992).

testing to make sure all equipment on the truck is functioning properly. Calls are usually answered using Engine 4 because it's an "all around truck," with jaws of life, EMS equipment, and fire suppressing foam. With only 3 per diem firefighters on duty, Engine 4 can address most calls on a day-to-day basis. In the case of a structure fire, Engine 3 is the first to respond. On a mutual aid call, the on-duty firefighters bring whatever type of vehicle is requested, whether it be a tanker, ladder truck, or engine, regardless of what vehicle to which a firefighter is "assigned." At a fire scene, the Fire Chief is in charge, if he's present (he usually is); if not, then the highest ranking officer or private present is in charge.

In addition to the first factor, the following community-of-interest considerations also support the conclusion that the per diem firefighters share a clear and identifiable community of interest:

2) **common supervision and determination of labor relations policy** -- all of the per diem firefighters are supervised by the Fire Chief and, unless expressly excluded thereby, the labor relations policies for all the per diem firefighters are determined by the Town personnel policy; 3) **similarity in the manner of determining earnings** -- all of the per diem firefighters are compensated on an hourly basis; 4) **similarity in employment benefits, hours of work and other terms and conditions of employment** -- none of the per diem firefighters receive paid time off; all work 12-hour shifts, Mondays through Fridays, 6 a.m. to 6 p.m.; and, to the extent that they are not excluded thereby, the terms and conditions of employment for all of the per diem firefighters are set by the Town of Paris Personnel Policy; 5) **similarity in the qualifications, skills and training of employees** -- all of the per

diem firefighters are expected to have (or to obtain "within established timeframes"): State of Maine Firefighter I and II certifications, CPR certification, EMT certification, Haz-Mat Operations Lever certification, and Emergency Vehicle Driver Certification; 6) frequency of contact or interchange among the employees -- The per diem firefighters all work three-person shifts, weekdays, at the fire department -- it is possible that each per diem firefighter will work with all others, over time; 7) geographic proximity -- all of the per diem firefighters are based at the Paris Fire Department facility, from which they respond to emergency calls; 10) extent of union organization -- the Union is proposing to represent all of the employees at the Paris Fire Department that are eligible for representation; and 11) the employer's organizational structure -- the Fire Department is a separate department of the Town.

The following factors have a neutral impact on the community of interest determination: 3) similarity in the scale of earnings -- there is no evidence in the record regarding the hourly rates for any of the per diem firefighters. 8) history of collective bargaining -- No evidence was produced on the record regarding any history of collective bargaining involving the employees at issue; and 9) desires of affected employees -- as required by the Act, at least 30% of the employees in the proposed bargaining unit have signed showing of interest documents in support of the petition.

Weighing and considering the several community-of-interest factors separately and together, I conclude that the per diem Firefighters and Fire Captains employed by the Town of Paris share a clear and identifiable community of interest as required by § 966(2) of the Act and, together, constitute an appropriate bargaining unit for purposes of collective bargaining.

CONCLUSION

On the basis of the foregoing findings of fact and discussion and by virtue of and pursuant to the provisions of 26 M.R.S.A. § 966, the hearing examiner ORDERS:

1. The petition for unit determination brought by Teamsters Union Local 340 is granted.
2. The per diem Firefighters and Fire Captains employed by the Town of Paris are public employees within the meaning of 26 M.R.S. § 962(6).
3. The per diem Firefighters and Fire Captains employed by the Town of Paris share a clear and identifiable community of interest, as required in 26 M.R.S. § 966(2), and constitute an appropriate bargaining unit within the meaning of 26 M.R.S. § 966(1).
4. A representation election for the Town of Paris Per Diem Firefighters and Fire Captains bargaining unit should be scheduled in the normal course of the Board's business.

Dated at Augusta, Maine, this 3rd day of June 2016

MAINE LABOR RELATIONS BOARD



Marc P. Ayotte
Executive Director

The parties are hereby advised of their right, pursuant to 26 M.R.S. § 968(4), to appeal this report to the Maine Labor Relations Board. To initiate such an appeal, the party seeking appellate review must file a notice of appeal with the Board within fifteen (15) days of the date of the issuance of this report. See Chapter 10 and Chap. 11 § 30 of the Board Rules.

