

_____)	
TEAMSTERS UNION LOCAL 340,)	
) Petitioner	
) and	UNIT DETERMINATION REPORT
) CITY OF WESTBROOK,	
) Respondent	
_____)	

PROCEDURAL HISTORY

This unit determination proceeding was initiated on June 26, 2012, when Daniel P. Walsh, the Business Agent of the Teamsters Union Local 340 ("Union"), filed a Petition for Unit Determination with the Maine Labor Relations Board ("Board," or "MLRB"). The petition seeks a determination that Westbrook's per diem firefighter/rescue personnel¹ be recognized and included under the collective bargaining agreement for the regular, full-time firefighter/rescue personnel. Westbrook ("the City"), the respondent in this case, filed a timely response to the petition. The city argued that per diem firefighter/rescue personnel are "on-call" employees within the meaning of 26 M.R.S.A. § 962(G) and, therefore, excluded from the definition of "public employee;" and that, pursuant to 26 M.R.S.A. § 966(1), employees who are excluded from the definition of "public employee" under Section 962 may not be included in a bargaining unit.

On October 23, 2012, a unit determination hearing notice was issued and was posted for the benefit of affected employees. A prehearing telephone conference with the parties and the Executive Director was held on November 21, 2012. A unit

¹The petition refers to 21 (plus or minus) employees listed on Union Exhibit 1 and/or W-13.

determination hearing was held in front of the hearing examiner on November 28, 2012, at the Maine Labor Relations Board. The Union was represented by Daniel P. Walsh, Teamsters Union Local 340 Business Agent, and the City was represented by Natalie L. Burns, Esq., and Jennifer W. Peters, Esq. The parties were afforded the full opportunity to examine and cross-examine witnesses and to present evidence. Daniel Link testified on behalf of the Union; Fire Captain Gerry Provencher, Director of Public Safety Michael W. Pardue, and Human Resources Generalist Liam Gallagher testified on behalf of the City. At the conclusion of the hearing, a briefing schedule was agreed upon, with each party to submit its brief by December 21, 2012. Daniel Walsh received an extension and filed his brief on December 31, 2012.

JURISDICTION

Jurisdiction of the hearing examiner over this matter, including the ability to make a unit determination, is pursuant to 26 M.R.S.A. §§ 966(1) and 966(2).

EXHIBITS

The following exhibits were offered and admitted into the record:

- Union 1: List, per diem firefighters
- Union 2: 26 M.R.S.A. § 962
- Union 3: 26 M.R.S.A. § 966
- Union 4: copy of *Town of Berwick and Teamsters Local Union No. 48*, Case No. 80-A-05 (July 24, 1980)
- Union 5: Agreement between City of Westbrook and Teamsters Local Union No. 340 for the Westbrook Fire/Rescue Department Union, July 1, 2009 to June 30, 2012
- Westbrook 1: Human Resources Policies and Procedures, classification of employees
- Westbrook 2: Article V: Police, Fire/Rescue & Communication Personnel rules
- Westbrook 3: Fire Police duties
- Westbrook 4: Job description: Paramedic Firefighter

- Westbrook 5: Job description: Per Diem Firefighter/EMS Provider
- Westbrook 6: Westbrook Fire and Rescue Department Per Diem Firefighter Scheduling/Call Back Policy
- Westbrook 7: Westbrook Public Safety Commission Rules for Hiring and Promotion of Fire & Rescue Personnel
- Westbrook 8: Westbrook job advertisement: Firefighter/EMS Provider; Per Diem Firefighter/EMS Provider.
- Westbrook 9: Westbrook Fire & Rescue Department Application for Employment
- Westbrook 10: Westbrook Civil Service Commission Applicant Release and Physician Permission Physical Fitness Test for Fire Department
- Westbrook 11: goperdiem.com brochure, questions and answers, and tentative schedules
- Westbrook 12: Westbrook Fire/Rescue sample shift schedule calendar, November 2012
- Westbrook 13: Chart, Westbrook Fire and Rescue Department Per Diem, Call Company, and Fire/Police 7/1/11-6/30/12
- Westbrook 14: Chart, Westbrook Fire and Rescue Department Per Diem, Call Company, and Fire/Police 7/1/12-11/3/12
- Westbrook 15: List, Westbrook Fire and Rescue Department full-time employees
- Westbrook 16: Chart, comparisons of pay rate based on licensure level and full-time vs. per diem status
- Westbrook 17: Comparison of benefits provided to full-time employees and per diem employees
- Westbrook 18: Westbrook Standard Operating Guideline: To provide a standard policy that will serve as the procedure for the submission of Per Diem Personnel monthly availability
- Westbrook 19: Westbrook Standard Operating Guideline: To establish a guideline for coverage of open slots on either rescue
- Westbrook 20: Westbrook Standard Operating Procedure: To provide for the fair and equitable scheduling of Per Diem Firefighter slots for greater departmental operational effectiveness
- Westbrook 21: Westbrook Standard Operating Procedure: Pertaining to all per diem personnel, to establish a process and documentation of personnel swaps for per diem members

