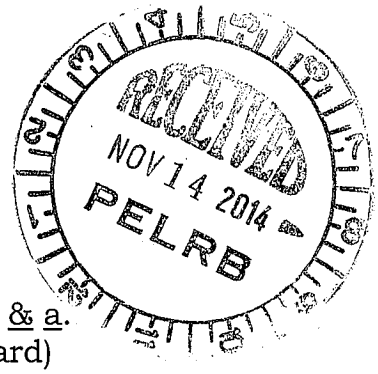
THE SUPREME COURT OF NEW HAMPSHIRE



Public Employee Labor Relations Board
No. 2013-506

APPEAL OF STRAFFORD COUNTY SHERIFF'S OFFICE & a.
(New Hampshire Public Employee Labor Relations Board)

Argued: September 11, 2014
Opinion Issued: November 13, 2014

Soldati Law Offices, P.A., of Portsmouth (Lincoln T. Soldati on the brief and orally), for the petitioners.

Nolan Perroni Harrington, LLP, of Lowell, Massachusetts (Peter J. Perroni on the brief and orally), for the respondent.

LYNN, J. The petitioners, the Strafford County Sheriff's Office and the Strafford County Board of Commissioners (collectively, the county), appeal an order of the New Hampshire Public Employee Labor Relations Board (PELRB), which found that the county committed an unfair labor practice by changing the terms and conditions of employment of Sheriff's Office employees during the period when the respondent, the New England Police Benevolent Association, Local 295 (union), was seeking certification of a bargaining unit that included those employees. We affirm.

I

The following facts were found by the PELRB or are supported by the record. The county is a public employer. See RSA 273-A:1, X (2010). On July

13, 2012, the union filed a petition for certification with the PELRB, seeking approval of a bargaining unit comprised of certain employees of the Sheriff's Office. The PELRB subsequently approved a bargaining unit composed of the positions of deputy sheriff, dispatcher, and secretary. Following an election in December 2012, the union was certified as the bargaining unit's exclusive representative.

As of July 13, 2012, Paul Rowe and Michael Lemoi were employed as deputies in the civil department of the Sheriff's Office. They both worked a schedule of four ten-hour days per week (4-10 schedule). Pursuant to contractual arrangements between the Sheriff's Office and the United States Immigration and Customs Enforcement (ICE), Rowe and Lemoi, as well as other deputies, also performed work for ICE, such as transporting detainees involved in ICE proceedings.

By September 2012, the county decided to establish two new full-time deputy positions dedicated to ICE work. The then-sheriff, Wayne Estes, discussed the new ICE positions with Rowe and Lemoi. Both deputies expressed interest in the positions, but only if their ICE work schedules consisted of five eight-hour work days per week (5-8 schedule). They sought 5-8 schedules for the ICE positions in order to maximize their potential for overtime earnings. However, both deputies preferred 4-10 schedules if they continued to work in the civil department, and neither deputy asked to have his civil department schedule changed to a 5-8 schedule.

In October 2012, the sheriff proposed a schedule for the new ICE positions, which called for Rowe and Lemoi to work 4-10 schedules. Lemoi responded by e-mail and requested the 5-8 schedule that he believed had been previously agreed upon. He also requested to stay in the civil department if the 5-8 schedules would not be implemented for the ICE positions. In response, the sheriff notified Rowe and Lemoi that they would remain in the civil department, but that their work hours were being changed from 4-10 schedules to 5-8 schedules.

Deputy sheriffs also sometimes perform "outside detail" work. This work consists of providing law enforcement services to third parties, such as local police departments, which have need for extra personnel at certain times.[1] The county bills the third parties who engage deputies to perform outside detail work and then compensates the deputies by paying them a portion of the funds it receives. Although outside detail work is not part of a deputy's normal work day or schedule, prior to the time the union sought certification, the county paid deputies for outside detail work at a rate equal to their overtime

[1] For example, deputies have regularly worked outside details for the Durham Police Department during the University of New Hampshire's yearly homecoming weekend.

compensation rate, regardless of whether they were otherwise eligible for overtime compensation.

Prior to the union's certification petition, the county also permitted deputies to include benefit time, such as holiday, vacation, and sick leave, in their hour totals for determining their eligibility for overtime pay for work in excess of 40 hours per week.

In the summer of 2012, the United States Department of Labor (DOL) completed an investigation into possible violations of the federal Fair Labor Standards Act (FLSA) by the Sheriff's Office, based on its wage and hour practices during the previous two years. The DOL investigator summarized his findings in a letter to the county, which stated in part:

> The investigation found violations of FLSA section 7 resulting from your failure to pay statutory overtime pay for hours worked in excess of 40 per week. Specifically, you failed to include federal [ICE] hours into the total work hours of non-exempt employees when computing overtime pay for hours worked in excess of 40 per week. As a result, the employees were paid at their regular hourly rate of pay with no additional half-time premium for hours worked in excess of 40 per week.
>
> The investigation further found violations of FLSA section 11 resulting from your failure to keep an accurate record of all hours worked for non-exempt employees. Specifically, you failed to retain an accurate record of hours worked per day and per week by all non-exempt employees for 2010.
>
> As a result of these violations, five employees were found due back wages totaling $4,812.17.

After the union filed its certification petition on July 13, 2012, the county discontinued both established practices of paying the overtime rate for outside detail work regardless of the number of hours worked, and of including benefit time when computing hours worked for purposes of overtime compensation.

