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TOWN OF PARIS,)	
)	
Appellant,)	DECISION AND ORDER ON
)	APPEAL OF
and)	UNIT DETERMINATION
)	
TEAMSTERS UNION LOCAL 340,)	
)	
Appellee.)	
_____)	

The Town of Paris filed this unit determination appeal on June 17, 2016, pursuant to 26 M.R.S.A. §968(4) of the Municipal Public Employees Labor Relations Law (the "Act") and Chapter 11, §30 of the Rules and Procedures of the Maine Labor Relations Board (the "Board"). The unit determination report that is the subject of this appeal (No. 16-UD-06) was issued on June 3, 2016. In that report, the Hearing Examiner concluded that the employees in the proposed bargaining unit were not "on-call employees" within the meaning of §962(6)(G) of the Act and were therefore public employees covered by the Act. The Hearing Examiner went on to conclude that the proposed unit was an appropriate bargaining unit as required by §966(2).

In its Memorandum of Appeal, the Town of Paris challenges the Hearing Examiner's conclusion that the per diem firefighters were not "on-call" employees excluded from the Act by §962(6)(G). The Town also argues that if the Board decides that these employees are not excluded as on-call employees, the Hearing Examiner's conclusion that the positions in the proposed unit shared the requisite community of interest to constitute an appropriate unit

was not supported by the evidence and should be overturned. On appeal, Ann Freeman, Esq., represented the Town of Paris, and Teamsters Union Local 340 was represented by Mr. Ed Marzano. The Board heard the parties' oral argument on September 13, 2016. The Board, comprised of Chair Katharine I. Rand, Employer Representative Robert W. Bower, Jr., and Employee Representative Amie M. Parker, deliberated this matter on September 13, 2016.

JURISDICTION

The Town of Paris is an aggrieved party within the meaning of 26 M.R.S.A. §968(4) and Chapter 11, §30 of the Rules and Procedures of the Board. The jurisdiction of the Maine Labor Relations Board to hear this appeal and to render a decision herein lies in 26 M.R.S.A. §968(4).

DISCUSSION

The standard of review for bargaining unit determinations is well established: The Board will overturn a hearing examiner's rulings and determinations if they are "unlawful, unreasonable, or lacking in any rational factual basis." Council 74, AFSCME and Teamsters Local 48, No. 84-A-04 at 10 (Apr. 25, 1984), quoting Teamsters Local 48 and City of Portland, No. 78-A-10 at 6 (Feb. 20, 1979).

The primary issue on appeal is whether the Hearing Examiner erred by concluding that the "per diem" firefighters were not on-call employees within the meaning of 26 M.R.S.A. §962(6)(G) and therefore not excluded from coverage under the Act. If we conclude that the firefighters are on-call employees, they have no statutory rights under the Act and the petitioned-for unit determination must be dismissed. If we conclude that the per diem firefighters are not on-call employees, a review of the Hearing

Examiner's conclusion on the appropriateness of the bargaining unit will be necessary.

The essential facts are not in dispute and can be summarized with the following:

- The Town's historic reliance on citizen-firefighters to respond to alarms is no longer effective because many local residents now work out of town during the week.
- Five years ago, the Town decided to use per diem employees for 12-hour shifts during the normal work week. The Town currently schedules three per diem employees on 12-hour day shifts during the normal workweek and two for 10-hour shifts on weekends. This ensures proper coverage at the station for emergencies, maintenance and testing of vehicles and equipment, and other related tasks.
- There are 15 per diem firefighters. The Fire Chief is the sole full-time employee in the Paris Fire Department. Most of the per diem firefighters work full- or part-time for one or more other employers.
- The scheduling process starts with each per diem employee using a scheduling program to enter his or her "offered availability" of shifts for the coming month. The Fire Chief makes the schedule based on the offered shifts. The Chief has sole discretion on scheduling, but his objective is to have one EMT on each shift, someone qualified to drive all the vehicles, and one with at least the Firefighter I qualification.
- The number of hours each per diem employee actually works varies, as does the number of shifts each submits as "offered availability".

Section 962, sub-§6 of the Act defines which employees of a public employer are covered by the Act. There are several exceptions to the definition, including paragraph G, which excludes any employee "who is a temporary, seasonal or on-call employee." In the case below, the Hearing Examiner applied a "reasonable expectation of continued employment" test and concluded that the per diem fire fighters were not on-call employees. The Hearing Examiner considered this test to be appropriate because it is used to determine whether an employee alleged to be a temporary or seasonal employee is properly excluded from the Act. The Hearing Examiner also noted that the test provided an overarching approach to the three exclusions in paragraph G. Report at 8.