FINDINGS OF FACT

1. The Teamsters Union Local 340 ("Union") is the petitioner and is the bargaining agent for the full-time Westbrook Firefighter/Rescue ("fire/rescue") bargaining unit

within the meaning of 26 M.R.S.A. § 962(2).

2. The City of Westbrook ("City" or "Westbrook") is a public employer within the meaning of 26 M.R.S.A. § 962(2).

3. The most recent collective bargaining agreement between the Union and Westbrook expired on June 30, 2012.

4. The fire/rescue bargaining unit covers Westbrook's full-time fire/rescue workers.

5. There are four categories of employees that work in Westbrook's fire/rescue department; full-time fire/rescue workers; per diem fire/rescue workers, who support the City's full-time fire/rescue workers and are scheduled a month in advance; the "call company," who are on-call personnel paid if they respond to calls for service; and the call/per diem personnel, who serve in the roles of both on-call personnel and per diem personnel, and who fill in schedule voids for the City.

6. The full-time fire/rescue personnel work an average of 42 hours per week over an eight-week period of time. Per diem fire/rescue personnel are expected to work no more than 36 hours per week.

7. Per diem firefighters had participated in an online schedule templating system known as "goperdiem," which was originally created by a per diem fire/rescue worker for Westbrook, Daniel Link, in 2005 or 2006 and is widely used all over the state.

8. Although Westbrook no longer formally uses the goperdiem program, Daniel Link, who testified at hearing and who has worked for Westbrook for nine (9) years as a per diem fire/rescue worker, is regularly scheduled to work 36 hours per week, on Sunday, Tuesday, and Wednesday nights. He refers to this as "templating."

9. Mr. Link's schedule is the same as when it was templated, using a similar process of filling in a monthly schedule as when formal templating using the goperdiem system for

per diems was utilized.

10. Captain Provencher, who has been with the fire department for 23 years, also refers to the process by which the fire/rescue personnel plug their schedules into a monthly grid as templating.

11. Captain Provencher testified that several per diem fire/rescue workers are on a template, and, thus, work regular hours.

12. The process now in place is that the per diems offer their available times the month prior to the one that needs to be filled. The City views it, as Westbrook's director of public safety since February of 2011, Michael Pardue, testified, "as an offered availability" where the City "reserve[s] the right to accept what they've offered." Mr. Pardue further testified that "absolutely in most cases we are very accepting of the times and dates that they offer because of the assistance they can provide to our department."

13. Captain Provencher testified that the highest EMS license level, or paramedics, are allowed to be the first to template their schedules, because Westbrook's preference is to have the highest licenced personnel on duty. As a result, those personnel are regularly scheduled.

14. Mr. Link testified that Westbrook's policy was that per diems had to submit a certain number of monthly hours to remain on a per diem status. Mr. Pardue testified that under his oversight, no minimum number of hours per month have been required for per diems. One of Westbrook's documents admitted into evidence, W-18, however, was consistent with Mr. Link's testimony that minimum hours were required. In addition, consequences for three consecutive months without availability submitted resulted in a 12-month probationary period, while another violation of the guideline resulted in a suspension of per diem duty for a six-month period.

15. Mr. Link testified that if he decided he wanted to work

fewer hours than what he was working per week, he would be able to with advance notice and approval from Westbrook.

16. Per diem fire/rescue workers work as directed, are subject to discipline, and are held accountable for their actions.

