

**Declines appeal of PELRB
Decision No. 2009-225.**

MANDATE

Certified and Issued as Mandate Under NH Sup. Ct. R. 24

Michele A. Casaway
Clerk/Deputy Clerk

3/19/2010

Date

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

**In Case No. 2009-0931, Appeal of AFSCME Council 93,
Local 1386 Portsmouth City Employees, the court on February
3, 2010, issued the following order:**

Appeal from administrative agency is declined. See Rule 10(1).

Under Supreme Court Rule 10, the supreme court has discretion to decline an appeal from an administrative agency. No appeal, however, is declined except by unanimous vote of the court with at least three justices participating.

This matter was considered by each justice whose name appears below. If any justice who reviewed this case believed the appeal should have been accepted, this case would have been accepted and scheduled for briefing.

Declined.

Broderick, C.J., and Dalianis, Duggan, Hicks and Conboy, JJ., concurred.

**Eileen Fox,
Clerk**

Distribution:

NH Public Employee Labor Relations Board, G-0030-17
Shawn J. Sullivan, Esquire
Thomas J. Flygare, Esquire
Attorney General
File





STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**AFSCME COUNCIL 93, LOCAL 1386
PORTSMOUTH CITY EMPLOYEES**

v.

**CASE NO. G-0030-17
DECISION NO. 2009-225**

CITY OF PORTSMOUTH

ORDER RE: CITY OF PORTSMOUTH'S MOTION TO DISMISS

In its August 31, 2009 amended complaint the Union asserts that on December 10, 2008 the City's Public Works Director issued a memo which provided that "[t]his memo is to remind you that overtime is considered to be mandatory and is a condition of employment." The Union responded by stating that "[a]s you are aware, employees have not been required to respond, in fact employees have been able to decline or not respond to overtime without disciplinary actions based on overtime being voluntary even in an emergency," that "[t]he Snow Plow Operation Memorandum refers to call outs which are addressed in Article 27, Call Outs." The Union also complains about the City's July 2009 issuance of "Standard Policy No. 21 Mandatory Overtime During Emergencies" and the City's practice of informing prospective employees of the mandatory overtime requirement during the interview process.

Article 20.2 of the parties' collective bargaining agreement ("CBA"), Joint Exhibit 1, provides that the final step of the grievance proceeding is final and binding arbitration. Article 27 of the CBA is titled "CALL OUTS," is referenced in the Union's amended complaint, and relates to how employees are compensated when called in for emergency work or when they are

placed on call. There is a pending employee grievance (the "Grievance"), Joint Exhibit 2, now scheduled for arbitration. The Grievance arises from a three day suspension of an employee at the end of December, 2008 on account of his failure to appear for an overtime shift during a snow event. The Grievance charges that "[t]he contract has been violated – also Art. 1, 21.3, 29.9 A-B-C (past practice)."

The City seeks dismissal, claiming the PELRB lacks jurisdiction because this dispute is subject to the parties' grievance process, which includes final and binding arbitration. The board finds that the resolution of the Union's claims in this matter depend in large part, if not entirely, upon the parties' respective rights and obligations under the CBA, and potentially past practice, in areas such as direction of the workforce, hours of work, call outs, and overtime. Notwithstanding the Union's assertions that the City's conduct violated RSA 273-A:5, I (a), (b), (c), (e), (g), (h) and (i) the board cannot determine with positive assurance that the parties' CBA "is not susceptible of an interpretation that covers the dispute" in this case. *See Appeal of Town of Bedford*, 142 N.H. 637, 640 (1998). Accordingly, as the parties were informed on the record at the October 8, 2009 hearing, the City's Motion to Dismiss is granted.

So ordered.

October 15, 2009.

/s/ Jack Buckley
Jack Buckley, Chair

By unanimous vote. Chair Jack Buckley presiding with Board Member Carol M. Granfield and Alternate Board Member Richard J. Laughton, Jr. and also voting.

Distribution:

Karen E. Clemens, Esq.

Thomas J. Flygare, Esq.