The Town's primary argument on appeal is that the Hearing Examiner erred as a matter of law by applying this "reasonable expectation of continued employment standard" in this case. The Town asserts that the correct legal standard is whether the per diem firefighters are employed on a "sporadic and intermittent" basis. The Town argues that had this "correct" legal standard been applied, the facts demonstrate that the per diem firefighters must be excluded due to their status as on-call employees.¹

The "reasonable expectation of continued employment" standard has been used by this Board in deciding whether an employee is a "temporary" or "seasonal" employee who must be excluded from the definition of employee, exceptions also under §962(6)(G). See Council 93, AFSCME v. Town of Sanford, No. 90-07 at 14 (June 15, 1990) and AFSCME Council 93 and State of Maine, No. 89-UC-07 at 39 (Aug. 10, 1990) aff'd State of Maine v. AFSCME Council 93, No. 91-

¹ The Town also asserts that the Hearing Examiner erred in concluding that the employees shared the requisite community of interest to constitute an appropriate unit, which we will address later.

UCA-02 (Feb. 12, 1991)². However, this "reasonable expectation of continued employment" standard has never been used by the Board or by any hearing examiner to determine whether an individual is an "on-call" employee under §962(6)(G). The Town contends that it was not appropriate for the Hearing Examiner to apply this standard. We agree.

The "expectation of continued employment" standard is not appropriate for determining "on-call" status because it is inconsistent with the plain meaning of the terms of the statute. Saying that someone is an "on-call" employee is generally understood to mean that the person works only when called by the employer to fill a particular need that could not reasonably have been anticipated. In broad terms, it is understood as being available for work upon short notice.³ While the "reasonable expectation of continued employment" is appropriate in determining if an employee is truly a temporary employee, it confuses the issue of on-call status.

The Town argues on appeal that the Hearing Examiner should have applied what the Town describes as an "established test" for evaluating the on-call exclusion. The Town cites Teamsters Union Local 340 and City of Westbrook for the proposition that employees who work "irregularly or sporadically" are on-call employees.

² Although the use of the "reasonable expectation of continued employment" standard was not appealed, this case was affirmed on appeal. The Law Court held that given the use of the word "or" between the subsections, the six-month requirement and temporary status exclusion in SELRA are separate exclusions that must be applied independently. Bureau of Employee Relations v. M.L.R.B., 611 A.2d 59 (Me. 1992).

³ There is another form of on-call that refers to regular employees already on the payroll being "on-call" to respond to emergencies. These employees, such as physicians being on-call on weekends or technicians being on-call in case of a disruption in services, are usually required to be near a phone and able to respond promptly when summoned.

Brief at 2-3, citing No. 13-UD-01 (Jan. 30, 2013).⁴ In Westbrook, the Hearing Examiner stated, "[m]ore than half of the per diems are regularly scheduled, and as many work, on average, more than 20 hours per week. Such work simply cannot be classified as 'irregular' or 'sporadic.'" No. 13-UD-01 at 12, citing AFSCME and County of Knox ("Knox County"), No. 82-UD-17 at 5 (Jan. 18, 1982) (Jail matrons, who worked sporadically and irregularly, are on-call employees) and Town of Berwick and Teamsters Local Union No. 48, No. 80-A-05 at 3 (July 24, 1980) (Officers who worked on a regularly-scheduled basis were not on-call employees). While we recognize that "sporadic and irregular" and "regular scheduled" are terms that have been used in various cases, we do not agree that Westbrook reflects the use of an "established test" on this issue.⁵

After thoroughly reviewing this Board's case law on the on-call exclusion, it is apparent that we have never established a clear standard for determining on-call status. In fact, the Board's case law has not been a model of clarity on this issue. The on-call exclusion has been addressed by a hearing examiner five times in the past 45 years and only appealed to the Board on three occasions. In Berwick, the first case addressing on-call status, the Hearing Examiner adopted the community-of-interest

⁴ The Town also cites AFSCME Council 93 and Penobscot County, No. 12-UC-03 (Aug. 20, 2013), claiming it applied the Board's "established test" for on-call status. The quoted section of the Penobscot Hearing Examiner's decision (inaccurately attributed to the Board) is not part of any sort of on-call determination or community-of-interest analysis. The statement was made in the context of determining whether the use of the part-time employees had changed sufficiently to justify a unit clarification petition. The Hearing Examiner concluded it had not and that was the conclusion affirmed by the Board in AFSCME v. Penobscot County, No. 14-UCA-01 at 8 (Dec. 17, 2013).

