



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Town of Milford

Petitioner

and

AFSCME Council 93,
Local 3657, Milford Police Employees

Respondent

Case No. P-0797-2

Decision No. 2008-151

APPEARANCES

Representing Town of Milford:

Warren Atlas, Esq.
Atlas & Atlas, P.C., Bedford, Massachusetts

Representing AFSCME Local 3657, Milford Police Employees:

Erin L. Goodwin, Esq.
Associate General Counsel, AFSCME Council 93, Boston, Massachusetts

BACKGROUND

The town filed this Petition for Declaratory Ruling on February 7, 2008 seeking a declaratory ruling with respect to the application of PELRB Decision No. 2007-183¹ to the parties' 2005-2009 collective bargaining agreement ("2005-09 CBA"). The town contends that

¹ Decision 2007-183 issued on January 4, 2008 in case No. A-0480-21.

under decision 2007-183 sergeants should be immediately excluded from the 2005-09 CBA. AFSCME Council 93, Local 3657, Milford Police Employees (the "union") filed its objections to the petition on February 25, 2008. The union contends that under decision 2007-183 sergeants remain in the bargaining unit until the expiration of the 2005-09 CBA.

The undersigned hearing officer conducted a hearing on May 21, 2008, at which time both parties appeared. Both parties had submitted pre-hearing filings indicating neither would be presenting witnesses or exhibits, although the union asked the board to take administrative notice of docket entries in case No. A-0480-21. The town's objection to a hearing officer conducting the hearing was considered and overruled at the outset of the hearing. The town also filed a Motion to Adopt Facts Set Forth in Petition for Declaratory Ruling, and the motion was taken under advisement. ~~The parties presented their argument and the town's request to file a post-hearing brief was granted, and briefs were scheduled for submission on or before June 4, 2008.~~ The town also requested and received copies of the hearing tapes on May 21, 2008. The parties' briefs have been filed and the record closed.

FINDINGS OF FACT

1. The town and the union are parties to a collective bargaining agreement for the years 2005 through 2009. (See Joint Exhibit 2).
2. The amended certification for the bargaining unit at issue is dated February 20, 1985 (Case No. A-0480) and expressly excludes sergeants.
3. The recognition clause in the 2005-2009 collective bargaining agreement, like the prior contracts since 1988, expressly includes sergeants.
4. Case No. A-0480-21 was commenced by the town when it filed a petition for declaratory ruling on December 30, 2004 and included consideration of issues such as the 1985

amended certification and the parties' inclusion of sergeants in the recognition clause of their collective bargaining agreements since 1988. The town's petition resulted in PELRB Decisions 2006-046 and 2007-183. The town did not move for clarification of decision 2007-183 and did not file an appeal of that decision.

DECISION

DECISION SUMMARY

Under decision 2007-183, sergeants remain covered by the 2005-09 CBA through its expiration and the town is not entitled to exclude sergeants from the 2005-09 CBA before its expiration. The town is not entitled to litigate whether sergeants should be or should have been immediately excluded from the 2005-09 collective bargaining agreement as a matter of law as ~~the town did not appeal decision 2007-183 and accordingly the board's order in decision 2007-~~ 183 is final and binding upon the parties.

JURISDICTION

The PELRB has jurisdiction to decide the Town's Petition for Declaratory Ruling pursuant to RSA 541-A and Pub 206.01.

DISCUSSION

The town's Motion to Adopt Facts relates to the "Statement of Facts Giving Rise to the Petition for Declaratory Ruling," set forth as paragraphs 1-9 in the town's petition. The motion is problematic because paragraphs 1-9 of the town's petition contain a mixture of facts, legal conclusions, argument, and matters characterized as fact which are actually an expression of the town's beliefs, opinions and legal positions. The relevant facts in this case, some of which are referenced in the town's motion, are set forth in this decision and are gleaned from the record of the prior proceedings. Accordingly, the town's motion is granted to the extent it is consistent

with the Findings of Fact contained in this decision and it accurately reflects the record of the prior proceeding, otherwise it is denied.

