

Also appearing:

John Maclean, City of Keene
 Al Merrifield, City of Keene
 Tom Powers, City of Keene
 Peter Shumway, City of Keene
 Eliezer, Rivera, State Employees/Keene Police Dept.
 Carol Patten, Jr., State Employees/Keene Police Dept.
 John Stewart, State Employees/Keene Police Dept.
 Peter S. Thomas, State Employees/Keene Police Dept.
 Randall J. Tefft, State Employees/Keene Police Dept.
 Bruce Uhas, State Employees/Keene Police Dept.

BACKGROUND

The State Employees Association of New Hampshire, SEIU Local 1984 (Union) filed unfair labor practice (ULP) charges on August 10, 1999 on behalf of Keene Police Officers against the City of Keene (City) alleging violations of RSA 273-A:5 I (e), (h) and (i) as the result of a breach of contract and refusal to bargain after the City refused to abide by an arbitration decision. The City filed an answer and its own ULP on August 23, 1999 alleging that the Union had violated RSA 273-A:5 II (a), (d), (f) and (g) by breaching the CBA and failing to comply with RSA 273-A by seeking call back pay for a three (3) hour minimum after an arbitrator allegedly ordered back pay for fifteen (15) minute roll call overtime increments. The Union filed a separate answer to the City's charges on September 1, 1999 along with a motion to consolidate both matters for hearing. Thereafter, both matters were consolidated for hearing and heard by the PELRB on September 28, 1999, in accordance with a pre-hearing conference held on September 9, 1999 (Decision No. 1999-095). At hearing, the parties agreed to confine their arguments to the issue of whether the three-hour minimum pay provisions applied to the circumstances of this case.

FINDINGS OF FACT

1. The City of Keene employs police officers and other personnel in the operation of its police department and, thus, is a "public employer" within the meaning of RSA 273-A:1 X.
2. The State Employees Association of New Hampshire, SEIU Local 1984, is the duly certified bargaining agent for all permanent, full-time non-probationary police

officers employed by the City.

3. The Union and the City are parties to a collective bargaining agreement (CBA) for the period July 1, 1997 through June 30, 2000. The prior agreement started in 1993 and expired June 30, 1997. The 1997-2000 agreement provides, in pertinent part:

ARTICLE VIII
Overtime

SECTION 1: All assigned services outside of an employee's regularly scheduled work week or regularly scheduled daily shift as established by the department (other than reimbursable details and court time) including service on an employee's scheduled day off or during his/her vacation, and service performed prior to the regularly scheduled starting time for his/her regularly scheduled daily shift shall be compensated at time and one-half the employee's hourly rate, provided said employee has not been absent without pay during his/her regularly scheduled work week or regularly scheduled daily shift. Provided further, however, that determining whether an employee is entitled to compensation at the overtime rate for assigned hours worked in excess of his/her regularly scheduled work week, any authorized time worked in excess of a regularly scheduled daily shift for which overtime has been paid shall not be counted; that is, the overtime rate shall not be pyramided, compounded, added together or paid twice for the same time worked.

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SECTION 3: In the event an employee who has completed his/her assigned duty and has left the police station, is recalled to duty or called in by the employer to attend to any matter relating to his/her work as a police officer, other than a reimbursable detail, he/she shall be guaranteed a minimum of three (3) hours pay at the rate of time and one half of the employee's regular rate of pay. This minimum shall be guaranteed for call backs, call ins and shall include the guarantee of a three hour minimum at the rate of time and one half including but not limited to the following call-back overtime; attendance at training programs, staff or department meetings and firearms qualifications.

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ARTICLE XVIII
Reimbursable Details

SECTION 1: Employees shall be paid at the overtime rate of the highest step for police officers with a minimum of three (3) hours pay guaranteed for reimbursable details that are worked.

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ARTICLE XIX
Grievance Procedure

For the purpose of this contract, a grievance is defined as a written dispute, claim or complaint which is filed and signed by an employee in the Bargaining Unit and which arises under and during the term of this Agreement. Grievances are limited to matters of interpretation or application of specific provisions of this Agreement.