⁵ It is important to note that a hearing examiner's report does not have the same "precedential value" as a Board decision. See Maine Maritime Academy v. MSEA, No. 03-UCA-01 at 3 (May 15, 2003).

approach used by the National Labor Relations Board with respect to temporary or seasonal employees. Teamsters Local Union No. 48 and Berwick, No. 80-UD-25 at 3 (April 25, 1980), aff'd Town of Berwick and Teamsters Local Union No. 48, No. 80-A-05 at 3 (July 24, 1980). Relying on the NLRB's approach was improper because there is no statutory exclusion for temporary or seasonal employees under the federal act, like there is in Maine's Act.

The NLRB cases cited by the Berwick Hearing Examiner were decisions that excluded temporary and seasonal employees from a bargaining unit based on their lack of a community of interest with the regular employees in the unit. No. 80-UD-25 at 3. Whether a position should be excluded from a bargaining unit is a significantly different question than whether a certain class of employees is covered by the Act in the first place. It is clear to us now that the use of the community-of-interest analysis to define a statutory exclusion is inappropriate and has contributed to the confusion on this issue.⁶ Thus, to the extent that Town of Berwick and Teamsters Local 48, No. 80-A-05, affirming No. 80-UD-25 (July 24, 1980), states that the community-of-interest analysis controls the determination whether an employee is a temporary, seasonal, or on-call employee, that decision is overruled.⁷

⁶ City of Saco and Teamsters, No. 83-A-08 at 3 (July 18, 1983), and In Re Petition for Decertification, Winthrop Bus Drivers, No. 01-E-02 at 5 (June 5, 2001), and the decisions cited in this discussion all refer to the statement in Berwick that the purpose of §962(6)(G) was to exclude employees who do not have a community of interest with regular employees. The community-of-interest analysis, however, was rarely applied and was never the sole basis of the decision.

⁷ The "temporary" and "seasonal" exclusions also contained in §962(6)(G) have been specifically addressed without reference to Berwick in several cases over the years. See, e.g., City of Bangor v. AFSCME and MLRB, 449 A.2d 1129 (Me. 1982)(Bureau of Employee Relations v. Maine Labor Relations Board, 611 A.2d 59 (Me. 1992)).

The absence of a clear standard led this Board and our hearing examiners to rely on certain phrases to describe the on-call status, or, more frequently, to describe what is not on-call. There has been the reference to "sporadic and irregular" work, used in Knox County to describe the work of the matrons, No. 82-UD-17 at 5, and in Town of Lebanon to describe the "irregular" work of reserve officers, Teamsters Union Local 48 and Town of Lebanon, No. 86-UD-02 at 13, 14 (Oct. 17, 1985), aff'd No. 86-A-01 at 3 (Dec. 5, 1985) ("regularly-scheduled part-time employees do not work intermittently or sporadically"), aff'd Inhabitants of the Town of Lebanon v. MLRB and Teamsters Union Local 48, CV-85-656 at 3 (Feb. 3, 1987). See also, AFSCME Council 93 and State of Maine, No. 89-UC-07 at 47 (Aug. 10, 1990) ("Her service certainly was not sporadic or irregular in nature ... as the Board has described truly on-call employees."). Similarly, there have been several statements that "regularly-scheduled" employees are not on-call employees. See Berwick, No. 80-A-05 at 2 (Reserve officers not on-call employees because they worked "year-round on regularly scheduled shifts") and Westbrook, No. 13-UD-01 at 12 (More than half of the per diem employees are "regularly scheduled"). In the present case, the Town of Paris relies on one of those labels, "sporadic and irregular," to support its case.

Applying the plain meaning of the words "on-call employee" in §962(6)(G), the standard must be whether, given all of the relevant circumstances, the employee works only when called by the employer to fill a particular need that could not reasonably have been anticipated. We note that had we applied this approach in each of the Board's earlier on-call cases, we are confident that the outcome would have been the same. In fact, reviewing these cases in light of this new approach to understanding the on-call

exclusion helps to illustrate the kinds of circumstances that are relevant to the assessment.

