



Officer Malisos suffered an improper loss of "earned time." Additionally, the union contends that the Chief's October 26, 2007 patrol staffing policy changing existing staffing standards was undertaken without prior notice to the union and without any opportunity for the union to bargain with the town over the alterations to the staffing policy.

The union requests that the PELRB: 1) find that the town has failed to bargain in good faith; 2) order the town to cease and desist dominating and interfering with the employee organization; 3) order the town to bargain in good faith; 4) order the town to publicly post the findings of the PELRB for 30 business days; 5) order the town to make Officer Malisos whole; and 6) order the town to make the union whole for any and all costs.

On December 14, 2007 the town filed its answer denying the charges. The town asserts that the Chief's actions represent the proper exercise of management rights, denies any violation of RSA 273-A:5, I, and contends that the union's claims should be resolved through arbitration. The town requests that the PELRB: 1) dismiss the complaint; and 2) grant such other relief as justice may require.

A hearing in this matter was originally scheduled for January 24, 2008. On January 10, 2008 the town filed an assented to motion to continue and the matter was rescheduled for hearing on February 12, 2008. On January 29, 2008 the town filed another assented to motion to continue and the matter was rescheduled to March 13, 2008. The undersigned hearing officer held a hearing on March 13, 2008 at the PELRB offices in Concord. The parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. At the parties' request, the record was initially held open until April 18, 2008 to allow the parties to file post-hearing briefs. Thereafter the parties requested and received an extension of time to file their briefs to May 2, 2008 and then to May 9, 2008. Both parties filed their briefs by May 9,

2008 and the record is now closed.

### FINDINGS OF FACT

1. The union is the board certified exclusive representative for Windham Police officers pursuant to RSA 273-A:10.

2. The town is a public employer within the meaning of RSA 273-A:1, X.

3. The union and the town are parties to an April 1, 2004 to March 31, 2006 Collective Bargaining Agreement (the "2004-06 CBA").

4. Gerald Lewis became the Chief of Police in Windham in May, 2005.

5. Article 16, Earned Time, ¶5 of the 2004-06 CBA provides that "[e]arned days may be used any time after being earned, including during an employee's probationary period. It is expected that all planned absences will be mutually agreed upon by the employee and his/her supervisor prior to the date of absence."

6. Article 8, Hours of Work & Overtime, ¶2 (a) of the 2004-06 CBA states:

Employees are permitted to work no more than sixteen (16) hours in a twenty four (24) hour period. Said twenty four (24) hour period shall begin with the first hour of work after time off. Exceptions to the sixteen (16) hour maximum are permitted only if either an officer is held over at the end of their shift or assignment or required to come in earlier for their shift or assignment or by specific exception granted by the Chief of Police or his formally assigned designee.

7. Article 30, Grievance Procedure, of the 2004-06 CBA provides:

1. Definition: A grievance under this article is defined as an alleged violation of any of the provisions of this Agreement.

### STEP THREE

If the employee or the Union is not satisfied with the decision of the Board of Selectmen, the Union may file, within twenty (20) days following receipt of the decision of the Board of Selectmen, a request for arbitration to the American Arbitration Association under its rules and regulations. The arbitrator shall not have the power to add to, ignore or modify any of the terms or conditions of this Agreement...His decision shall not go beyond what is necessary for the interpretation and application of the express provisions of this

Agreement. The arbitrator shall not substitute his judgement for that of the parties in the exercise of rights granted or retained by this Agreement. The decision of the arbitrator shall be final and binding on the parties.

8. The department maintains an overtime list which establishes the order in which off duty officers are contacted for overtime duty. The department also maintains a second list, known as the "order in list," apparently put together with the cooperation of the union to establish, on an equitable basis, the order in which off duty officers are contacted for mandatory overtime duty.

9. In a March 9, 2006 Memorandum Chief Lewis discussed time off requests, writing that "if less than 24-hours notice is provided, then an attempt to fill the position will be made, however, no one will be ordered to work." Town Exhibit 2. (this is really a discussion attempting to reach consensus about how the parties will be implementing the mutually agreeable language).

10. In an April 20, 2007 Memorandum, Captain Wagner addressed staffing issues, providing that the "current practice of allowing a shift to run with less than three officers for up to three (3) hours is no longer in effect." Union Exhibit 2.

11. Captain Wagner's April 20, 2007 Memorandum also provides that "[i]n essence, the officer desiring to use earned time to work a detail will be responsible for locating and filling the patrol shortage (per the existing contract language)." This provision of the Memorandum has not been enforced.

12. The Town's use of earned time dates to the 1991-92 time period. Historically, officers were never required to find shift coverage when requesting earned time, as this task was usually handled by the officer's supervisor processing the request.

13. On May 31, 2007 at approximately 5:00 p.m. Officer Malisos submitted a payroll adjustment request seeking to use earned time so he could work a contracted detail from 4:00 to 5:30 p.m. on June 1, 2007. Officer Malisos' earned time request was submitted less than 24 hours before the requested time off. The request was denied because his shift could not be filled and the town declined to use the "order in list" to compel an off duty officer to report for overtime coverage consistent with Chief Lewis' March 9, 2006 Memorandum. Town Exhibits 2 and 5.

