
In the Matter of TOWN OF BOURNE

and

PROFESSIONAL FIREFIGHTERS OF BOURNE, IAFF
LOCAL 1717

Case No. MUP-10-5928

67.161 *pending litigation*
67.18 *inappropriate unit*
67.66 *altering bargaining unit*
67.7 *refusal to meet or delay in meetings*

August 9, 2011

Jennifer N. Smith, Hearing Officer

Michael C. Gilman, Esq. *Representing the Town of Bourne*
Leah M. Barrault, Esq. *Representing the Professional
Firefighters of Bourne, IAFF
Local 1717*

HEARING OFFICER'S DECISION'

SUMMARY OF THE CASE

The issue in this case is whether the Town of Bourne (Town) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by refusing to bargain with the Professional Fire Fighters of Bourne, IAFF Local 1717 (Union) during the pendency of a unit clarification petition before the Commonwealth Employment Relations Board (Board). I find that the Town violated the Law as alleged.

STATEMENT OF THE CASE

The Union filed this charge with the Department on July 28, 2010. The Department investigated the charge and issued a complaint of prohibited practice and partial dismissal on March 2, 2011, alleging that the Town had violated Section 10(a)(5) and derivatively Section 10(a)(1) of the Law by refusing to bargain with the Union over wages, hours and working conditions until the Department ruled on the appropriateness of the bargaining unit.² The Town filed an answer to the Department's complaint on March 10, 2011.

The parties waived their right to a hearing and submitted complete stipulated facts and exhibits with briefs on May 23, 2011. After reviewing the parties' submissions, I render the following decision.

STIPULATIONS OF FACT

1. The Town is a public employer pursuant to Section 1 of the Law.

1. Pursuant to Chapter 3 of the Acts of 2011, the Division of Labor Relations' name is now the Department of Labor Relations (Department). References to the Department include the Division of Labor Relations. Pursuant to Chapter 145 of the Acts of 2007, the Department "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission." The Commonwealth Employment Relations Board (Board) is the body within the Department charged with deciding adjudicatory matters. References in

this decision to the Board include the former Labor Relations Commission (former Commission).

2. On August 17, 2010 the Town filed a unit clarification petition in case No. CAS-10-3756 with the Department seeking to sever the Fire Department's Lieutenants and Deputy Chief from the bargaining unit of full-time firefighters, lieutenants, deputy chiefs, EMTS paramedics and fire inspectors. On July 22, 2011 the Board dismissed the petition.

2. The Union is an employee organization pursuant to Section 1 of the Law.

3. The Union is the exclusive bargaining representative for certain Town employees employed by its Fire Department, including the Firefighters, Lieutenants, and Deputy Chiefs.³

4. The Town and the Union were parties to a Collective Bargaining Agreement (Agreement) for the period of July 1, 2007 through June 30, 2010. (JX1).

5. Article XXVII of the parties' 2007-2010 Agreement contains and "Evergreen" clause that provides: "[t]his Agreement shall be effective as of July 1, 2007 and shall continue in full force and effect until and including June 30, 2010 and from day to day thereafter until a new agreement is negotiated and executed by the parties hereto." (JX1).

6. In late Spring and early Summer 2010, the Town and the Union met twice to begin negotiations for a successor Agreement. No written proposals were exchanged at either of these meetings.

7. The parties never agreed to the terms of a successor contract.

8. By a letter dated July 23, 2010, the Town advised Union President Filbert Taylor of its intention to file a Petition for Clarification or Amendment (CAS Petition) at the Department of Labor Relations ("Department") seeking a separate unit of Lieutenants and Deputy Chiefs, and further that until such a time as the Department ruled on the appropriateness of the bargaining unit, it would not meet with the Union to negotiate a successor Agreement for the existing unit. (JX2).

9. On August 17, 2010, the Town filed a CAS Petition at the Department seeking the severance of the Lieutenants and the Deputy Chiefs into a separate unit. (JX3).

10. On October 22, 2010, the Supreme Judicial Court in *Boston Housing Authority v. National Conference of Firemen and Oilers, Local 3*, 458 Mass. 155, 935 N.E.2d 1260 (2010) (BHA), ruled that the Evergreen clause contained in the parties' memorandum of agreement, which provided that its terms would remain in full force and effect after its expiration until a new collective bargaining agreement was signed, violated MGL c. 150E, § 7(a), because it extended the term of the Agreement to more than three years.

11. Since at least July 23, 2010, the Town has refused to bargain a new agreement with the Union covering the existing bargaining unit, holding to the position that said overall unit is inappropriate.