In November 2012, the union filed a complaint with the PELRB, alleging that the county committed an unfair labor practice, in violation of RSA 273-A:5, I(a), (b), (c), and (g), by changing the terms and conditions of employment of proposed bargaining unit members after the union petitioned to act as the unit's exclusive representative for purposes of collective bargaining. Following a hearing, the PELRB determined that the county "committed an unfair labor practice because it failed to maintain the status quo during the pendency of bargaining unit formation and representation election proceedings." The PELRB decided that the three changes made – to the deputies' schedules, to

the rate of pay for outside detail work, and to the manner in which overtime was calculated – were all mandatory subjects of bargaining that the county could not unilaterally change once the union filed its certification petition. The PELRB ordered the county to "restore the affected employees to the status quo ante that existed as of the filing of the certification petition and make them whole." The PELRB denied the county's motion for rehearing, and this appeal followed.

II

RSA chapter 541 governs our review of PELRB decisions. See RSA 273-A:14 (2010); RSA 541:2 (2007). We will not set aside the PELRB's order except for errors of law, unless we are satisfied, by a clear preponderance of the evidence, that it is unjust or unreasonable. RSA 541:13 (2007). The PELRB's findings of fact are presumed prima facie lawful and reasonable. Id. In reviewing the PELRB's findings, "our task is not to determine whether we would have found differently than did the [PELRB], or to reweigh the evidence, but rather to determine whether the findings are supported by competent evidence in the record." Appeal of Dean Foods, 158 N.H. 467, 474 (2009) (quotation omitted). We review the PELRB's rulings on issues of law de novo. See Appeal of Portsmouth Regional Hosp., 148 N.H. 55, 57 (2002).

III

The county first contends that it did not violate the status quo doctrine when the sheriff changed Rowe's and Lemoi's work schedules. It argues that the status quo was that the sheriff retained the prerogative to determine deputies' work schedules; therefore, when the sheriff altered the schedules, there was no change in the status quo and, accordingly, no unfair labor practice. We disagree.

"Maintenance of the status quo demands that all terms and conditions of employment remain the same during collective bargaining." Appeal of City of Nashua Bd. of Educ., 141 N.H. 768, 772 (1997) (quotation omitted). "We have explained that the status quo doctrine derives from RSA 273-A:3, I, which imposes the obligation to negotiate in good faith over the terms of employment, and from RSA 273-A:5, . . . which makes it an unfair labor practice for a public employer to refuse to negotiate in good faith." Id. A public employer's "unilateral change in a term or condition of employment[,] whether during negotiations for an initial [collective bargaining agreement] or during a status quo period following expiration of a CBA[,] is tantamount to a refusal to negotiate that term and destroys the level playing field necessary for productive and fair labor negotiations." Id. (emphasis added; quotation and parentheses omitted). However, "the status quo doctrine is limited by its rationale. Thus, an employer is prohibited from making unilateral changes on mandatory subjects of collective bargaining, but not on permissive topics of collective

bargaining." Id. at 772-73. "[A] unilateral change in the former is an unlawful refusal to engage in required negotiation, but a unilateral change in the latter is generally a legitimate exercise of discretion." Id. at 773 (citation omitted).

RSA 273-A:1, XI (Supp. 2013) defines the "'[t]erms and conditions of employment'" as:

> [W]ages, hours and other conditions of employment other than managerial policy within the exclusive prerogative of the public employer, or confided exclusively to the public employer by statute or regulations adopted pursuant to statute. The phrase "managerial policy within the exclusive prerogative of the public employer" shall be construed to include but shall not be limited to the functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and number of its personnel, so as to continue public control of governmental functions.

To determine whether the county had a managerial prerogative to change the deputies' work schedules, we apply a "three-step analysis for measuring a particular proposal or action against the managerial policy exception." Appeal of City of Nashua Bd. of Educ., 141 N.H. at 773. "First, to be negotiable, the subject matter of the proposed contract provision must not be reserved to the exclusive managerial authority of the public employer by the constitution, or by statute or statutorily adopted regulation." Id. at 773-74 (quotation omitted). "Second, the proposal must primarily affect the terms and conditions of employment, rather than matters of broad managerial policy." Id. at 774 (quotation omitted). "Third, if the proposal were incorporated into a negotiated agreement, neither the resulting contract provision nor the applicable grievance process may interfere with public control of governmental functions contrary to the provisions of RSA 273-A:1, XI." Id. (quotation omitted).

Applying this three-step analysis to the present case, we conclude that the deputies' scheduling was a mandatory subject of bargaining that the county could not unilaterally change after the union filed its petition. See id. at 772 (noting that a public employer's "unilateral change in a term or condition of employment . . . during negotiations for an initial CBA . . . is tantamount to a refusal to negotiate that term and destroys the level playing field necessary for productive and fair labor negotiations" (emphasis added; quotation omitted)); see also Piggly Wiggly, Tuscaloosa Div., Etc. v. N.L.R.B., 705 F.2d 1537, 1538-39 (11th Cir. 1983) (describing the "'critical period'" during which unfair labor practices may occur under the National Labor Relations Act as beginning "when a representation petition is filed").

First, the parties here fail to identify any "independent statute, or any constitutional provision or valid regulation, that reserves to the [county] the

exclusive authority" to alter the deputies' work schedules. Appeal of City of Nashua Bd. of Educ., 141 N.H. at 774. Instead, the county refers to the deputies' hiring letters and a "specifically designated policy of the Sheriff's department" that allegedly reserved for the sheriff the "exclusive right to set work schedules of deputies." Even assuming that this policy was in place, the county fails to argue, or present any evidence, that such a policy was codified in any constitution, statute, or regulation. See id. Therefore, we proceed to the second step in the analysis.

