

**State of New Hampshire**

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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NEW HAMPSHIRE TROOPERS  
ASSOCIATION

Petitioner

v.

NEW HAMPSHIRE DEPARTMENT OF  
SAFETY, DIVISION OF STATE POLICE

Respondent

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CASE NO. P-0754-10

DECISION NO. 2003-029

APPEARANCES

Representing the New Hampshire Troopers Association:

James W. Donchess, Esquire

Representing the State of New Hampshire:

Thomas F. Manning, Director of Personnel

BACKGROUND

The New Hampshire Troopers Association (Association) filed an unfair labor practice charge on June 26, 2002 pursuant to RSA 273-A:5, I (e), (h), and (i), alleging that the NH Department of Safety/Division of State Police (Division) and its agents undertook a prohibited unilateral action and breached the Collective Bargaining Agreement (CBA) by not properly calculating the amount of pay due to Sergeant James White, a Major Crime Unit member, who had been called back to duty to investigate a crime on January 19, 2001. Specifically, the Union claims that there is a "past practice"

governing the determination of that point in time at which the unit member's paid time begins in the event that member is "called back" to duty.

The Division filed its answer with the PELRB on July 11, 2002. It denies that a past practice existed between the parties that established the time the initial telephone call is received by a member as the beginning of the member's return to work for purposes of calculating the amount of time for which the member was to be paid. It denies that it undertook any unilateral action that is prohibited by either the statute or the parties' collective bargaining agreement. The Division maintains that the method of calculation it utilized on January 19, 2002 in the case of Sgt. White is set by the parties' CBA. The Division says that the initial start time is that moment at which the member signs in electronically using his or her vehicle's radio.

In addition to the statutory basis for this action as referenced above, the grievance language specifically negotiated and agreed upon by parties in their existing CBA stipulated that issues of contract interpretation shall be arbitrated at the fourth and last step by the PELRB.

#### FINDINGS OF FACT

1. The State of New Hampshire through its Department of Safety, Division of State Police ("Division") employs individuals, including sworn officers and troopers, to perform certain public safety services and therefore is a public employer within the meaning of RSA 273; A: I X.
2. The NH Troopers Association ("Association") is the dually certified exclusive bargaining representative for sworn personnel employed by the Division of State Police up to and including the grade of sergeant.
3. The Division and the Union are parties to a current collective bargaining agreement (CBA) that began effective in 2001 and by its terms, "shall remain in effect through June 30, 2003, or until such time as a new Agreement is executed." (Joint Exhibit #1, ARTICLE 22.1). This CBA also provides that in the event that are "grievances and disputes arising with respect to interpretation or application of any provision of this agreement" the last step in the resolution process provides for adjudication by the PELRB which shall be final and binding. (ARTICLE 14.1 and ARTICLE 14.5.1)
4. The parties' CBA contains the following language in the Overtime clause (Article VII):
  - "7.2 The following provision constitutes the understanding of the parties with respect to defining "time worked" for the purpose of determining the number of hours required for the overtime compensation eligibility.

“Hours worked” shall include all hours actually worked and all hours on approved leave status including bona fide meal periods, bona fide rest periods and absences due to a compensable worker’s compensation injury except any time worked for which specific compensation provisions have been established elsewhere in the Agreement.”

“7.3 Employees called back to work without prior notice on the same day after once leaving work or before the next regular starting time, shall be guaranteed a minimum of not less than four (4) hours compensation.”

“7.4 Employees called back to work pursuant to 7.3 shall have the ‘hours worked’ calculated from portal to portal.”