12. To date, the Department has not ruled on the Town's CAS Petition, Case No. CAS-10-3756.⁴

13. On July 28, 2010 the Union filed with the Department this Charge of Prohibited Practice. (JX4).

14. On March 2, 2011, this Department issued a Complaint in this case, including the dismissal of the alleged violations of Sections 10(a)(2) and (3) of Chapter 150E. (JX5).

15. On March 9, 2011 the Town filed its Answer to this Department's March 2nd Complaint.

16. On May 16, 2011, the Union filed a Petition with the Joint Labor-Management Committee seeking its jurisdiction over the parties' contract dispute. (JX7).

OPINION

The Union contends that the Town violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it announced in July 2010 that it would not meet and bargain with the Union until the Department had ruled on the CAS Petition filed by the Town. The Union argues that the Town's CAS petition does not raise a question of representation, and therefore does not require the Town to cease bargaining in favor of strict employer neutrality. Further, the Union argues, the extension of the Town's logic would allow an employer to file a CAS petition for the express purpose of unnecessarily prolonging successor contract negotiations.

The Town argues that it is excused from its obligation to bargain under the Law because the bargaining unit as currently comprised is inappropriate. Further, the Town argues, it has taken the necessary and proper steps to seek a determination of the appropriateness of the bargaining unit under the Law. Therefore, the Town continues, it is entitled to receive a decision on its CAS petition, and forcing it to bargain with the unit during the pendency of its CAS petition would be prejudicial and is not required by law.

The Town's right to file a CAS petition and the appropriateness of the petition is not in question in the instant action; rather, the dispositive question is if filing a CAS petition transforms the Town's obligation to bargain under the law. I think not. First, Section 6 of the Law requires public employers and public unions to meet at reasonable times to negotiate in good faith regarding wages, hours, standards of productivity and performance, and any other terms and conditions of employment. It is a prohibited practice to refuse to bargain collectively and in good faith with an employee organization's exclusive representative. *Town of Wenham*, 23 MLC 82, 83 (1996), citing *City of Beverly*, 20 MLC 1166, 1170 (1993).

There is no exact formula for determining what level of participation in the bargaining process is required by Section 6; however, refusing to meet is a *per se* violation of Sections 10 (a) (1) and (5)

3. The recognition clause of the parties' most recent collective bargaining agreement, dated July 1, 2007 - June 30, 2010, describes the unit as:

All full-time employees of the Bourne Fire Department, presently including Firefighters, Lieutenants, Deputy Chiefs, Emergency Medical Technicians, Paramedics, and Fire Inspectors, but excluding the Chief and the Clerk and other civilians.

4. The Board dismissed CAS Case No. 10-3756 on July 22, 2011, on the grounds that a CAS petition is not the appropriate procedural vehicle for determining if Fire Department Deputy Chiefs and Lieutenants should be excluded from the bargaining unit.

of the Law and does not require an affirmative demonstration of bad faith. *Boston School Committee*, 23 MLC 111, 112 (1996), citing *City of Chelsea*, 3 MLC 1169 (H.O. 1976), aff'd 3 MLC 1384 (1977). Here, the Town has refused to meet with the Union since the Town contemplated filing a CAS petition.⁵ The Town's admission of its refusal to bargain, even prior to filing the CAS petition, establishes the violation.

The Town attempts to couch its refusal to bargain as a sincere effort to comply with the Law. If a question of representation exists, the Town argues, it must not bargain. However, in the instant action the Board has ruled that no question of representation existed:

...where there have been no significant changes to the Officers' duties and the Department's organizational structure for over forty years, and in the absence of compelling circumstance warranting an exception of the rule, the Board finds no basis to treat [a] unit clarification petition as a severance petition in the absence of a question of representation. *Town of Bourne*, No. CAS-10-3756, slip op. at 16, (July 22, 2011).

Generally, CAS petitions are employed to determine the inclusion or exclusion of a newly created position in a bargaining unit or to determine if, over time, substantial changes to job duties require the inclusion or exclusion of a position from a bargaining unit. *Town of Sharon*, 36 MLC 97 (2009). In the circumstances that preceded the instant action the Town attempted to use a CAS petition to remove members from a bargaining unit because in the Town's view, a safe and effective workplace was frustrated by the perpetuation of an inappropriate bargaining unit. However, the Board affirmed previous decisions, a CAS petition is inappropriate to sever a bargaining unit unless there is a question of representation or the bargaining unit is inappropriate as a matter of law. *Town of Bourne*, No. CAS-10-3756, slip op. at 12, citing *City of Quincy*, 10 MLC 1027, 1033 (1983). If a question of representation existed, under the Law, the Town would absolutely be under an obligation to refrain from bargaining with an incumbent representative, however, an employer filing of a unit clarification petition, cannot, on its face, excuse an employer from its statutory obligation to bargain.⁶