We also conclude that the change in schedules "primarily affect[s] the terms and conditions of employment, rather than matters of broad managerial policy." Id. As previously noted, RSA 273-A:1, XI defines the terms and conditions of employment to specifically include "wages, hours and other conditions of employment." (Emphasis added.) "[O]ur cases have consistently recognized proposals and actions that primarily affect wages or hours as mandatory subjects of bargaining." Appeal of City of Nashua Bd. of Educ., 141 N.H. at 775 (emphasis added). Additionally, "a public employer's 'greater' power to create or eliminate a position or program does not necessarily include the 'lesser' power to unilaterally determine wages and hours for the position or program." Id. Thus, the change in Rowe's and Lemoi's hours of work in the civil department from 4-10 to 5-8 schedules primarily affected the terms and conditions of the deputies' employment. See id.

Finally, we "conclude that if this proposal were incorporated into a negotiated agreement, the resulting contract provision would not interfere with public control of governmental functions." Appeal of Town of North Hampton, 166 N.H. ___, ___, 93 A.3d 299, 303 (2014). Preventing the county from unilaterally altering the deputies' schedules after the union's petition was filed "does not present the type of problem we have identified in this context: hindering or impeding a public employer's authority to establish policy, standards, or criteria for disciplinary action." Appeal of City of Nashua Bd. of Educ., 141 N.H. at 775; see Appeal of White Mts. Regional School Bd., 125 N.H. 790, 794 (1984) (noting that a "unilateral action to change hours of work" is "forbid[den]"). Because the changes in the deputies' schedules satisfy all three steps of the analysis, the changes are mandatory subjects of collective bargaining. See Appeal of City of Nashua Bd. of Educ., 141 N.H. at 774.

Nonetheless, the county argues that the sheriff did not violate the status quo doctrine by changing the work schedules of Rowe and Lemoi subsequent to the filing of the union's petition because the sheriff had exercised the authority to establish and change work schedules before the petition was filed. Although the letters by which Rowe and Lemoi were originally offered employment stated that "[t]he Sheriff reserves the right to adjust working hours," the evidence before the PELRB concerning the manner in which the sheriff actually exercised his scheduling authority prior to the filing of the petition was conflicting, and supports the PELRB's finding that the sheriff "was indifferent

to whether the Deputies worked a 5-8 or a 4-10 schedule." In these circumstances, we cannot say that the PELRB's determination that the county violated the status quo doctrine, and thereby committed an unfair labor practice, by unilaterally altering the deputies' schedules, over their objection, following the filing of the union's petition was unsupported by the evidence or legally erroneous.[2] See id. at 774-76. Therefore, the PELRB's decision on this point is affirmed.

IV

Turning to the changes to the pay rate for the outside detail work and the way in which overtime was calculated, the union correctly notes that the county does not argue on appeal that these two changes did not involve mandatory subjects of bargaining. Therefore, any claim of error predicated on this ground is waived. See Aubert v. Aubert, 129 N.H. 422, 428 (1987) ("Arguments not briefed are waived on appeal."). Accordingly, we cannot conclude that the PELRB erred in determining that the county committed an unfair labor practice by violating the status quo when it made these two unilateral changes after the union filed its certification petition.

Nevertheless, the county maintains that it was justified in making these two changes because of the DOL investigation. It contends that it had "no choice but to comply with" what it "understood to be mandated" by the DOL, and, thus, that it changed these practices to avoid possible future fines and penalties that could have been imposed by the DOL.

We are not persuaded. Even assuming that the county actually made the changes in response to the DOL investigation, "the FLSA sets only minimum standards, a floor, not the maximum amount an employer may agree to pay." U.S. Dept. of Air Force v. F.L.R.A., 952 F.2d 446, 455 (D.C. Cir. 1991) (Randolph, J., dissenting); see also Rogers v. City of Troy, New York, 148 F.3d 52, 57 (2d Cir. 1998) ("The FLSA sets a national 'floor' in terms of working conditions, in order to protect workers from the substandard wages and excessive hours that might otherwise result from the free market. Parties may, of course, contract for additional rights above those guaranteed by the statute."). Apart from its apparent misunderstanding, then, nothing prevented

[2] To the extent that the county invites us to adopt the reasoning and outcome of Marion Cty. Law Enf. Assn. v. Marion Cty., 883 P.2d 222 (Or. Ct. App. 1994), we decline the invitation. That case involved a collective bargaining agreement that explicitly provided the employer with the "discretion to change the work schedule" of the employees as necessary. Marion Cty. Law Enf. Assn., 883 P.2d at 225. Since that written agreement was the "basis for determining the status quo," when the employer changed the employees' schedules pursuant to that agreement, the court concluded that "there was no change in the status quo and, hence, no unfair labor practice." Id. Here, however, there was no explicit written collective bargaining agreement (expired or otherwise) that reserved to the sheriff the right to set work schedules. Thus, this case and Marion Cty. are readily distinguishable.

the county from continuing to pay the increased outside detail wage and continuing to include benefit time when computing overtime wages, as these were simply wages and benefits greater than what the FLSA required. Therefore, we conclude that the county has not met its burden of demonstrating that the PELRB erred in finding that these changes constituted an unfair labor practice. See RSA 541:13.

The county also asserts that the PELRB erred by failing to properly account for county policy regarding overtime calculations. It maintains that the county "had a countywide overtime policy that was part of its Employee Manual" and that the DOL investigation "brought to light the conflict between the Sheriff's department and all other county employees . . . with respect to the calculation of overtime." At bottom, the county contends that, because the way the sheriff had been calculating overtime prior to the filing of the union's petition violated county policy, the status quo doctrine should not require it to continue to violate that policy.

