

CONNECTICUT STATE BOARD OF MEDIATION AND ARBITRATION
LABOR DEPARTMENT

38 WOLCOTT HILL ROAD
WETHERSFIELD, CONNECTICUT

Wednesday, February 17, 2010

TRANSMITTAL MEMORANDUM

Waterford, Town of
and
AFSCME Co. 15
Local 1948

Case # 2008-A-0940 Police Union

08-07

Case # 2008-A-0941 Police Union

08-08

ARBITRATION AWARD

Copies were sent to the following parties:

Richard P. Gudis, Esquire

Gerald T. Weiner, Esquire

Thomas Gibbons, Esquire

Frank H. Livingston

Daniel M. Steward, First Selectman

Raymond Shea

Edward DeLaura, President

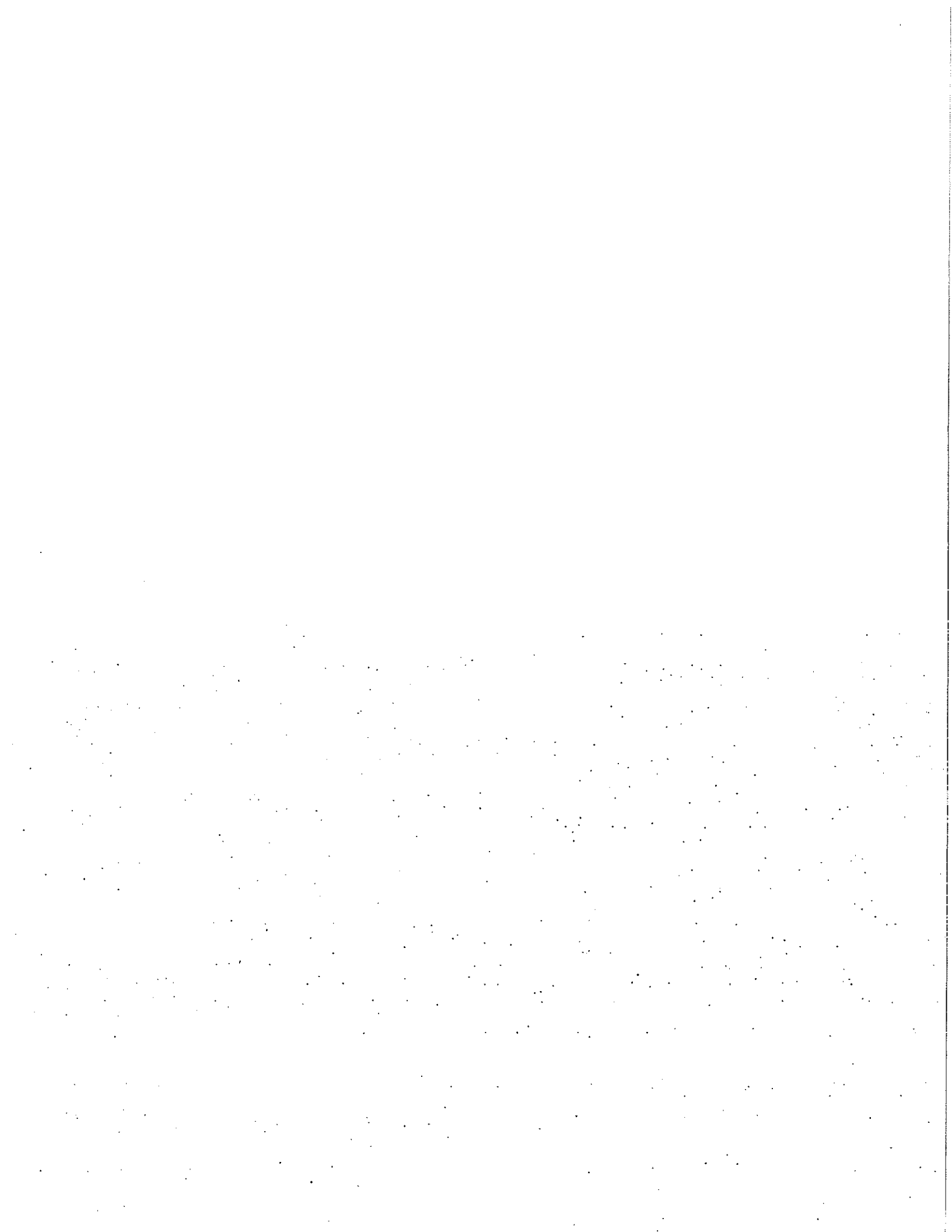
Town Clerk*

File

*When applicable, this transmittal is filed with the town clerk in accordance with Section 31-98, Chapter 560, of the Connecticut General Statutes.