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SECTION 4: The arbitrator shall not have the power to add to, ignore, or modify any of the terms and/or conditions of this Agreement. The arbitrator shall not have the power to hold hearings for more than one grievance (that is, multiple grievances before the same arbitrator will not be allowed) unless mutually agreed to by the parties. His/her decision shall not go beyond what is necessary for the interpretation and application of express provisions of the Agreement. The arbitrator shall not substitute his/her judgment for that of the parties in the exercise of the rights granted or retained by this Agreement. The decision of the arbitrator shall be final and binding upon the parties as to the matter in dispute. The expenses of the arbitrator shall be shared equally by the parties. Each party shall make arrangements for and pay any expenses of witnesses who are called by them. Excluded from arbitration are unadjusted grievances which question the exercise of rights set forth in Article II of this Agreement entitled "Management Rights", or which question the use or application of any right over which the City or its designated agents have unilateral discretion.

4. The 1993-97 CBA provided that, "the regular hours of work shall not exceed one hundred sixty (160) hours during a twenty-eight (28) day period plus an additional fifteen (15) minutes each day for roll call." This roll call provision was omitted from the 1997-2000 CBA so that Article VII, Section 1 of that document now reads only that, "The regular hours of work shall not exceed one hundred sixty (160) hours during a twenty-

eight (28) day period." Notwithstanding the stated duration of the 1997-2000 CBA from July 1, 1999 through June 30, 2000, found at Article XXI, Section 1, the fifteen minute roll call practice continued until sometime in mid-December of 1997. According to testimony from Carl Patten, Jr., chapter president, the extra fifteen (15) minute for roll call was eliminated on approximately December 15, 1997 when it was incorporated into the regular duty shift. Counsel for the City suggests the separate roll call period was eliminated on or about December 10, 1997 (pleadings, item 4), as per the Union's grievance memo (DeNafio to MacLean) submitted on or about February 5, 1998 (City's ULP, Tab 2).

5. On January 7, 1998, City Finance Director Matson sent a memo to DeNafio saying, in pertinent part, the City will not pay time worked to attend roll call. (City Exhibit No. 3.) On or about February 5, 1998, the Union submitted a grievance seeking a retroactive payment for roll call periods worked by unit members between the effective date of the CBA, July 1, 1997, and the cessation of the roll call procedure external to the duty shift in mid-December of that same year. The requested relief was to compensate all patrol officers for all hours worked in excess of 160 hours during a 28 day period from July 1, 1997 until separate roll calls were eliminated in mid-December, 1997. (City Exhibit No. 1) Arbitrator Mark Grossman heard this grievance on or about April 5, 1999 (City pleadings, No. 5 and answer thereto).
6. During the grievance arbitration process, the parties made a joint submission of the issue to be addressed by the arbitrator, to wit: "Did the City violate the collective bargaining agreement by failing to pay roll call overtime retroactive to July 1, 1997? If so, what shall be the remedy?" In his award of July 22, 1999, the arbitrator answered the first question affirmatively and directed the City Manager to submit the cost of paying for the roll call time retroactive to July 1, 1997 to the City Council for payment. (City ULP, Tab 5.)
7. On July 29, 1999, union steward Peter Thomas sent an e-mail to City Manager John MacLean "to formally

apprise you it is the Union's position that the decision dated July 22, 1999...entitles the officers to three hours OT compensation per roll call attendance from July 1, 1997 to December 1997." MacLean responded to Thomas on July 30th saying, "The city believes the arbitrator has ruled that the City Manager must submit the 15 minutes roll call issue to the City Council for payment...no more, no less... the City Council is not obligated to pay this item, nor was it the arbitrator's intent of the arbitrator to award three hours of OT compensation for each fifteen minute roll call attendance."

8. Police Chief Thomas Powers, a party to these proceedings and to the grievance arbitration, testified that as of January 16, 1998 (when the city agreed to extend time limits for filing in City Exhibit No. 4) and through the proceedings before the arbitrator, the Union sought no more than compensation for the 15 minute increments of roll call overtime. He did not learn of the Union's request for 3-hour increments of overtime pay for roll call attendance until two or three days after the Grossman award. Powers understood DeNafio's request for remedy incorporated into the stipulated issue for the arbitration case to be for time worked, i.e., "failing to pay roll call overtime," not for a three hour minimum, the provision for which may be found in Article VIII, Sections 1 and 3, respectively. (See Finding No. 3, above.) Likewise, the union's post-hearing brief to Arbitrator Grossman makes no reference to a 3 hour minimum, only for payment under Article VIII for the CBA. (City Exhibit No. 2.)
9. City Manager John MacLean testified that the Union did not raise the issue of retroactive overtime pay for roll calls until approximately one month after the separate roll call duty was eliminated. After receiving the Grossman award, he intended to recommend payment of the fifteen minute segments of incremental roll call duty to the City Council at time and a half until he learned of the three-hour minimum pay demand. According to an e-mail from MacLean to Thomas on August 6, 1999, referring to the City Council meeting of Thursday evening, two scenarios were considered by them:

I want to advise you that the City Council met last

evening and considered the Union's and City Administration's differing interpretations of the arbitrator's decision dated July 22, 1999. In doing so, two motions were made...the first to authorize payment consistent with the Union's interpretation, which failed 13 to 0, and the second being to authorize payment in accordance with the City Administration's interpretation, which failed 11 to 2. (Union Exhibit No. 1.)

10. The Union perceives that it is entitled to relief for the City's lack of compliance with the arbitrator's award and because the entitlement is for three hours, not for fifteen minutes. The City believes it has complied with the arbitrator's award because the City Manager did submit the cost of paying the retroactive roll call entitlements to the City Council, not withstanding that the sought-for payments were rejected by the Council members

DECISION AND ORDER

The three-hour minimum callback or minimum overtime pay provisions of Article VIII do not apply to the circumstances of this case. It is undisputed that the external roll call provisions continued under the 1997-2000 CBA after the language of Article VII changed. (Finding No. 4, above.) The roll call period external to the work shift did not change and become internal to the shift until December of 1997. This leaves us with two very significant conclusions. First, since the roll call was external to the shift from July 1, 1997 until mid-December of that same year and since patrol officers routinely stood roll call during that time, they obviously worked more than the base of 160 hours in a 28 day period. Second, once this is acknowledged to have happened, i.e., the overtime is acknowledged to have been worked, the patrol officers involved are entitled to pay under the overtime provisions of the contract as found at Article VIII.

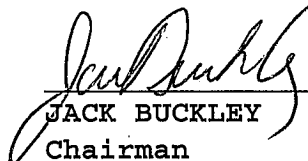
Next we must determine which overtime provisions of Article VIII apply to this case. We are persuaded that Article VIII, Section 3 does not apply, i.e., the employees do not qualify for the three hour minimum. First, no employees were called back to the station to stand roll call. Employees did not complete assigned duty and leave the station only to be brought back for that purpose. It would be a strenuous stretch of the imagination to construe roll call as a training program, staff meeting or firearms qualification, all of which typically require far more than fifteen minutes.

From the evidence before us and from the fact that it appears that the Union did not articulate its position about the three hour minimum call back pay until after the arbitrator rendered his decision, we conclude that any overtime pay due for roll calls between July and December of 1997 is owed under Article VIII, Section 1. This is consistent both with the practice, as we understand it, and with testimony presented. Union negotiator and chapter president Patten said the roll call was mandated, just as if it were a holdover, when the officer never left the station between the time the roll call was conducted and the shift was worked. In the context of the contract language, the roll call duty, as it existed from July to December of 1997, was "assigned services outside of an employees' regularly scheduled work week or regularly scheduled daily shift" for which that employee is entitled to be compensated at "time and one-half the employee's hourly rate."

By way of remedy we affirm that portion of the Union's ULP alleging a violation of RSA 273-A:5 I (e), breach of contract, for failure to implement the arbitrator's award to overtime entitlement under Article VIII, Section 1 of the contract, as this translates into 15 minutes of pay at time and a half for each roll call stood from July to December for each employee with a valid claim. All other requests for relief by the Union, inclusive of a request for payment under Article VIII, Section 3 of the CBA, are denied. Likewise, we affirm that portion of the City's ULP alleging a violation of RSA 273-A: II (8) as it alleges a breach of contract for the Union's attempting to enforce a three-hour minimum call back provision as being within the meaning and intent of the arbitrator's award. All other requests for relief by the City are denied. The City shall forthwith make payment for 15 minute roll call periods worked between July and December, 1997, to officers with valid claims thereto.

So ordered.

Signed this 27th day of October, 1999.


 JACK BUCKLEY
 Chairman

By unanimous decision. Chairman Jack Buckley presiding. Members Richard Roulx and E. Vincent Hall present and voting.