We decline to consider this argument. "It is the burden of the appealing party, here the [county], to provide this court with a record sufficient to decide [its] issues on appeal." Bean v. Red Oak Prop. Mgmt., 151 N.H. 248, 250 (2004). However, in its briefs, the county fails to cite any evidence in the record to support its contention that such a county policy existed. And although the county referenced a portion of its alleged policy in its motion for rehearing filed with the PELRB, it acknowledged in that motion that "[a]dditional testimony and exhibits are necessary to clarify the existing personnel policies (status quo) of the County and the corresponding authority and responsibilities of the Board of County Commissioners vis-à-vis the Sheriff with respect to establishing and implementing personnel policies." In essence, the county's motion asked the PELRB to permit it to reopen the hearing and allow it to present additional evidence, without making any showing as to why such evidence could not have been presented at the original hearing. The PELRB was under no obligation to grant such a request, and the county has not demonstrated that the board unsustainably exercised its discretion in failing to do so. Cf. Brown v. John Hancock Mut. Life Ins. Co., 131 N.H. 485, 492 (1989).

V

Finally, the county notes that the PELRB made no finding of retaliation or improper motive by the sheriff in changing the deputies' schedules, the pay rate for the outside detail work, and the manner in which overtime compensation was calculated. The county argues that such a finding is a necessary prerequisite to an unfair labor practice. In support of its position, the county cites Hudon v. City of Manchester, 141 N.H. 420, 424 (1996) ("We have recognized that a claim under RSA 273-A:5 requires evidence of a retaliatory or discriminatory motive on the part of the public employer.");

Appeal of Sullivan County, 141 N.H. 82, 88-89 (1996) (stating that "the union must prove some minimal degree of illegal motivation on the part of the employer to commit an unfair labor practice before the PELRB can find that RSA 273-A:5, I(a) or (b) has been violated"); and Appeal of Prof. Firefighters of E. Derry, 138 N.H. 142, 145 (1993) (noting that to establish an unfair labor practice under RSA 273-A:5, one "must prove by a preponderance of the evidence some element of retaliatory action"). These cases are easily distinguishable from this case, however, because none of them involved an employer making a unilateral change to the terms and conditions of employment after a petition for certification of a bargaining unit had been filed with the PELRB, as occurred here.[3]

Additionally, in our recent decision in Appeal of Town of North Hampton, we concluded that "a finding of anti-union animus was not necessary" for the PELRB to determine that the public employer "committed an unfair labor practice by unilaterally setting the wage and other conditions of employment." Appeal of Town of North Hampton, 166 N.H. at ___, 93 A.3d at 305. In that case, we reasoned that a "unilateral change in a condition of employment is equivalent to a refusal to negotiate that term and destroys the level playing field necessary for productive and fair labor negotiations." Id. (quotation omitted). For the same reason, we reject the county's argument here that the PELRB erred in finding an unfair labor practice without making findings of retaliation or improper motive on the part of the county. See id.

Affirmed.

DALIANIS, C.J., and HICKS, CONBOY, and BASSETT, JJ., concurred.

[3] As the union correctly observes, in Appeal of Sullivan County, the employer both decided to make the changes at issue and provided notice of its decision to do so to prospective bargaining unit members before the filing of the petition for certification. See Appeal of Sullivan County, 141 N.H. at 88.

NH Supreme Court affirmed this decision on 11-14-2014, Slip Op. No. 2013-506 (NH Supreme Court Case No. 2013-506)

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

New England Police Benevolent Association

v.

Strafford County Sheriff's Office

Case No. G-0196-2
Decision No. 2013-048

Appearances: Kevin E. Buck, Esq., Nolan, Perroni, Harrington, LLP
Lowell, Massachusetts for the Complainant

Gary Wulf, Labor Relations Consultant,
Strafford County, New Hampshire for the Respondent

Background:

On November 19, 2012 the New England Police Benevolent Association (Union) filed an unfair labor practice complaint claiming that the County violated RSA 273-A:5, I (a), (b), (c), and (g). The Union charges that after it filed a petition for certification of a new bargaining unit the County changed the terms and conditions of employment for employees holding proposed bargaining unit positions. The alleged improper changes include hours of work and work schedule changes, a change in the rate employees are paid for outside detail work, and the discontinuation of the inclusion of benefit (holiday, vacation, sick) time when computing hours worked for overtime purposes. The Union requests that the PELRB: 1) order the County to cease and desist from violating RSA 273-A:5, I; 2) order the County to return to the status quo that existed prior to July 13, 2012; and 3) order the County to pay the Union's costs and attorney fees.

The County denies the charges. According to the County, all of the complained about changes were required as the result of a United States Department of Labor (USDOL) investigation and/or are within the scope of the County's management rights under RSA 273-A:1, XI. At hearing the County also argued the Union's complaint should be dismissed as moot since the Union prevailed in the representation election.

A hearing was held on January 31, 2013 at the offices of the PELRB in Concord. Both parties submitted post-hearing briefs, and the decision in this case is as follows.

Findings of Fact

A. Background and Certification Proceedings:

1. Strafford County is a public employer within the meaning of RSA 273-A:1.

2. On July 13, 2013 the Union filed a petition for certification, requesting that the PELRB determine and approve a bargaining unit comprised of certain employees of the Sheriff's department and conduct a representation election to determine the bargaining unit's exclusive representative.

3. A hearing was held on the Union's certification petition on August 24, 2012. The PELRB subsequently approved a bargaining unit containing the positions of Deputy (full time and part time), Dispatcher (full time and part time), and Secretary. See PELRB Decision No. 2012-254 (November 19, 2012). A secret ballot election was held on December 11, 2012 and the Union has been certified as the bargaining unit's exclusive representative. See PELRB Decision No. 2012-275 and No. 2012-276.