17. The disciplinary process for per diems is a progressive step process that includes a verbal counseling session, a letter of counsel, and, ultimately, a separation from employment. The Director of Public Safety referred to the process as "due diligence and due process." Discipline may be administered for unexcused absences from shifts the per diem fire/rescue worker has accepted.

18. Full-time fire/rescue personnel have a similar disciplinary process, which includes an investigation of the complaint, a recommendation to the mayor as to the disposition of the case, and the mayor's decision.

19. The full-time firefighters/rescue personnel have the option of arbitration under their contract.

20. Per diem fire/rescue workers cannot be forced in to work, while full-time fire/rescue workers can be required to come in on their off days.

21. Hours are limited for per diems in order to avoid having to pay benefits and overtime for them, as Westbrook is obligated by contract to do for its full-time fire/rescue personnel.

22. The call company only consists of firefighters or firefighter/EMTs who carry pagers. The pager tone goes off in the case of a fire, requesting the call company member to respond, if able, to the fire.

23. Fire/Police call company members have a van, which is a fire/police unit that has traffic control equipment on it that they use at the scene of a fire or other emergency.

24. In addition to responding to fire calls they may answer, members of the call company are paid for four hours' work every

week to check their trucks and for scheduled training. Except for those four hours, they are not regularly scheduled.

25. Call company members do not serve in the capacity of fire/rescue workers, although many are former fire/EMTs; traffic control is the sole function they serve.

26. On-call fire/rescue workers fill a very different role than call company members, and respond to requests to fill in for other fire/rescue workers.

27. On-call fire/rescue hours are filled in by full-time fire/rescue workers and/or by per diem fire/rescue workers, depending on the particular needs of the department on a given shift or day.

28. Liam Gallagher, the Human Resources Generalist for Westbrook, testified that he is familiar with the duties and functions of the Westbrook per diem employees. Mr. Gallagher testified that he does not consider per diem fire/rescue workers as traditional on-call employees.

29. The hiring process for full-time fire/rescue workers begins with advertisements on newspaper websites, the city website, and the Maine Municipal Association's website. The applications are reviewed and the applicants who meet the requirements desired by the city and collective bargaining agreement for Firefighter I and II and Paramedic are chosen. A written examination, scored by a national testing company, follows, and the applicants who receive a score of 70 or greater are allowed to continue. An interview with the public safety commission occurs, and those candidates who are approved for advancement by the commission and the Director of Public Safety are recommended to the mayor, who is the appointing authority.

30. Mr. Pardue testified that the positions for per diem fire/rescue workers are sometimes filled by word of mouth because the "highly professional folks" who serve on the Westbrook Fire Department "know their peers, they know folks that are highly

skilled and might be able to supplement our needs[.]" These applicants are interviewed by the deputy fire chief and the Director of Public Safety, who assess their "skills, knowledge, and abilities," and then make a recommendation to the mayor, who is the appointing authority. There is no psychological test, drug test, physical exam, or public safety commission interview when hiring per diems.

31. Fire Captain Provencher testified that the per diem fire/rescue workers have to pass the same physical agility test as the full-time fire/rescue workers, and that Westbrook is moving towards the same testing process for the per diems "because ... if we're going to be doing the same job, we should ... have the same process." Captain Provencher further testified that aside from the EMS license level, "[t]here is really no difference in qualifications" in those personnel. Per diem fire/rescue workers have the opportunity to advance to full-time status.

32. Full-time fire/rescue workers are required to attain their firefighter I and II and paramedic certification within 24 months from their date of hire. With 5 years' experience, they may apply for the rank of lieutenant.

33. Per diem fire/rescue workers are required to attain their firefighter I and intermediate level EMT certification within 24 months from their date of hire. They may not apply for the position of lieutenant.

34. Public safety commission rules allow only full-time fire/rescue workers who have served for five or more years to serve as acting lieutenants.

35. The pay scales for full-time fire/rescue workers is much higher than for per diem fire/rescue workers.

36. Full-time fire/rescue workers are paid as follows for base pay to 21 years of service:

Unlicensed: \$15.58 - \$20.20 per hour

Basic:	15.58 - 20.20	per hour
Intermediate:	16.22 - 20.85	per hour
Paramedic:	17.16 - 21.77	per hour

37. Per diem fire/rescue workers are paid as follows for base pay to 21 years of service:

Unlicensed:	\$9.37 - \$12.70	per hour
Basic:	9.66 - 12.97	per hour
Intermediate:	10.75 - 13.52	per hour
Paramedic:	14.07 - 16.83	per hour

38. Full-time fire/rescue workers receive a full range of benefits, including insurance and vacation, while per diem fire/rescue workers have Social Security and workers' compensation deducted, and are allowed to participate in an IRA program.

