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:

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