B. Sheriff Department Deputies and ICE Work:

4. Deputies Paul Rowe and Mike Lemoi are both full time Deputies who, as of July 13, 2012, worked in the civil department of the Sheriff's office on a 4-10 schedule (four days a week, ten hours a day). The work of Deputies in the civil department, as reflected by the

evidence in this case and in the certification decision, includes service and enforcement of writs and secure transport of individuals involved in District, Superior, and Probate court proceedings. As of July 13, 2013 the regular rate of pay for Deputies was $22.74 per hour, with an overtime rate (1 ½ times their regular rate) of $34.11 per hour.

5. United States Immigration and Customs Enforcement (ICE) is a federal law enforcement agency that has a local office in Manchester. ICE carries out its operations in part with the assistance of local law enforcement, including the Strafford County Sheriff's Department. Pursuant to contractual arrangement between the Sheriff's department and ICE, Deputies in the Strafford County Sheriff's Department perform ICE work such as the transport of individuals involved in ICE proceedings to various locations throughout New England, sweeps, property runs, and mail runs. Deputies sometimes refer to ICE work as "federal runs." As of September, 2012 part-time Deputies performed the majority of this work, and full-time Deputies filled in as necessary and regularly earn overtime as a result.

6. Prior to July 13, 2012 full time deputies sometimes did federal runs in the middle of their regularly scheduled county work day and sometimes on their day off. This might mean, for example, that a deputy's work day would consist of two hours of county work, followed by three hours of ICE work, followed by three hours of county work. When a deputies' work day included a mixture of County work and ICE work the County did not record the ICE work as part of the county work day; the County treated such ICE work as "off the county clock."

7. By September of 2012 the County had decided to establish two new full time Deputy positions that would be dedicated to ICE work.

8. Sheriff Wayne Estes discussed the new positions in September with Deputies Rowe and Lemoi, both of whom were interested but only so long as their ICE work schedule was "5-8" (five days a week, eight hours a day). The Deputies preferred a 5-8 ICE work schedule because

of overtime considerations - they had reasonably calculated that they could maximize their earnings working a 5-8 ICE schedule, a legitimate and important employee objective. The Deputies believed the Sheriff understood and agreed to their schedule request in the event they accepted the full time ICE positions.

9. Neither Deputy had asked to have their current schedule as Deputies working in the civil department changed from a 4-10 to a 5-8 schedule. In fact, both Deputies preferred a 4-10 schedule in their civil department positions as this schedule allowed them to do federal runs on their day off on an over time basis which, they reasonably judged, allowed them to maximize their earnings more than would be the case if they worked a 5-8 schedule in the civil department.

10. On October 2, 2011 Sheriff Estes' office circulated a proposed ICE schedule for the new full time Deputy ICE positions. The schedule called for Deputies Rowe and Lemoi to work a 4-10 ICE schedule despite their earlier discussions with Sheriff Estes about working a 5-8 ICE schedule. See County Exhibit 4-A and 4-B.

11. Deputy Lemoi promptly responded by email to the Sheriff's proposed 4-10 ICE schedule and requested implementation of the schedule agreed upon in September. He also stated that "[i]f the previously agreed upon schedule is not an option, then I request to stay in the Civil Department." See County Exhibit 5-A.

12. Several hours later Sheriff Estes responded as follows: "As per your request, you will be staying on as a Civil Deputy effective 10/15/12. Work hours will be Mon-Fri, 8 hours per day per your request." See County Exhibit 5-A. In this email Sheriff Estes notified the Deputies that he was changing their existing schedule as Civil Deputies from 4-10 to 5-8 even though they were not moving into the new ICE positions. The Sheriff's position was that he had given the Deputies the work schedule that they had requested, and both Deputies have remained on a 5-8

scheduled since October 15, 2012 and have earned overtime while on the 5-8 schedule, as reflected in County Exhibit 6.

C. Outside Detail Work:

13. In addition to their work for the County Deputies sometimes work "outside details." Outside detail work occurs when Deputies are hired by third parties (like area police departments) to provide services consistent with their skills, training, and qualifications. Outside detail work is not part of a Deputy Sheriff's normal work day or schedule, it is work that is valued by employees because of the additional compensation it provides, and Deputy Sheriffs sign up for outside detail work as it becomes available. As reflected in Union Exhibit E, the County is paid for such detail work by a third party and a portion of these payments is used to pay Deputies an outside or special detail wage. A portion of the third party payment is retained by the County. Outside detail work thus serves as an opportunity for Deputy Sheriffs to supplement their earnings and it also provides additional revenue to the County.

14. Deputies have regularly worked outside special details for the Durham police department on homecoming weekend in the fall at the University of New Hampshire (UNH). The Deputies primarily transport individuals taken into custody for various offenses to holding facilities, an activity known as "van detail."

15. Union Exhibit E is a copy of the County's Outside Detail Agreement used for the UNH van detail. It provides that the third party "agrees to compensate the Strafford County Sheriff's Office at the rate of $52.00 per hour, per Deputy Sheriff (4 hour minimum)." Prior to July 13, 2012, Deputies who worked such outside details were paid a detail work rate of $34.11, which also happens to be an amount equal to their overtime rate. However, the Deputies were always paid the detail work rate regardless of how many hours they had otherwise worked for the County in the pay period and regardless of whether they were eligible for overtime.

