

Commonwealth of Massachusetts  
County of Worcester  
The Superior Court

Civil Docket WOCV2010-02153

RE Picone v Leominster et al

TO David A Guberman, Esquire  
Mass Atty General's Office  
One Ashburton Place  
Room 2019  
Boston, MA 02108-

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JAN 18 2011  
OFFICE OF THE CLERK OF THE COURTS  
ADMINISTRATIVE LAW DIVISION

CLERK'S NOTICE

This is to notify you that in the above referenced case the Court's action on 01/11/2011

*RE: Defts City of Leominster, Leominster Retirement Board's  
MOTION to Dismiss (MRCP 12b) Amended Complaint & Plff's  
Opposition to Motion (P#7)*

is as follows

**Motion (P#9) ALLOWED - see memorandum & order of the court (John S  
McCann, Justice) Notices mailed 1/14/2011**

Dated at Worcester, Massachusetts this 14th day of January,  
2011

Dennis P. McManus, Esq.,  
Clerk of the Courts

BY

Alexander Rodriguez, III  
Assistant Clerk

Telephone 508-831-2358 (Session Clerk) or 508-831-2347

Copies mailed 01/14/2011

Commonwealth of Massachusetts  
County of Worcester  
The Superior Court

CIVIL DOCKET# WOCV2010-02153C

John Picone, Individually and on behalf  
of a class of persons similarly situated  
Plaintiff(s)

vs

City of Leominster, Public Employee Retirement  
Commission, and Leominster Retirement Board  
Defendant(s)

**JUDGMENT ON MOTION TO DISMISS**  
(Mass R Civ P 12b)

This action came on for hearing before the Court, John S. McCann, Justice upon the Defendant's, City of Leominster, Public Employee Retirement Commission, Leominster Retirement Board, Motion to Dismiss pursuant to Mass R Civ P 12(b), and upon consideration thereof, 11

It is **ORDERED** and **ADJUDGED**

That the Complaint of the plaintiff, John Picone, Individually and on behalf of a class of persons similarly situated, is hereby **DISMISSED** against the defendant(s), City of Leominster, Public Employee Retirement Commission, Leominster Retirement Board, and that the defendant(s) recovers their costs of action

Dated at Worcester, Massachusetts this 11th day of January, 2011

By

  
Assistant Clerk

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss

SUPERIOR COURT  
CIVIL ACTION  
NO 10-2153-C

JOHN PICONE & all others similarly situated<sup>1</sup>

vs

CITY OF LEOMINSTER & others<sup>2</sup>

MEMORANDUM OF DECISION AND ORDER  
ON DEFENDANTS' MOTIONS TO DISMISS

This case arises out of claims brought by the plaintiff John Picone, a fire fighter employed by the defendant City of Leominster (the "City") The plaintiff claims that the defendants violated the City's collective bargaining agreement with its firefighters when they ceased treating a clothing allowance as regular compensation for purposes of pension contributions and benefits The defendants have all moved to dismiss pursuant to Mass R Civ P 12(b)(6) arguing, inter alia, that the collective bargaining agreement was no longer valid and that their action was therefore appropriate For the following reasons, the defendants' motions are ALLOWED

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BACKGROUND

The Amended Complaint's allegations are taken as true for purposes of the pending motion, except to the extent that they contradict the express terms of the collective bargaining agreement as attached to the City's Motion to Dismiss

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<sup>1</sup> The plaintiff has not moved for class certification, but stated in his Amended Complaint that he filed suit on behalf of "all other current and retired unionized employees of the City of Leominster who received uniform or clothing allowances as part of their regular compensation and who were part of a bargaining unit whose collective bargaining agreement continued in effect past July 1, 2009" Amended Complaint, par 3 The plaintiff's attorney stated at the hearing on this motion he intends to move for class certification

<sup>2</sup> Public Employee Retirement Administration Commission and Leominster Retirement Board

Copies Mailed 1/14/11

The plaintiff served as a Leominster fire fighter since 1976. As such, he was a member of the Leominster Fire Fighters Union, IAFF Local 1841, which negotiated a series of collective bargaining agreements with the City that required payment of a clothing allowance. The most recent agreement became effective on July 1, 2006 and continued in effect until June 30, 2009. Until that time, the defendants treated the clothing allowance payments as regular compensation for purposes of retirement contributions and computing benefits. On or about July 1, 2009 the defendants stopped that practice.

The most recent collective bargaining agreement included an “evergreen provision” that extended the terms and provisions of the agreement for any period during which an extension or new agreement was being negotiated.

The plaintiff initiated this action in October 2010.

#### **DISCUSSION**

When evaluating the sufficiency of a complaint under Mass. R. Civ. P. 12(b)(6), the court accepts as true its factual allegations and draws all reasonable inferences in favor of the plaintiffs. Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008). The court may also take into account exhibits attached to the pleadings. Schaer v. Brandeis Univ., 432 Mass. 474, 477 (2000). In addition, the court may consider contracts and regulations relied upon by the plaintiff but not attached to the pleadings if they are attached to the motion at issue and the plaintiff had access to these documents prior to discovery. Cumis Ins. Soc’y Inc. v. BJ’s Wholesale Club, Inc., 455 Mass. 458, 465 n.14 (2009). To survive a motion to dismiss, a complaint must contain factual allegations which, if true, raise a right to relief above the speculative level. Mere labels and conclusory allegations will not suffice. Rather, a complaint must allege facts “plausibly suggesting (not merely consistent with) an entitlement to relief.” Iannacchino, 451 Mass. at 636 (internal quotation marks omitted).

The defendants argue that the plaintiff's claims must be dismissed because the collective bargaining agreement was no longer in effect after June 30, 2009. Furthermore, pursuant to St 2009, c 21, § 3, codified as G L c 21, § 1, wages, for purposes of pension calculations, cannot include clothing allocations. The plaintiff relies on St 2009, c 21, § 23 ("Section 23"), which states that if already considered such, a clothing allowance "shall continue to be included in the definition of regular compensation during the term of [a] collective bargaining agreement." The issue before the court is whether the collective bargaining agreement's term ended June 30, 2009 or remained in effect while the parties negotiated a new agreement.

The Supreme Judicial Court, construing G L c 150E, § 7(a), recently decided Boston Hous Auth v National Conf Of Firemen & Oilers, Local 3, 458 Mass 155 (2010). Section 7(a) governs collective bargaining between public employers and employees and provides in relevant part that "[a]ny collective bargaining agreement shall not exceed a term of three (3) years." In Boston Housing Authority, this was construed to invalidate evergreen clauses. Applying this decision to the collective bargaining agreement at issue, this court must hold that the collective bargaining agreement terminated on June 30, 2009. This was both its stated end date and three years after its effective date. The evergreen provision is invalid.

The plaintiff argues that Boston Housing Authority should be limited to its facts and should not reach collective bargaining agreement for public safety employees. This court disagrees and finds no support for the plaintiff's argument in either Boston Housing Authority or G L c 150E, § 7(a).

Because the agreement is no longer in force, Section 23 does not prohibit the defendant from removing the clothing allowance from its pension contributions and calculations and the plaintiff's action cannot survive.

The defendants have raised other arguments that this court need not address.

**ORDER**

For the foregoing reasons, it is **ORDERED** that the defendants' Motions to Dismiss are  
**ALLOWED**

  
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John S. McCann  
Justice of the Superior Court

Date January 11, 2011