39. Both the full-time fire/rescue workers and the per diem fire/rescue workers have a formal policy for swapping shifts.

DISCUSSION

The issue presented by this case is whether Westbrook's per diem fire/rescue employees, who currently have no bargaining unit affiliation, should be recognized and included in the bargaining unit for the full-time fire/rescue employees. The petitioner argues that the unit determination petition should be granted because the fire/rescue per diem employees have the same duties and responsibilities, share the same firehouses, drive the same ambulances and fire trucks, are held to the same standards and codes of conduct as the full-time fire/rescue employees, and, thus, share a community of interest with the regular, full-time fire/rescue employees. The City of Westbrook argues that the unit determination petition should be denied because the per diem fire/rescue workers are on-call employees within the meaning of 26 M.R.S.A. § 962(G), and, therefore, are excluded from the definition of public employee. Because on-call employees are excluded from the definition of public employee, the City further argues, the per diems may not be included in a bargaining unit

pursuant to 26 M.R.S.A. § 966(1).

1. Are the per diem firefighter/rescue workers on-call workers within the meaning of 26 M.R.S.A. Sec. 962(G) and, therefore, excluded from the definition of "public employee?"

Westbrook argues that the per diem firefighter/rescue workers are not public employees within the meaning of 26 M.R.S.A. § 962(6)(G) because they are on-call employees. 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. 85-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.

Some of Westbrook's witnesses provided mixed testimony about the duties of on-call workers with per diem workers and even call company workers, whose only duties are to show up at a fire scene to direct traffic. However, Westbrook's human resources generalist, Liam Gallagher, testified unequivocally that the per diem fire/rescue workers were not on-call workers.

The per diem fire/rescue worker who testified at hearing,

Daniel Link, works a regular 36-hour week, and works the same schedule every week. He is a nine-year veteran of the Westbrook fire department per diem program, and was one of the creators of the goperdiem program, a template program that is widely used for scheduling per diems and, according to all who testified regarding the program, was used up until recently by Westbrook. Although there were conflicting testimony and documentary evidence about whether templating was still being used by Westbrook, the weight of the evidence indicated that it was still in use at the time of the hearing or just before the hearing. This was supported by its use in Mr. Link's scheduling, testimony as to its use at the time of the hearing by Captain Provencher,² and evidence in Exhibit W-19, which states, "EMS per diem personnel wishing to template their scheduled time will be allowed to do so as long as license requirements match the schedule needs." In addition, Chief Michael Pardue called the process by which per diem fire/rescue workers currently fill in their time schedules as "offered availability by our per diem members."

What is clear from the evidence presented is that in order to meet its staffing requirements, the "offered availability" of the per diems is a necessary component of running Westbrook's fire department. Chief Pardue testified that there was still a need for "sometimes it's two, or oftentimes there's [sic] three [per diems] ... that would be supplementing our career member staff" on a daily basis. Unless there is a scheduling conflict, the "offered availability" is accepted, and is regularly scheduled for most of the per diem fire/rescue employees on the per diem roster.

Based on the evidence in the record, the per diem fire/rescue workers cannot be considered as "on-call" workers within

²Provencher testified that "[s]everal of the [per diem] members are on a template, as Dan said." Transcript, p. 28, l. 2.

the meaning of the statute. More than half of the per diems are regularly scheduled, and as many work, on average, more than 20 hours per week. Such work simply can not be classified as "irregular" or "sporadic." *Council # 74* at 5; *Town of Berwick and Teamsters Local Union No. 48*, No. 80-A-05, (MLRB 1980) at 3. For these reasons, the hearing examiner finds that the per diem fire/rescue workers are not on-call workers within the meaning of 26 M.R.S.A. § 966(1).

