



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

IBPO Local 314

Complainant

v.

City of Somersworth

Respondent

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Case No. P-0705-12

Decision No. 2001-138

PRE-HEARING DECISION and ORDER

The IBPO Local 314, ("Union") filed a two count unfair labor practice complaint on December 3, 2001 based upon the alleged failure of the City of Somersworth, ("City") to comply with an Arbitrator's Award, dated March 14, 2001, regarding overtime payments to certain police personnel. More specifically, the Union alleges that the City has failed to make payments to police personnel who had terminated service after the filing of the grievance but before the arbitrator's decision (Count I). The Union asserts that such failure to pay these former police personnel constitutes violations of RSA 273-A:5 I (a), (e), (g), (h) and (i).

Count II of the unfair labor practice complaint regards the City's actions in refusing to let a previously injured employee return to a light duty position upon being released for such activity by her treating physician and the City's action in hiring a part-time employee to perform functions previously assigned to the injured employee who had been prevented from returning to employment. According to the Union, such actions as are alleged to have been undertaken by the City within Count II constitute conduct involving unilateral action by the City and a failure to bargain in good faith. The Union also raises a conditional contention alleging that the City has unlawfully "contracted out" unit work.

The Union requests relief in the form of a Board finding that the City committed unfair labor practices and requests that the Board issue a cease and desist order, order the City to bargain over the changes alleged to have occurred in Count II and order that all

employees be made whole by the City. Further, the Union requests that the cease and desist order be posted within the workplace.

The City of Somersworth filed its answer on December 19, 2001. In its answer to Count I, the City asserts that it has complied with the Arbitration Award and that no additional police personnel are owed money under that decision. In its answer to Count II, it admits that its agents would not allow the previously injured employee to return to work and it admits that a new part-time employee is performing "certain but not all" of the functions previously performed by the injured employee. However, the City denies any comprehensive application of a past practice regarding off duty injured employees returning to light duty, asserting that the City reviewed such cases on a "case by case" basis, only. It further denies that light duty policies constitute a mandatory subject of bargaining between the parties and that it is free to hire a part-time employee to perform functions previously assigned to the injured employee. As relief, the City requests that the Board deny Count I and Count II of the Union's complaint.

PARTICIPATING REPRESENTATIVES

For the Complainant: Peter C. Phillips, Esquire, IBPO Counsel

For the Respondent: David McGrath, Esquire (for Elizabeth A. Bailey, Esquire)

ISSUES FOR DETERMINATION BY THE BOARD

1. Whether or not the City, in failing to make payments to certain police employees who had terminated their service with the City after a grievance had been filed but before an Arbitration Award had been decided, has committed an unfair labor practice. (Count I)
2. Whether or not the City's actions in connection with its refusal to assign an employee, injured off-duty, to light duty constituted a unilateral change in the parties' past practice of light duty assignments. (Count II)
3. Whether or not the City's actions in hiring a new part-time employee and assigning certain duties previously performed by the injured employee to that new employee constituted an unfair labor practice involving a unilateral action without good faith bargaining or the assignment of so-called "unit work" to a non-bargaining unit employee. (Count II)

WITNESSES

For the Complainant:

1. William Lemoi, Officer and Local President
2. Diane Flaherty, Parking Enforcement Officer

For the Respondent:

1. Dean Crombie, Chief
2. David Kretschmar, Captain
3. Daniel Gagne, Lieutenant
4. Diane Flaherty, Parking Enforcement Officer
5. Daniel Donovan, Captain
6. Jen Richard, Part-Time Parking Enforcement Officer
7. Douglas Elliott, City Manager
8. Karen Cantrell, Secretary, Police Department
9. William Lemoi, Officer and Local President
10. Dr. Leavitt, Ms. Flaherty's treating physician

Both parties reserve the right to amend their List of Witnesses in conformity with the schedule contained in the DECISION SECTION appearing at the conclusion of this order, or upon proper showing, later reasonable notice to the other party. It is understood that each party may rely on the representations of the other party that witnesses appearing on their respective list will be available at the hearing.