14. The denial of Officer Malisos' May 31, 2007 earned time request is the subject of a grievance currently scheduled for arbitration in September, 2008.

15. In a October 26, 2007 Memorandum addressing patrol staffing, Chief Lewis listed the number of required sworn personnel for particular shifts and provided that mandatory overtime is required to maintain the listed staffing levels. Chief Lewis also provided that "[p]ersonnel shall not be relieved from duty until sufficient personnel from the oncoming shift are at work and ready for duty." Union Exhibit 3.

16. The negotiated successor collective bargaining agreement to the 2004-06 CBA includes the language "[i]t is understood that no employee may be dismissed until properly relieved." This language was included in the town's November 2005 "Management Proposals." Union Exhibit 4. However, earned time and 24 hour notice were not topics of negotiation for this contract.

### DECISION AND ORDER

#### DECISION SUMMARY

The disputes relating to earned time and Chief Lewis' October 26, 2007 Memorandum concerning overtime are contract disputes subject to the parties' grievance procedure, including

final and binding arbitration. The portion of Chief Lewis' October 26, 2007 Memorandum concerning the number of personnel required for particular shifts is a matter reserved to managerial policy and is a permissive, but not mandatory, subject of bargaining. Therefore, the town's refusal to bargain the number of personnel for particular shifts is not an unfair labor practice.

#### JURISDICTION

The PELRB has primary jurisdiction of all violations of RSA 273-A:5. RSA 273-A:6 I. PELRB jurisdiction is proper in this case as the union has alleged violations of different provisions of RSA 273-A:5, I subject to a decision on the town's motion to dismiss seeking to have this matter dismissed or held in abeyance pending arbitration.

#### DISCUSSION

The town seeks dismissal of the complaint, contending the issues raised should be resolved through arbitration. The town also contends the number of personnel required for particular shifts constitutes managerial policy and is not a mandatory subject of bargaining. The union argues that the complaint concerns matters which constitute unfair labor practices under RSA 273-A:5, I (b), (e), (g), (h), and (i) because the town has failed to bargain in good faith because of its unilateral implementation of terms and conditions of employment and its failure to recognize the union as the exclusive representative.

Most of the matters in dispute are addressed in the parties' contract. Earned time is addressed in Article 16 of the 2004-06 CBA. The 24 hour notice dispute concerning the use of earned time ultimately requires an interpretation or application of the Article 16 language that "[i]t is expected that all planned absences will be mutually agreed upon by the employee and his/her supervisor prior to the date of absence." That the earned time dispute is a contractual

matter is supported by the union's May 31, 2007 grievance concerning the denial of Officer Malosis' May 31, 2007 earned time request which is currently scheduled to proceed to arbitration in September, 2008. Given the facts of this case and the provisions of the 2004-06 CBA, I find that the arbitration clause includes the disputes concerning earned time because I cannot find, with positive assurance, that the 2004-06 CBA is not susceptible of an interpretation that covers the dispute. *Appeal of Town of Bedford*, 142 N.H. 637, 640 (1998).

The next issue arises from Chief Lewis' October 26, 2007 Memorandum which provides that "[p]ersonnel shall not be relieved from duty until sufficient personnel from the oncoming shift are at work and ready for duty." The issue raised by the union involves Article 8 of the 2004-06 CBA, Hours of Work and Overtime, which references officers being "held over at the end of their shift or assignment." This is a dispute concerning the interpretation and application of the 2004-06 CBA which, like the earned time issue, should be addressed through the grievance process and arbitration.

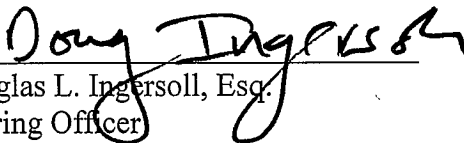
The remaining issue concerns staffing changes Chief Lewis has implemented, and in particular his stated policies which change the number of officers on duty during certain shifts. The number of officers scheduled for particular shifts involves the "functions, programs and methods" as well as the "selection, direction and number" of the town's personnel. As such, this issue constitutes managerial policy within the exclusive prerogative of the town as the public employer, and it is not a mandatory subject of bargaining. See RSA 273-A:1, XI; *Appeal of International Association of Firefighters*, 123 N.H. 404, 408 (1983)(number of firefighters in platoon excluded from employer's obligation to bargain and is only a permissive subject of bargaining). Accordingly, the town was not required to negotiate the number of officers on duty during certain shifts and did not commit an unfair labor practice on account of its refusal to

negotiate. The union does enjoy the right to demand impact bargaining to the extent necessary, but there is no evidence that the town has declined any request to impact bargain the shift staffing changes.

In accordance with the foregoing, the union's complaint is dismissed.

So ordered.

June 24, 2008.

  
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Douglas L. Ingersoll, Esq.  
Hearing Officer

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