D. The United States Department of Labor Investigation:

16. In the summer of 2012 the United States Department of Labor (USDOL) completed an investigation of the Sheriff's department wage and hour practices during the period June 12, 2010 to June 2, 2012. The investigation concerned possible violations of the Fair Labor Standards Act (FLSA). The investigator did not testify at hearing, but the results of the investigation are summarized in an August 14, 2012 letter (County Exhibit 8) from the USDOL's Manchester office to the County Finance Director and include the following:

> Thank you for your cooperation and courtesy extended to Wage and Hour Investigator Brian Cleasby during the recent Fair Labor Standards Act (FLSA) investigation of your firm. The investigation covered the period 06/12/10 to 06/02/12 and found that your employees are subject to the requirements of the FLSA.
>
> The investigation found violations of FLSA section 7 resulting from your failure to pay statutory overtime pay for hours worked in excess of 40 per week. Specifically, you failed to include federal transport hours into the total work hours of non-exempt employees when computing overtime pay for hours worked in excess of 40 per week. As a result, the employees were paid at their regular hourly rate of pay with no additional half-time premium for hours worked in excess of 40 per week
>
> The investigation further found violations of FLSA section 11 resulting from your failure to keep an accurate record of all hours worked for non-exempt employees. Specifically, you failed to retain an accurate record of hours worked per day and per week by all non-exempt employees for 2010.
>
> As a result of these violations, five employees were found due back wages totaling $4,812.17.
>
> Investigator Cleasby has advised me that you agreed to comply fully with all the provisions of the FLSA in the future. Specifically, you agreed to include federal transport hours into the total work hours of non-exempt employees for overtime purposes and pay all covered non-exempt employees an additional one-half times their regular rate of pay for all hours worked in excess of 40 hours per week.
>
> Additionally, you agreed to record and maintain an accurate record of hours worked per day and per week for all covered non-exempt employees. You are required to maintain pay records for minimum (sic) of three years and to maintain time records for a minimum of two years.

17. Both Sheriff Estes and County Administrator Raymond Bower met with the USDOL investigator to review the results of his investigation. Based upon these meetings, which all took

place prior to the USDOL's August 14, 2012 letter, Sheriff Estes and Mr. Bower understood that benefit time should not be counted when computing overtime pay for hours worked in excess of 40 per week and that outside special detail work (like the UNH van transport detail) should be treated like regular county work and paid at regular county rates and not at the work detail rate.

18. Subsequent to the July 13, 2012 filing of the certification petition the Sheriff's department discontinued the established practice of including benefit time when computing hours worked for purposes of overtime and discontinued the established practice of payment of the outside detail rate ($34.11), irrespective of the number of hours worked.

Decision and Order:

Decision Summary:

The County committed an unfair labor practice because it failed to maintain the status quo during the pendency of bargaining unit formation and representation election proceedings. The County improperly changed the work schedule of two Deputies, improperly changed the manner in which overtime was computed, and improperly changed the outside detail pay rate. The County shall restore the affected employees to the status quo ante that existed as of the filing of the certification petition and make them whole.

Jurisdiction:

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, *see* RSA 273-A:6.

Discussion:

Under the provisions of the Public Employee Labor Relations Act (Act) it is a prohibited practice for any public employer:

> (a) To restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter;

(b) To dominate or to interfere in the formation or administration of any employee organization;
(c) To discriminate in the hiring or tenure, or the terms and conditions of employment of its employees for the purpose of encouraging or discouraging membership in any employee organization;
(d) To discharge or otherwise discriminate against any employee because he has filed a complaint, affidavit or petition, or given information or testimony under this chapter;
(e) To refuse to negotiate in good faith with the exclusive representative of a bargaining unit, including the failure to submit to the legislative body any cost item agreed upon in negotiations;
(f) To invoke a lockout;
(g) To fail to comply with this chapter or any rule adopted under this chapter;
(h) To breach a collective bargaining agreement;
(i) To make any law or regulation, or to adopt any rule relative to the terms and conditions of employment that would invalidate any portion of an agreement entered into by the public employer making or adopting such law, regulation or rule.

See RSA 273-A:5, I. The Union charges that the County violated sections (a), (b), (c), and (g). Also of relevance to this case is RSA 273-A:3, I which "provides that terms of employment are subjects of mandated bargaining." *Appeal of White Mountains Regional School Board,* 125 N.H. 790, 792 (1984).

When a petition to form a new bargaining unit and hold a representation election has been filed, the law requires that public employers maintain existing terms and conditions of employment, or the "status quo," effective upon the filing of the petition. *AFSCME, Local 1348 for Hanover Town Employees v. Town of Hanover,* PELRB Decision No. 95-47. The purpose of the status quo doctrine is twofold. First, it maintains appropriate conditions for the conduct of the representation election:

> We have been diligent in attempting to prevent either the enhancement or reduction in employee benefits prior to a bargaining agent election. Notwithstanding that sometimes modifications by an employer may prompt employees to vote for a union, our function is to attempt to achieve an atmosphere where employees may vote in such a way to express their "uninhibited desires" relative to the organizational campaign.

See AFSCME, Local 1348 for Hanover Town Employees v. Town of Hanover, PELRB Decision No. 95-47. Second, it ensures the public employer will not have an unfair advantage when

negotiations commence on a first contract because it protects against the bargaining "playing field" being "tilted in (the employer's favor) with the union having to negotiate and recover to conditions as they existed...before getting off to an even start." *Id.*

> Maintenance of the status quo demands that all terms and conditions of employment remain the same during collective bargaining after a CBA has expired. We have explained that the status quo doctrine derives from RSA 273-A:3, I, which imposes the obligation to negotiate in good faith over the terms of employment, and from RSA 273-A:5, I (e) (1987), which makes it an unfair labor practice for a public employer to refuse to negotiate in good faith. *A public employer's unilateral change in a term or condition of employment (whether during negotiations for an initial CBA or during a status quo period following expiration of a CBA) is tantamount to a refusal to negotiate that term and destroys the level playing field necessary for productive and fair labor negotiations.*
>
> As both our cases and federal cases under the National Labor Relations Act indicate, however, the status quo doctrine is limited by its rationale. Thus, an employer is prohibited from making unilateral changes on mandatory subjects of collective bargaining, but not on permissive topics of collective bargaining. By definition, an employer must bargain over mandatory topics and may--but need not--bargain over permissive or permissible topics. Accordingly, a unilateral change in the former is an unlawful refusal to engage in required negotiation, but a unilateral change in the latter is generally a legitimate exercise of discretion.

