



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**AFSCME COUNCIL 93, LOCAL 365,
NASHUA DEPT. OF PUBLIC WORKS**

COMPLAINANT

CASE NO. G-0045-15

v.

DECISION NO. 2008-219

**CITY OF NASHUA PUBLIC WORKS &
PARKS-RECREATION COMMISSION**

RESPONDENT

PRE-HEARING MEMORANDUM AND ORDER

Date of Conference: October 24, 2008 at the PELRB in Concord.

Appearances: Complainant: Karen Clemens, Esq.
Respondent: James McNamee, Esq.

Background:

AFSCME Council 93, Local 365, Nashua Department of Public Works (the "Union") filed an unfair labor practice complaint on July 10, 2008. The Union contends that on January 14, 2008, UAW foreman Carl Gagnon performed bargaining unit work when he plowed on Kinsley Street in the vicinity of Euclid avenue. The Union contends the parties arbitrated a similar issue which resulted in a June 5, 2007 arbitration award in favor of the Union.

At the pre-hearing, the Union indicated that it is not aware of any bargaining unit employee who was not called to work on the day in question. However, the Union claims that before the UAW foreman plowed, the work should first have been offered to bargaining unit employees serving as a "shotgun" or second team member on a larger plow truck and then to custodial employees, transit employees, and retired AFSCME employees, in that order. The Union claims this process is required under Appendix E, "Snow Coverage," to the parties' collective bargaining agreement. The Union did not grieve the matter raised in its complaint, and contends that the grievance procedure is unworkable because the City has disregarded the contractual grievance procedure by virtue of its alleged refusal to comply with a final and binding arbitration decision, and contends that the prosecution of a grievance is otherwise not required given the June 5, 2007 arbitration award.

The Union contends the City's actions violated RSA 273-A:4 (requiring collective bargaining agreements to have workable grievance procedures) and RSA 273-A:5, I (g), (h) and (i). As remedies, the Union requests that the PELRB: a) find that the Board of Public Works failed to adhere to a final and binding grievance decision, in violation of RSA 273-A:4 and RSA 273-A:5:I (b), (g), (h) and (i); b) order the Nashua Board of Public Works to cease and desist having non-bargaining unit employees do bargaining unit work and further adhere to the final and binding arbitration decision on Case No. A-0410-82; c) order the Nashua Board of Public Works to Bargain in Good Faith; d) order the Nashua Board of Public Works to publicly post the board's order for 30 business days; e) order the Nashua Board of Public Works to make the Union whole for any and all cost and expenses incurred to pursue the prohibited practice charge; and f) order any and all other relief as the board deems necessary and appropriate.

The City filed its answer on July 24, 2008. The City contends that the arbitration decision is not controlling in this case and UAW foreman Carl Gagnon's actions were proper. According to the City, Mr. Gagnon operates the foreman pickup truck which is equipped with plowing equipment, and he was performing his typical duties during a snowstorm. The City also contends that the disputed area is part of plow route 20, is an area routinely assigned to a private contractor, and is not exclusive bargaining unit work.

The City requests that the PELRB: a) dismiss the complaint; b) deny the requested findings that the Nashua Board of Public Works committed improper labor practices; c) strike the Union's request for an order to bargain in good faith, particularly since no bad faith bargaining has been alleged; d) deny the union's request for costs and expenses; e) grant such other relief as is just and equitable

ISSUES FOR DETERMINATION BY THE BOARD

1. Whether the matters raised in the complaint should have been pursued through the grievance process contained in the parties' collective bargaining agreement?
2. Whether UAW foreman Carl Gagnon improperly performed bargaining unit work?

WITNESSES

For AFSCME:

1. John Lyons
2. Rusty Gagne
3. Steve Lyons
4. Michael Maccaro
5. Matthew Eisenman
6. Arthur McCann
7. Randy Mandra

For the City:

1. Richard Seymour

2. Scott Pollock
3. Daniel Lavoie
4. Carl Gagnon

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 with 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

For AFSCME:

1. Union post hearing brief
2. City's post hearing brief
3. Collective Bargaining Agreement
4. Arbitration Decision

For the City:

1. 2002-2006 CBA
2. Arbitration Award from A-140-82
3. Grievance Forms from A-140-82
4. Snow Agreement – Appendix E to Collective Bargaining Agreement
5. December 5, 2003 Snow Agreement clarification letter
6. Snow Plow Route Map
7. Snow Plow Route Assignments
8. Towing Records from January 14, 2008
9. Correspondence related to snow agreement
10. Independent Contractor Invoice
11. Snow Emergency Notice
12. Photos of snow board in Streets Department Conference Room
13. Hanover Streets Aerial Photo
14. Euclid Avenue Aerial Photo

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 with 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 understood that each party may rely on the representations of the other party that the exhibits listed above will be available at the hearing.

DECISION

1. "Parties" means the named petitioner and respondent or the counsel/representative appearing in the case.
2. The parties shall prepare and file a statement of stipulated facts on or before November 14, 2008. Based upon the discussions at the pre-hearing, it appears that the parties can prepare a fairly comprehensive fact stipulation. Objections to the admissibility of any particular fact stipulation is not a basis for refusing to stipulate to an otherwise uncontested fact, although it is expected that the parties will not seek fact stipulations as to matters which are plainly irrelevant. The written fact stipulation shall include a statement of a party's relevancy objection immediately following the stipulated fact. The board will address any such relevancy objection to a stipulated fact to the extent necessary in connection with its decision.
3. The parties shall file any amendments to, or deletions from, their Witness and Exhibit lists on or before November 14, 2008.
4. The parties shall pre-mark all exhibits for identification or as full exhibits by agreement prior to the time of hearing and have sufficient copies available for distribution at the hearing as required by Pub 203.02.

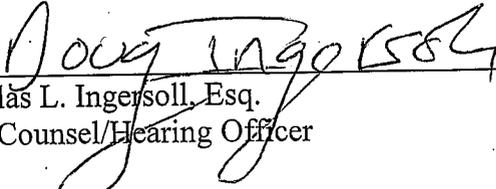
HEARING

Unless otherwise ordered as a result of the filing of any subsequent motion or for other good cause shown, the evidentiary hearing between the parties will be held on **November 25,**

2008 @ 9:30 a.m. at the offices of the Public Employee Labor Relations Board in Concord.
The time set aside for this hearing is 4 hours. If either party believes that additional time is required, written notice of the need for additional time shall be filed with the PELRB at least 10 days prior to the date of hearing.

So ordered.

October 24, 2008



Douglas L. Ingersoll, Esq.
Staff Counsel/Hearing Officer

Distribution:

Karen Clemens, Esq.

James McNamee, Esq.