2. Do the per diem fire/rescue employees share a community of interest with the full-time fire/rescue workers?

The Teamsters Union Local 340 argues that the per diem fire/rescue employees share a community of interest with the full-time fire/rescue employees and, therefore, should be recognized and included under the collective bargaining agreement for those full-time fire/rescue employees. Westbrook argues that the Union failed to demonstrate that a community of interest exists between the two groups of fire/rescue employees.

The Law Court has recognized that there are two fundamental purposes of the Municipal Public Employees Labor Relations Law: to protect employees' rights to self-organization, and to promote the voluntary adjustment of their terms of employment. *Lewiston Firefighters Ass'n, Local 785, IAFF v. City of Lewiston*, 354 A.2d 154, 160 (Me. 1976). Bargaining units with a clear and identifiable community of interest are necessary to both of these objectives. The Board set forth the extent to which the hearing examiner must examine the community of interest over 30 years ago as follows:

[C]ommunity of interest exists between the positions in question so that potential conflicts of interest among bargaining unit members during negotiations will be minimized. Employees with widely different duties, training, supervision, job locations, etc., will in many cases have widely different collective bargaining objectives and expectations. These different objectives

and expectations during negotiations can result in conflicts of interest among bargaining unit members. Such conflicts often complicate, delay, and frustrate the bargaining process.

AFSCME and City of Brewer, No. 79-A-01, slip op. at 4, NPER 20-10031 (MLRB Oct. 17, 1979).

In order to determine whether employees share the necessary community of interest in matters subject to collective bargaining, the follow factors, at a minimum, must be considered: (1) similarity in the kind of work performed; (2) common supervision and determination of labor relations policy; (3) similarity in the scale and manner of determining earnings; (4) similarity in employment benefits, hours of work, and other terms and conditions of employment; (5) similarity in the qualifications, skills and training among the employees; (6) frequency of contact or interchange among the employees; (7) geographic proximity; (8) history of collective bargaining; (9) desire of the affected employees; (10) extent of union organization; and (11) the employer's organizational structure. MLRB Rules, Ch. 11, Rule 22(3).

As set forth in the Findings of Fact in this Report, the record establishes that the per diem fire/rescue workers share several of the community of interest factors listed above with the full-time fire/rescue workers, including, but not limited to, similarity in the kind of work performed; common supervision; similarity in many of the qualifications, skills, and training among the employees; frequency of contact or interchange among the employees; geographic proximity; and the employer's organizational structure.

Community of interest factors not shared by the fire/rescue workers include determination of labor relations policy; similarity in the scale and manner of determining earnings; similarity in employment benefits, hours of work, and other terms and conditions of employment; similarity in some qualifications,

skills, and training among employees; and a history of collective bargaining. The desire of the affected employees is not clear from this record.

In examining key community of interest factors more closely, the hearing examiner finds that the most important among the number of factors the two groups share in common is that all of these fire/rescue workers carry out the same duties and functions as a team, working side by side. As testified to by Daniel Link, a per diem fire/rescue worker who holds a firefighter I and II certification and an intermediate level EMS certification,

My partner on the ambulance is generally, almost always a full-time firefighter, and we perform exactly the same jobs; sometimes we switch off on rescue calls; one call I'll drive, the other guy techs; and the next one he drives and I give patient care...

Based on these facts, the key community of interest factors set forth in *AFSCME and City of Brewer* have been met. For that reason, the hearing examiner finds that there is a community of interest between the Westbrook per diem fire/rescue workers and full-time fire/rescue workers.

ORDER

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 petition for unit determination filed on June 26, 2012, by Daniel Walsh on behalf of the per diem firefighter/rescue workers of the City of Westbrook seeking that those positions be included in the same bargaining unit with the full-time firefighter/rescue workers is hereby granted.

The following described unit of employees of the City of Westbrook is held to be appropriate for purposes of collective bargaining:

INCLUDED: Firefighter, Firefighter/EMS Provider,
Fire Captain, Fire Lieutenant, Fire
Inspector, and Part-time Per Diem
Firefighter

EXCLUDED: All other employees of the City of
Westbrook

Dated at Augusta, Maine, this 13th day of February, 2013.

MAINE LABOR RELATIONS BOARD

Gwendolyn D. Thomas
Hearing Examiner

The parties are hereby advised of their right, pursuant to 26 M.R.S.A. Sec. 968(4), to appeal this decision 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 issuance of this report. See Chapters 10 and 11(30) of the Board Rules.