Further, in *Massachusetts Turnpike Authority*, 33 MLC 111 (2007), the Board ruled that the employer's refusal to bargain over the entire certified bargaining unit while attempting to challenge the certification of the newly formed unit was a violation of Sections 4(1) and 4(5) of MGL 150A. There the Board reasoned that fragmented bargaining fails to recognize a union as a full partner in negotiations, hinders the parties' ability to reach an agreement, and elongates the collective bargaining process. *Id.* at 130.

While factually quite dissimilar from the instant action, *Massachusetts Turnpike Authority* is generally instructive. Following the

same reasoning, refusing to bargain over any of the terms and conditions of employment for any of the positions in a bargaining unit because an employer believes the unit is inappropriate, encumbers successful successor contract negotiations; the point of which is to bargain intelligently and arrive at mutually agreeable compromises. The Town's argument, that being forced to bargain over the terms and conditions of employment of positions that may ultimately be excluded from the unit presupposes that the Town's risk of wasted time is more important than the rights and obligations of employees and employers under the Law. Here, unquestionably, by refusing to bargain over the terms and conditions of employment for an entire bargaining unit, absent a question of representation, the Town has failed to recognize the Union as a full partner in the collective bargaining process and untenably delayed contract negotiations in violation of the Law.

CONCLUSION

Based on the record and for the reasons explained above, I conclude that the Town violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by refusing to bargain with the Union over wages, hours, and conditions of employment during the pendency of a Petition for Clarification.

ORDER

WHEREFORE, based upon the foregoing, it is hereby ordered that the Town of Bourne shall:

1) Cease and desist from:

- a) Refusing to bargain collectively in good faith with the Professional Fire Fighters of Bourne, IAFF Local 1717.
- b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights guaranteed under the Law.

2) Take the following affirmative action that will effectuate the purposes of the Law:

- a) Upon demand, immediately bargain in good faith with the Professional Fire Fighters of Bourne, IAFF Local 1717 concerning wages, hours, standards of productivity and performance, and any other terms and conditions of employment.
- b) Post in all conspicuous places where members of the Union's bargaining unit usually congregate, or where notices are usually posted, including electronically, if the Employer customarily communicates with these unit members via intranet or email, and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.
- c) Notify the Division in writing of the steps taken to comply with this decision within ten days of receipt of the decision.

5. The Town notified the Union on July 23, 2010 of its intention to file a CAS petition with the Department. The July 23, 2010 letter continues:

We anticipate the Town's petition being filed in the next seven to ten days. Until such a time as the Division of Labor Relations hears this petition and rules on the appropriateness of the existing bargaining unit, we will not negotiate a new collective bargaining agreement for an overall unit of Lieutenants and Deputy Chiefs.

6. In *Commonwealth of Massachusetts*, 7 MLC 1228 (1980), the Board adopted the Midwest Piping doctrine and held that, "An employer commits a *per se* violation of Sections 10(a)(1) and (2) ... if it bargains with an incumbent [representative] once a question of representation has been raised by a rival union."

SO ORDERED.

APPEAL RIGHTS

The parties are advised of their right, pursuant to MGL Chapter 150E, Section 11 and 456 CMR 13.02(1)(j), to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of the Department of Labor Relations within ten (10) days after receiving notice of this decision. If a Notice of Appeal is not filed within ten days, this decision shall become final and binding on the parties.

NOTICE TO EMPLOYEES

A hearing officer of the Massachusetts Department of Labor Relations has held that the Town of Bourne has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by refusing to bargain with the Union over wages, hours, and conditions of employment during the pendency of a Petition for Clarification.

The Town of Bourne posts this Notice to Employees in compliance with the hearing officer's order.

Section 2 of MGL Chapter 150E gives public employees the following rights:

- to engage in self-organization; to form, join or assist any union;
- to bargain collectively through representatives of their own choosing;
- to act together for the purpose of collective bargaining or other mutual aid or protection; and
- to refrain from all of the above.

WE WILL NOT fail to bargain over wages, hours and working conditions.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of their rights guaranteed Section 2 of the Law.

WE WILL take the following affirmative action:

Upon the request of the Union, meet and bargain in good faith.

[signed]

Town of Bourne

[date]

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