EXHIBITS

Joint Exhibits:

1. Parties' Collective Bargaining Agreement,
2. Arbitrator's Award, dated March 14, 2001
3. Letter from Attorney Phillips to Renny Perry, dated 8/6/01
4. Memorandum from Lemoi to Kretschmar, dated 8/24/01
5. Memorandum from Kretschmar to Lemoi, dated 8/31/01
6. Memorandum from Lemoi to Elliot, dated 9/6/01

For the Complainant Union:

None other than those to be entered as Joint Exhibits, at present

For the Respondent City:

1. Somersworth Police Department (SPD) General Order I-17 (Respondent's Counsel to identify date of last revision)
2. Note from Sports Medicine at Atlantic Orthopedics, dated 8/15/01
3. Letter from Lt. Gagne to Ms. Flaherty, dated 8/20/01
4. Certification of Flaherty by Sports Medicine at Atlantic Orthopedics, dated 12/7/01
5. Letter from Chief Crombie to Officer Lemoi, dated 12/11/01

6. Ms. Flaherty's personnel file (contents to be identified by respondent's counsel)

Both parties reserve the right to amend their List of Exhibits in conformity with the schedule contained in the DECISION SECTION appearing at the conclusion of this order or, upon proper showing, later reasonable notice to the other party. Copies of all exhibits are to be submitted to the presiding officer in accordance with Pub 203.02. It is to be understood by the parties that each party may rely on the representations of the other that the exhibits listed above will be available at hearing.

LENGTH OF HEARING

The time being set aside for this hearing is one half day. If either party believes additional time is required, written notice of the need for additional time shall be filed with the PELRB no later than January 11, 2002.

DECISION

1. Both parties shall make a good faith effort to locate the original copy of the note from Sports Medicine at Atlantic Orthopedics, dated 8/15/01, and forward a copy of same to opposing counsel no later than January 4, 2002.
2. On or before January 11, 2002 the Union shall provide the City with an offer of proof as to the existence of the past practice the City is alleged to have violated as referenced in Count II.
3. The Union shall contact the City for the purposes of discussing the continued necessity of maintaining Count I of the complaint in light of alleged settlement discussions that have transpired between the parties. On or before January 11, 2002 the parties shall notify the PELRB whether or not a settlement has been reached on the outstanding matters at issue in Count I. In the event a settlement is reached, any funds to be paid by the City shall be paid on or before January 31, 2002.
4. The party representatives shall forward any amendments of their Witness and Exhibit lists detailed above to the opposing representative or counsel and to the PELRB no later than five (5) days prior to an evidentiary hearing. The party representatives shall meet, or otherwise arrange, to pre-mark any exhibits, for identification, prior to the time of hearing and have sufficient copies available for distribution at the hearing as required by Pub 203.02.
5. In the event that Count I is not settled by January 11, 2002 the parties shall meet and confer, prior to January 31, 2002, to compile a report, by chart or by

narrative memorandum, expressing a mutually agreed computation of damages in the form of lost wages and other compensation due to former police personnel in the event the Union prevails at hearing on Count I. If the parties cannot agree as to a mutually agreed amount of damages, each shall prepare their respective computation of damages in chart or narrative memorandum format. Six copies of this potential exhibit or these exhibits shall be available for submission to the Board at the evidentiary hearing.

6. Any additional preliminary, procedural or dispositive motions shall be filed by the parties no later than ten (10) calendar days prior to the scheduled hearing date.
7. Unless otherwise ordered as a result of the filing of any subsequent motion, an evidentiary hearing between the parties is scheduled to be conducted at the Office of the Public Employee Labor Relations Board on Tuesday, February 5, 2002 beginning at 9:30 A.M.

Signed this 27th day of December, 2001.



Donald E. Mitchell, Esq.
Hearings Officer