CONTACT PERSON

Julie Ferrigno



STATE OF CONNECTICUT
STATE BOARD OF MEDIATION AND ARBITRATION

RULING

In the Matter of _____

TOWN OF WATERFORD : CASE NO. 2008-A-0940 AND 2008-A-0941

AND : HEARING DATE: August 31, 2009
September 3, 2009
October 19, 2009

AMERICAN FEDERATION OF STATE, : LOCATION OF HEARING: State Board
COUNTY, AND MUNICIPAL of Mediation and Arbitration
EMPLOYEES COUNCIL 15, LOCAL 1948 38 Wolcott Hill Road
Wethersfield, CT 06109

AWARD DATE: February 17, 2010

APPEARANCES: Kenneth DeLorenzo, Esquire (Union)
Thomas R. Gibbons, Esquire (Town)

FACTS

The Panel has before it two grievances filed by the Union. The underlying issue is the same in both matters, i.e. whether the Town's Board of Police Commissioner selection of certain police officers for promotion was appropriate under the Collective Bargaining Agreement ("CBA"). Case No. 2008-A-0941 concerns promotion of a Sergeant to a Lieutenant and Case No. 2008-A-0940 concerns promotion of three patrol officers to Sergeant.

While these grievances have not been consolidated, the parties agreed that they be heard by the same Panel. Moreover, the evidence and exhibits are essentially the same for both cases and the issue was the same for both cases except for the ranks of each promotion. The parties also chose to write one brief.

The CBA contains a managements rights clause which specifically addresses the hiring, appointment and promotion of officers. (Article II, Section 2.1). That section grants authority to the Town to hire, appoint or promote officers. (Joint Exhibit 1). Article X of the CBA requires a written exam for promotions and the positions be filled within 120 days of vacancy. By ordinance, the Town has given the authority to promote to its Board of Police Commissioners (Chapt. 2.16 of the Waterford ordinances). The CBA and Town's ordinances are consistent with C.G.S. Sec. 7-276 which grants to the police commissioners the sole power of appointment, promotion and removal of ordinances.

When a promotion is warranted, the department gives notice that a vacancy exists, establishes a testing schedule and utilizes the Law Enforcement Council of Connecticut ("LEC") to administer the test. The LEC is an independent agency which administers tests for more than 20 Southeastern Connecticut towns.

All contractually eligible employees are able to take the written part of the LEC exam and those receiving at least a 70% score on the written exam are then permitted to take the oral exam. The oral portion of the exam is administered by ranking area law enforcement professionals who are not affiliated with the Town. The oral and written scores are combined

to form an overall score. The Chief determines a cutoff point in the LEC scores and those above the cutoff are given an interview by the Board of Police Commissioners.

The Board interviews each candidate in executive session, then returns to public session and votes on the individuals and the appointment is made based upon the vote of the police commissioner.

Case No. 2008-A-0941 involves the Lieutenant's promotion exam. The Town promoted Sgt. David Burton to Lieutenant even though Sgt. Dana Seymour ranked first on the overall LEC score.

Case No. 2008-A-940 involves the Sergeant's promotion. The Town promoted officers Dimmock, Willard and Bellos to the rank of Sergeant even though officers Silva and Balestracci scored higher on the overall LEC score.

TOWN ARGUMENT

The Town argues that the Union has failed to provide sufficient evidence to establish that the Town incorrectly interpreted the agreement. They argue the Union failed to establish that favoritism was behind the decision making process. The favoritism assertion was based on the Union's belief that Burton (promoted to Lieutenant) attended New England Patriot football games with the Chief (The tickets were allegedly provided by the Chief) and had lunch with the deputy. The Town argues that the Chief took several officers to football games and favoritism did not enter into the promotion process, especially since the promotions were implemented by the Board of Police Commissioners and not the Chief. The Town asserts the Chief was not involved in the decision as to who was promoted and promotion authority is vested solely with the Board of Police Commissioners.

The Town also disputes the Union's claim that there was a past practice to promote the individuals who received the highest test scores.