Appeal of Nashua Board of Education, 141 N.H. 768, 772-773 (1997)(quotations and citations omitted)(emphasis added).

Under the Public Employee Labor Relations Act (PELRA), "terms and conditions" of employment are:

> [W]ages, hours and other conditions of employment other than managerial policy within the exclusive prerogative of the public employer, or confided exclusively to the public employer by statute or regulations adopted pursuant to statute. The phrase "managerial policy within the exclusive prerogative of the public employer" shall be construed to include but shall not be limited to the functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and number of its personnel, so as to continue public control of governmental functions.

See RSA 273-A:1, XI. Whether a particular matter qualifies as a "term and condition of employment" which must be bargained is determined by a three step test:

> First, to be negotiable, the subject matter of the proposed contract provision must not be reserved to the exclusive managerial authority of the public employer by the constitution, or by statute or statutorily adopted regulation.... Second, the proposal must primarily affect the terms and conditions of employment, rather than matters of broad managerial policy....Third, if the proposal were incorporated into a negotiated agreement, neither the resulting contract provision nor the applicable grievance process may interfere with public control of governmental functions contrary to the provisions of RSA 273-A:1, XI. A proposal that fails the first part of the test is a prohibited subject of bargaining. A proposal that satisfies the first part of the test, but fails parts two or three, is a permissible topic of negotiations, and a proposal that satisfies all three parts is a mandatory subject of bargaining.

Appeal of State, 138 N.H. 716, 721-723 (1994).

The Union complains in this case about three changes the County has made: 1) the alteration of the Deputy Sheriffs' work schedule which impacts their overtime earnings; 2) the change in the manner overtime is calculated; and 3) the change in the rate of pay for outside detail work.

Turning to the first part of the three part *Appeal of State* test, there is "no independent statute, or any constitutional provision or valid regulation" that reserves to the County the exclusive authority to unilaterally establish the terms and conditions in these three areas. *See Appeal of City of Nashua Bd. Of Educ.,* 141 N.H. 768, 774-775 (1997) (the provisions of RSA 273-A cannot serve as the basis for the independent authority required under the first part of the *Appeal of State* test).

As to the second part of the test, the proposal primarily affects the terms and conditions of employment, rather than matters of broad managerial policy. Matters of managerial policy include, at least, "the functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and number of its personnel." RSA 273-A:1, XI. Often, both the public employer and the employees will have significant interests affected by a proposal, and determining the primary effect of the

proposal requires an evaluation of the strength and focus of the competing interests. *Appeal of City of Nashua Bd. Of Educ.*, 141 N.H. at 774; *Appeal of State*, 138 N.H. 716, 722 (1994).

In this case, the record reflects that the switch of the Deputy Sheriffs from a 4-10 to a 5-8 schedule was ostensibly done at the request of the employees, and not to implement any particular managerial policy. The County was indifferent to whether the Deputies worked a 5-8 or a 4-10 schedule. However, it is apparent the County misapprehended the Deputies' request; they were only seeking a 5-8 schedule in the event they assumed the new full time ICE positions. The interests of the Deputies in continuing with a 4-10 schedule given the opportunity for over time ICE work on the fifth day (the Deputies' day off) or their interest in simply having a four day work week are significant. The fact that the Deputies have been able to earn some overtime since being placed on a 5-8 schedule (County Exhibit 6) does not vitiate the strength or legitimacy of their interest in the hours and earning potential presented by the 4-10 schedule. In weighing the respective interests of the employees and the County, the County's schedule change primarily "affects the wages and hours of [these] employees, rather than issues of broad managerial policy" under the second part of the three part test. The same is also true with respect to the changes the County made in the calculation of overtime (the exclusion of benefit time in calculating overtime eligibility) and in the amount paid to Deputies who work outside details.

The Union's position in this case also satisfies the third part of the three part *Appeal of State* test, since the inclusion of contract provisions on these subjects does not interfere with public control of governmental functions contrary to the provisions of RSA 273-A:1, XI.

The County argues the changes it made in overtime computation and outside detail pay rates were justified given the results of the USDOL investigation. In general, employers like the County must comply with certain FLSA wage and record keeping requirements. *See* 29 U.S.C.

201, *et seq.* Such requirements include an obligation to provide overtime wages for hours worked in excess of specified thresholds. However, the FLSA does not restrict the ability of employers like the County to provide workplace benefits greater than those required under the FLSA. It also does not prohibit the inclusion of benefit time when computing overtime wages, and it does not prohibit the payment of a special detail wage rate like the $34.11 per hour Deputies have always been paid for outside details like the UNH van detail. Likewise, the USDOL report (County Exhibit 9) does not prohibit (or even address) the established Sheriff Department practices in these areas.