Pub 206.01, Petition for Declaratory Ruling, provides in part:

(a) Any public employer, any public employee or any employee organization may petition the board under RSA 541-A for a ruling regarding the applicability of any statute within the jurisdiction of the board to enforce, or regarding any rule or order of the board, by filing with the board a petition for declaratory ruling setting out:

(1) The specific statute, rule or order whose applicability is in question; and

(2) A clear and concise statement of the facts giving rise to the petition.

(b) The board shall determine within 30 days of filing whether it shall dismiss such a petition or issue a ruling, and it shall subsequently give a ruling on all such petitions properly before it as expeditiously as possible.

~~(c) The board shall dismiss any such petition whose subject matter:~~

(1) Is substantially the same as that of a petition for declaratory ruling previously dismissed;

(2) Was the subject of a previous ruling on the merits, absent a showing that the circumstances attending the previous ruling or dismissal have changed substantially in the intervening period.

Procedurally, the union correctly argues that since the town did not appeal decision 2007-183 the town is not entitled to re-litigate in this proceeding (Case No. P-0797-2) the underlying case which resulted in decision 2007-183. Decision 2007-183 is a final decision and is binding upon the parties. Accordingly, this order does not address whether as a matter of law sergeants should be immediately excluded from the recognition clause contained in the parties' 2005-09 CBA.

The relevant language concerning whether the board ordered the immediate exclusion of sergeants from the 2005-09 CBA or whether the board ordered that sergeants are covered by the

2005-09 CBA until its expiration is contained in the last two sentences of the final paragraph of decision 2007-183:

AFSCME's reliance upon the recognition clauses in place since 1988 and the *Appeal of City of Laconia*, 150 N.H. 91 (2003) is misplaced. *Appeal of Laconia* involved an effort by the public employer to exclude two positions already included in a certified bargaining unit, not a conflict between a board certification and a recognition clause. In accordance with RSA 273-A:8, I, the 1985 amended certification, and not the recognition clauses used since 1988, defines the bargaining unit. ***Under the circumstances of this case there is no need to address the provisions of the 2005-2009 CBA. However, as to any future contracts the Town is entitled to rely on the 1985 amended certification, and is not required to negotiate with AFSCME in order to exclude sergeants from the recognition clause, as that exclusion is required by the current certification unless the bargaining unit is changed in a PELRB modification proceeding.*** (emphasis added)

In this portion of its decision, the board expressly states that it does not address the provisions of the 2005-09 CBA. Accordingly those provisions, including the recognition clause which includes sergeants, were left "as is." The board also mentioned the "circumstances" of the case, a reference which includes the parties' long time inclusion of sergeants in the recognition clauses of their collective bargaining agreements since 1988. This includes the 2005-09 CBA, a contract which was negotiated and finalized during the pendency of case No.A-0480-21. The "circumstances" also include the fact that only a little more than a year remained in the term of the 2005-09 CBA at the time decision 2007-183 issued in January, 2008.

That decision 2007-183 leaves sergeants in the recognition clause and covered by the 2005-09 CBA is reinforced by the time reference included in the very next sentence of the decision. The board ordered that "***as to any future contracts, the Town is entitled to rely on the 1985 amended certification, and is not required to negotiate with AFSCME in order to exclude sergeants from the recognition clause...***" (emphasis added) In this portion of its order the board

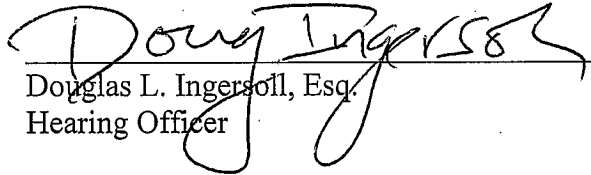
clearly draws a distinction between the existing 2005-09 CBA and future collective bargaining agreements.

The meaning of decision 2007-183 as to the treatment of sergeants is plain. The board specifically mentioned the 2005-09 CBA and left the provisions of that contract, including the recognition clause, alone. The board also specifically ordered that the town could rely on the 1985 amended certification in order to exclude sergeants from any future contracts. The board did not order that the town could rely on the 1985 amended certification as to the existing 2005-09 CBA. Accordingly, under decision 2007-183 sergeants are covered by the 2005-09 CBA until its expiration and the town may not rely upon the 1985 amended certification to exclude sergeants from coverage under the 2005-09 CBA.

So ordered.

August 12, 2008

Distribution:
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Hearing Officer