The Town argues that since there is no ambiguity in the CBA. It asserts that Article II of the CBA grants exclusive promotion power to the Town. The Town argues that the Union's

own witnesses admitted that in the past higher scoring candidates were passed over by lower scoring candidates for promotion. The Town argues the Union has failed to establish a past practice let alone one with "clarity, consistency, longevity and repetition".

UNION ARGUMENT

The Union argues since 1999 every single promotion for Sergeant or Lieutenant was awarded to the person ranked number one on the combined score list and the Union has therefore established a past practice. The Union argues the CBA and rules are silent as to how a candidate is selected for promotion and the Panel needs to rely upon the prior ten years of practice to determine whether the Town violated the CBA. The Union relies on the fact that the number one scoring candidate on the promotion test received the promotion for a ten year period.

The Union argues that favoritism was in play in the Town's decision to skip the number one candidate for Lieutenant and the number one and two candidates for Sergeant. The charge is that Sgt. Burton accompanied the Chief to football games and lunches.

The Union further argues that the management rights clause of the CBA is limited by the CBA itself which means the promotion process must be "fair". The Union asserts the process was unfair since the Town ignored past practice by promoting lower test scoring candidates over the number one scoring candidates.

DISCUSSION

The Panel cannot ignore the management rights clause of the CBA (Article II, 2.1(m)) which provides:

"The Employer shall continue to have...all of the functions of management and shall have retained and reserved unto itself the right to exercise all the powers, authority and prerogatives of management, except as specifically abridged or modified by a specific provision in this Agreement, including, but not limited to, the following items:

M. The hiring, appointment and promotion of officers;(Joint Exhibit 1).(Emphasis added)

By ordinance, the Town has placed the promotional authority of officers with its Board

of Police Commissioner. (Chapt. 2.16, Code of Ordinance, Waterford). Moreover, C.G.S. Sect.7-276 provides: "Such board shall have the sole power of appointment, promotion and removal of the officers...".

It is clear to a majority of the Panel that the CBA, Waterford Code of Ordinances and the Connecticut General Statutes authorize the Board of Police Commissioners to promote officers in the Waterford Police Department.

The Panel must determine whether the Town's past practice of promoting officers have consistently been contrary to the mandates of the CBA.

The Town correctly points out that a custom of past practice is relevant in order to interpret ambiguous contract language or to provide a basis of rules governing matters not included in the written contract. There simply is no ambiguous language in the CBA in these cases.. As previously stated, the CBA clearly grants exclusive promotion power to the Town and there is no contract language that even suggest that the Town is limited to promoting the highest scoring officers to positions. Moreover, the Union has not established a clear and convincing past practice of promoting the individual with the highest score on an exam. The Union's own witness testified that in the past higher scoring candidates were passed over by lower scoring candidates. The evidence demonstrates that the LEC tests and scores operate as a threshold requirement for promotion. If a person satisfies the threshold, he or she is then interviewed by the Police Commissioner. The Board then makes the promotions free of any requirement to promote the highest scorer. While it is apparent the highest scorer is often promoted, it does not happen in every case.

A majority of the Panel finds the Union's argument of favoritism as unpersuasive. The Chief testified that he took several officers to football games and out to lunch (other than officer Burton) and there was no substantial and probative testimony establishing favoritism.

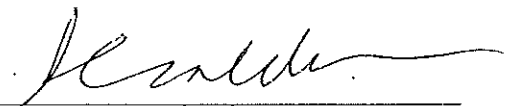
Based upon a review of the evidence and by a preponderance of the evidence, a majority of the Panel finds:

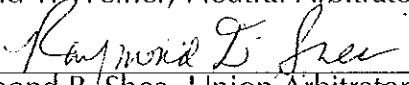
1. The Town did not violate Article II and X of the CBA and/or rules/regulations and policies of the Waterford Police Department when it failed to promote Sgt. Dana Seymour to the rank of Lieutenant on or about March 10, 2008. (Case No. 2008-A-0941).


2. The Town did not violate Article II and X of the CBA and/or rules/regulations and policies of the Waterford Police Department when it failed to promote Officers Timothy Silva and Marc Balestracci to the rank of Sergeant on or about March 20, 2008. (Case No. 2008-A-0940).

DECISION

The grievances in Case Numbers 2008-A-0940 and 2008-A-0941 are denied.

By: 
Gerald T. Weiner, Neutral Arbitrator

 *DISSENTING*
Raymond B. Shea, Union Arbitrator


Frank H. Livingston, Management Arbitrator