



**STATE OF NEW HAMPSHIRE**  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**AFSCME, Council 93, Local 1386, Portsmouth City Employees**

**v.**

**City of Portsmouth**

**Case No. G-0030-22**

**Decision No. 2010-237**

**PRE-HEARING MEMORANDUM AND ORDER**

Date of Conference: December 6, 2010

Appearances: Karen E. Clemens, Esq. for the AFSCME, Council 93, Local 1386,  
Portsmouth City Employees

Thomas J. Flygare, Esq. for the City of Portsmouth

**Background:**

On October 22, 2010 the AFSCME, Council 93, Local 1386, Portsmouth City Employees (Union) filed an unfair labor practice complaint based upon the City's conduct in arbitration proceedings which began in June, 2010 and which are still pending. According to the Union, the City improperly characterized the issue being submitted to the arbitrator and persuaded the arbitrator to exclude an issue that the arbitrator should have heard. The Union claims the City's conduct in the arbitration proceeding was contrary to its representations and arguments before the PELRB in *AFSCME, Council 93, Local 1386, Portsmouth City Employees v. City of Portsmouth*, Case No. G-0030-17 which resulted in PELRB Decision No. 2009-225, appeal

declined, Supreme Court No. 2009-0931 (Feb 3, 2010). The Union claims that the City's actions violate RSA 273-A:5, I (a), (b), (e), and (g). As relief, the Union requests that the PELRB find that the City violated RSA 273-A, I (a), (b), (e), and (g); hold an adjudicatory hearing on the merits of the Union's claim that the City's snow operations overtime policy violates RSA 273-A or order the City to agree to have it heard by an arbitrator; and order the City to retract this policy until such time that the issue can be litigated, to cease and desist from violating RSA 273-A, to publicly post the PELRB's findings for 30 business days, and to make the Union whole for any costs and expenses incurred to pursue the unfair labor practice charge.

The City denies the Union's charges. The City asserts that it acted properly at the PELRB and arbitration proceedings; that the Union agreed to have the arbitrator decide the issues to be arbitrated; that the Union is not entitled to maintain the current action at the PELRB; and that the Union's claims are barred by res judicata and the limitations period set forth in RSA 273-A:6, VII.

#### ISSUES FOR DETERMINATION

1. Whether the Union's complaint is barred or should be dismissed for any of the reasons cited by the City.
2. Whether the City has committed an unfair labor practice in violation of RSA 273-A:5, I (a), (b), (e), or (g) on account of its conduct at arbitration.

#### WITNESSES and EXHIBITS:

As outlined in the parties Joint Pre-Hearing Worksheet. Both parties reserve the right to amend their List of Witnesses and 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. 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. 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 Union, the City, or their counsel/representative appearing in the case. The parties shall simultaneously copy each other electronically on all filings submitted in these proceedings.
2. At hearing the parties will be allowed to offer evidence concerning the Union's claim that the City committed unfair labor practices in the arbitration proceedings. Whether the parties will be allowed to offer evidence at this hearing concerning the merits of the Union's claim regarding the City's snow operations overtime policy, previously addressed in the above referenced PELRB proceedings (Case No. G-0030-17) and involving the events which occurred more than six months prior to the filing of the present complaint, shall be determined at the hearing. The Union's right to proceed to the merits of its snow operations overtime claim may be a matter that cannot be determined until the Union's complaint concerning the City's conduct in the arbitration proceeding is decided, at which time the determination of the relief to be awarded, if any, will be made.
3. The parties shall prepare and file a final statement of stipulated facts no later than 10 days prior to the date of adjudicatory hearing.
4. The parties shall exchange and file their final witness and exhibit lists no later than 10 days prior to the date of adjudicatory hearing.

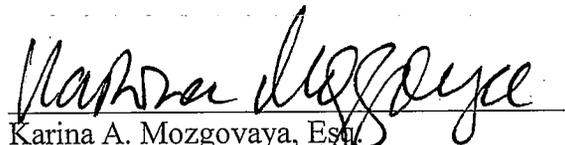
5. The parties shall pre-mark exhibits by placing identifying markers in the upper right corner of each exhibit. The parties shall also use tabs to separate exhibits to facilitate the review of exhibits at hearing.

### HEARING

Unless otherwise ordered as a result of the filing of any subsequent motion, submitted no later than 10 days prior to the date of adjudicatory hearing, or for other good cause shown, the adjudicatory hearing between the parties will be held on **December 21, 2010 at 9:00 a.m.** at the offices of the Public Employee Labor Relations Board in Concord. The time set aside for this hearing is 3 hours.

So ordered.

December 8, 2010

  
Karina A. Mozgovaya, Esq.  
Staff Counsel/Hearing Officer

Distribution:

Thomas J. Flygare, Esq.  
Steven Lyons, Staff Rep.  
Karen E. Clemens, Esq.