In accordance with the foregoing, the three unilateral management changes about which the Union complains qualify as mandatory subjects of bargaining and are terms and conditions of employment which the County could not unilaterally change once the certification petition was filed. They constitute mandatory subjects of bargaining in accordance with *Appeal of State*. The Union's request for dismissal based on the outcome of the representation election is denied. The County violated its obligation under RSA 273-A:3, I to bargain with the Union when it made the discussed changes to the status quo and therefore committed an unfair labor practice in violation of RSA 273-A:5, I (g)(to fail to comply with this chapter or any rule adopted under this chapter). The fact that County made these changes in advance of the representation election is also an unfair labor practice, as the County has violated RSA 273-A:5, I (a)(to restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter); (b)(to dominate or to interfere in the formation or administration of any employee organization); and (c)(to discriminate in the hiring or tenure, or the terms and conditions of employment of its employees for the purpose of encouraging or discouraging membership in any employee organization).

The County is ordered to provide the following relief: 1) restore the Deputies to a 4-10 schedule; 2) reinstate the outside detail pay rate in effect on July 13, 2012; 3) make whole employees who have worked outside details after July 13, 2012 but were deprived of the outside detail pay rate in effect as of July 13, 2012; 4) include benefit time when calculating whether employees are eligible for overtime compensation as was the practice as of July 13, 2012; and 5) make whole employees who have been deprived of overtime because of the exclusion of benefit time in the overtime calculation.

Posting: The County shall post this decision for thirty (30) days in a conspicuous place where employees affected by this decision work.

So ordered.

March 29, 2013

Douglas L. Ingersoll, Esq.
Executive Director/Presiding Officer

Distribution:

Kevin E. Buck, Esq.
Gary Wulf, Labor Relations Consultant

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

New England Police Benevolent Association

v.

Strafford County Sheriff's Office

Case No. G-0196-2
Decision No. 2013-075

Order on Motion for Review of Hearing Officer Decision

The County filed a Motion for Review of Hearing Officer Decision No. 2013-048 pursuant to Pub 205.01, which provides in part as follows:

(a) Any party to a hearing or intervenor with an interest affected by the hearing officer's decision may file with the board a request for review of the decision of the hearing officer within 30 days of the issuance of that decision and review shall be granted. The request shall set out a clear and concise statement of the grounds for review and shall include citation to the specific statutory provision, rule, or other authority allegedly misapplied by the hearing officer or specific findings of fact allegedly unsupported by the record.

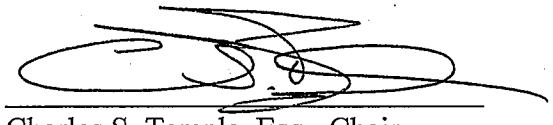
(b) The board shall review whether the hearing officer has misapplied the applicable law or rule or made findings of material fact that are unsupported by the record and the board's review shall result in approval, denial, or modification of the decision of the hearing officer. The board's review shall be made administratively based upon the hearing officer's findings of fact and decision and the filings in the case and without a hearing or a hearing de novo unless the board finds that the party requesting review has demonstrated a substantial likelihood that the hearing officer decision is based upon erroneous findings of material fact or error of law or rule and a hearing is necessary in order for the board to determine whether it shall approve, deny, or modify the hearing officer decision or a de novo hearing is necessary because the board concludes that it cannot adequately address the request for review with an order of approval, denial, or modification of the hearing officer decision. All findings of fact contained in hearing officer decisions shall be presumptively reasonable and lawful, and the board shall not consider requests for review based upon objections to hearing officer findings of fact unless such requests for review are supported by a complete transcript of the proceedings conducted by the hearing officer prepared by a duly certified stenographic reporter.

Since the County's motion is not supported by a duly prepared transcript of the proceedings, the hearing officer's findings of fact are not subject to review per Pub 205.01 (b).

We have reviewed the hearing officer's decision in accordance with the provisions of Pub 205.01 and unanimously approve the hearing officer's decision and deny the County's motion.

So ordered.

Date: May 22, 2013



Charles S. Temple, Esq., Chair

By vote of Chair Charles S. Temple, Esq., Board Member Carol Granfield, and Board Member Senator Mark Hounsell.

Distribution:
Kevin E. Buck, Esq.
Gary Wulf, Labor Relations Consultant
Peter J. Perroni, Esq.

NH Supreme Court affirmed this decision on 11-14-2014, Slip Op. No. 2013-506
(NH Supreme Court Case No. 2013-506)

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

New England Police Benevolent Association

v.

Strafford County Sheriff's Office

Case No. G-0196-2
Decision No. 2013-111

Order on Motion for Rehearing

The County filed a motion for rehearing of PELRB Decision No. 2013-075. Motions for rehearing are governed by RSA 541:3 and Pub 205.02[1], which provides in part as follows:

> **Pub 205.02 Motion for Rehearing.**
>
> (a) Any party to a proceeding before the board may move for rehearing with respect to any matter determined in that proceeding or included in that decision and order within 30 days after the board has rendered its decision and order by filing a motion for rehearing under RSA 541:3. The motion for rehearing shall set out a clear and concise statement of the grounds for the motion. Any other party to the proceeding may file a response or objection to the motion for rehearing provided that within 10 days of the date the motion was filed, the board shall grant or deny a motion for rehearing, or suspend the order or decision complained of pending further consideration, in accordance with RSA 541:5.

Upon review, the County's Motion for Rehearing is denied.

So ordered.

Date: July 8, 2013

Charles S. Temple, Esq., Chair

By vote of Chair Charles S. Temple, Esq., Board Member Carol Granfield, and Board Member Senator Mark Hounsell.

Distribution:
Peter J. Perroni, Esq.
Lincoln Soldati, Esq.

[1] The parties are advised that action on the County's motion has been delayed due to scheduling constraints.