For example, in Westbrook, the Hearing Examiner concluded that the per diem employees were not on-call employees of the Westbrook fire department because they were scheduled in advance, the employment of per diem employees was a regular and necessary component of running the city's fire department, and they were not hired to fill a need that arose by some circumstance beyond the control of the employer. Westbrook, No. 13-UD-01 at 5, 11. These factors are all relevant considerations in determining on-call status. Similarly, the "reserve" officers in Berwick were scheduled on a monthly basis with ample notice and the Hearing Examiner and the Board concluded they were not on-call. Berwick, No. 80-UD-25 at 2, aff'd No. 80-A-05 at 2.

In contrast, the matrons held to be on-call in Knox County and the reserve patrolmen in Town of Lebanon were both called in at the time the need arose--for the matrons, when a female was arrested; for the patrolmen, immediately before the start of a shift when a regular employee called in sick. Knox County, No. 82-UD-17 at 5, Town of Lebanon, No. 86-UD-02 at 6, 13, aff'd No. 86-A-01 at 4; aff'd Inhabitants of Lebanon v. MLRB and Teamsters, CV-85-656 at 3. In both cases, it would not have been possible for the employer to schedule the employees in advance: the need had not yet arisen. Thus, hearing examiners, this Board, and the Superior Court have recognized that evidence of whether the employees can be scheduled in advance and how and when the need for them arises are important factors in the on-call determination. In contrast, when a need arises because of an event essentially beyond the control of the employer (such as a

snow storm or a mechanical failure), scheduling employees in advance generally is not an option.

When employees are scheduled in advance, it is generally to fulfill a need that can be anticipated. Thus, employees who are regularly scheduled in advance are not "on call," irrespective of the regularity or consistency of an individual employee's work schedule. In Berwick, reserve officers were scheduled to provide an extra officer on weekend shifts, when there was, predictably, a greater need. No. 80-UD-25 at 2 (holding employees were not on-call). In Westbrook, the department used two or three per diem employees on a daily basis to supplement the full-time staff, similarly indicating a dependence on them. No. 13-UD-01 at 11 (same). There was variation in the consistency or regularity of the individual work schedules of Westbrook's per diem firefighters ("more than half" being regularly scheduled), but the need for them was constant. Id. at 11, 12.

We conclude that the Paris firefighters are not on-call employees excluded from coverage under that Act because their employment does not meet this test. Here, the Paris Fire Chief schedules three per diem employees to cover the 12-hour day shifts during the work week and two per diem employees for 10-hour shifts on the weekends. Report at 10. The available work was based on a regular need for staff to enable the fire department to function: the Paris fire department is entirely dependent on per diem employees to cover the day shifts during the work week because there were simply not enough call company members available to respond to alarms. Report at 11. The need for the per diem employees is a regular and predictable need, as demonstrated by the Chief's ability to schedule well in advance. All of these

facts together indicate that the Paris per diem firefighters are not on-call employees within the plain meaning of §962(6)(G).

The Town argues that the Hearing Examiner misapplied or misconstrued several facts in his analysis of the on-call issue. The factual conclusions that the Town objects to are not relevant to our analysis. For example, the fact that both per diem firefighters and call company members wear pagers and may respond to alarms is not relevant, nor is the fact that the per diem employees have other jobs. Similarly, the fact that the Fire Chief has complete discretion in scheduling and considers employees' certifications in that process does not alter our conclusion that the per diem employees are not on-call employees.

Having concluded that the per diem firefighters are employees under the Act and entitled to be in a bargaining unit, we must consider the Town's objection to the Hearing Examiner's conclusion that the proposed unit is an appropriate unit. The Town asserts that the Hearing Examiner incorrectly concluded that the Paris Fire Department employees in the petitioned-for bargaining unit shared a community of interest. The Town's argument is without merit. We agree with the Hearing Examiner that the per diem firefighters share a clear and identifiable community of interest and that it is an appropriate unit.

ORDER

On the basis of the foregoing discussion and pursuant to the powers granted to the Maine Labor Relations Board by the provisions of 26 M.R.S.A. §968(4), it is ORDERED:

that the appeal of the Town of Paris, filed with respect to the Unit Determination Report in Case No. 16-UD-06,

is denied and the report is affirmed as set forth above.

Dated at Augusta, Maine, this day of October, 2016.

MAINE LABOR RELATIONS BOARD

The parties are advised of their right to seek review of this decision and order by the Superior Court by filing a complaint pursuant 26 M.R.S.A. § 968(4) and in accordance with Rule 80C of the Rules of Civil Procedure within 15 days of the date of this decision.

Katharine I. Rand
Chair

Robert W. Bower, Jr.
Employer Representative

Amie M. Parker
Employee Representative