5. Sgt. James W. White’s relevant service with the Division commences with his employment as a Probationary Trooper in August, 1989, his assignment to the Major Crimes Unit in May, 1998 and his tenure in the rank of sergeant in the Major Crimes Unit since May of 1999.
6. On January 19, 2002 Sgt. White received a “call back” telephone call from Sgt. Kelly McClare, who was also assigned to the Major Crimes Unit, informing him of a “suspicious death” case that required Sgt. White to begin work to investigate this case. The call from Sgt. McClare lasted between 5 and 10 minutes during which background information was related and initial mobilization issues discussed that related to the case that necessitated the call.
7. Sgt. White submitted a Weekly Duty Report, Duty Hours (Association Exhibit #1) in the normal course of events that indicated that his start time on January 19, 2002 was 0600 hours reflecting the time of day he received the call requiring him to begin work on the assigned case.
8. Such calls are not uncommon in the Major Crimes Unit and Sgt. White testified that since his appointment to the Major Crimes Unit in 1998 he had received between 20 and 30 so-called “call outs”.
9. Major Barry Hunter has served the Division since his appointment as a Probationary Trooper in March 1978 and continuing through his most recent promotion to the rank of major in 2001. He reviewed Sgt. White’s Weekly Duty Report as part of an examination of all overtime used on that particular case. In the course of that examination he reviewed Sgt. White’s report that indicated an “on” time of 0600 hrs. on January 19, 2002 and an “off” time of 1630 hrs. Major Hunter also reviewed a radio log Unit Report (Association Exhibit #2) that indicated that Sgt. White first

signed "on" via his vehicle's radio at 0632 hrs. and that he signed "off" at 1714 hrs. on that same day.

10. As a result of the overtime review, Lt. Russell Conte requested that Sgt. White write a letter of explanation regarding the conflicting times appearing on the two records. (Association Exhibit #1 Duty Report and Association Exhibit #2 Unit Report). Sgt. White complied on February 5, 2002 (Association Exhibit #3). In addressing the conflict of starting time entry on the Duty Report 0600 hrs. and the 0632 hrs. entry on the radio log Unit Report, Sgt White wrote as follows:

" As I have always been instructed to do, both by my Field Training Officers early in my career, and later by my various Supervisors, I listed the time of the telephone call as the beginning of my duty day...Never before has the practice been questioned. In any call out, the initial telephone call serves not only as the initial notification and oftentimes a wake up call, but facts of the case, along with personnel and strategy considerations, are also discussed, those issues are clearly duty related not personal in nature." (Paragraph #2).

11. Sgt. White's letter of explanation also pointed out that the inverse of conflicting time entries applied at the end of his work such that his radio log Unit Report indicated the signed off on his vehicle radio 44 minutes later than he had indicated on his Duty Report for January 19, 2002.
12. A now retired, former Major Crimes Unit Commander, Lt. David Eastman, testified that it was his practice throughout his career to indicate the time at which he was called as the start time and as promoted through the ranks from 1979 through July 2001 he never challenged the practice of members of that unit putting down the time of the initial call as their start time.
13. A now retired, former supervisor of the Division's section referred to as "Investigative Services" that included the Major Crimes unit, Major Nicholas Halias, testified that he had served with the Division from 1969 to 2000 and that at the times in his career during which he was "in charge" his best recollection was that the start time used by members of the Division was the initial call. Under cross-examination, he stated that he could not say "for a fact" that all members of the Division calculated the start time from the initial call.
14. Trooper John Cody is a member of the Major Crimes Unit and during his 14 years of service with the Division he has served in drug, canine and patrol units before his present assignment to the Major Crimes Unit. He has served in these units as a Trooper and as a Trooper Detective. Prior to coming into the Major Crimes Unit, he served with Troop D and during his service as a Trooper and as a Trooper Detective, he was paid from the time he was first called. He testified that upon his assignment to Major Crimes Unit, Lt. Conte who was a Sergeant at the time told him, "Now we work in a professional unit... you put in and get paid for the time you are called."

15. Sgt. Kelly McClare has served in the Major Crimes Unit for 6 ½ years and testified that, "When you received the call at home is when you started." Sgt McClare has been involved in negotiating four CBA's between the parties, including the current one. His recollection is that Troopers senior to him utilized the "initial call" method of determining the start time for duty. Sgt. Kelly testified that since January 19, 2002 the manner of computation in Major Crimes Unit has changed and that he believed the manner of computation now varies by unit.
16. Trooper Lou Copponi has been in the Division since 1984 and has participated in every CBA negotiation since 1990. He testified that the language of the current CBA regarding the specific type of "call backs" at issue in these proceedings has remained the same in the succession of the parties' CBA's. He did acknowledge that there had been other changes to the CBA provisions that related to the number of hours (Article 6.3) and minimum hours for "call backs" (Article 7.6). However, he testified that there have never been any changes to the type of "call back" at issue in these proceedings as contained in Articles 7.2, 7.4 and 7.6.
17. The parties' current CBA contains language in Article 7.6 that has existed in the same form in prior collective bargaining units for as long as any witness could recall:

"7.6 Any employee who is not on duty and is required by the employer to appear in court or at an administrative hearing on behalf of the Employer shall be compensated for all hours worked at time and one-half the regular rate and shall be guaranteed a minimum of four (4) hours compensation. The employee shall be paid portal to portal."
18. The term "portal to portal" is not defined in the parties' CBA. This term has not been the object of specific negotiation discussions used in the context of such "call backs" as Sgt. White was subject to in these proceedings. The term does appear in several clauses of the parties' CBA for specific application to situations such as court appearances, special details and call backs "to work without prior notice on the same day after once leaving work or before the next regular starting time" (Joint Exhibit #1, Article 7.3). (See further, Articles 7.3, 7.4 and 7.6 of the parties' CBA, Joint Exhibit #1).
19. The term "portal to portal" also appears in the parties' CBA in the context of mileage reimbursement as follows: "19.5 All employees shall receive portal to portal mileage reimbursement when on call back." (Joint Exhibit #1)
20. Trooper Copponi testified that the method of computing hours for "call backs" in the past was for members of the Division to utilize the initial time called as the starting time for duty hour calculations and that there had been no conflicts with this practice until January 19, 2002 and the Sgt. White situation in the Major Crimes Unit.

21. The existence of the practice of utilizing the initial call as the start time was substantiated by offers of proof from several other employees of the Division including individuals with much experience as members of the Major Crime Unit, SWAT Unit, Special Investigative Unit or Troop A.
22. When supervisors are making "call back" telephone calls to other Major Crimes Unit members, the supervisors are paid for their time speaking with individuals like Sgt. White.
23. Maj. Barry Hunter has twenty-five years of experience with the Division. He has not served in the Major Crimes Unit. He has not negotiated any of the parties' collective bargaining agreements. He testified that once the supervisor is informed of the need to call back personnel and starts to make calls, he or she is considered on duty. This duty status continues even if that supervisor begins making calls and then attends to such things as taking a shower before returning to make additional calls. He testified that the time when Sgt. White is speaking on the telephone with his supervisor he is entitled to pay.
24. On January 19, 2001, nine individuals were mobilized to address the suspicious death case. Of those nine, seven utilized the "initial call" time to begin work. Of the remaining two that did not utilize the "initial call" time to begin work, one did not begin service until 1000 hrs. because he was not home to receive the initial call and the other was not scheduled for a day off, but rather was scheduled to begin his duty at 0730 hrs. on that same day. Neither of these two individuals testified.
25. Major Hunter used the terms "entered into service" and "left service" to explain the beginning and end of a member's work shift. When requested to explain these terms, Major Hunter stated that, in his opinion, the start time was that "time in the cruiser" when the member signed on to his or her radio using the call sign "10-1" indicating he or she was "ready to serve".
26. Major Hunter did not discuss the method of calculating the start time for "call backs" with either Major Halias, who, from 1995 to 2000, supervised the Investigative Services Unit of which the Major Crimes Unit was a part, or Lt. Eastman who had supervised the Major Crimes Unit members from 1996 to 2001. Major Hunter further testified that he was "entitled" to give the collective bargaining agreement his own interpretation.
27. Capt. Craig Wiggin has been employed with the Division for 19 ½ years and is presently the Commander of the Support Services Bureau. He was assigned to the Major Crimes Unit for 5 ½ years and served as Assistant Commander to Lt. Eastman. During his career with the Division he also was a Field Training Officer in Troop E. He testified that he could not specifically recall telling Probationary Troopers how to record their "call back" time.

28. Capt. Wiggin testified that he understood "portal to portal" to mean the time one signs on and signs off from the vehicle radio. He also believed that "time worked" included telephone calls. His own practice was that he would "make a note of time called" but didn't consider himself on until he signed onto the radio. In his supervisory role, he never questioned Weekly Duty Report submissions.
29. In January 2002, the Division installed a reporting technology referred to as "Computer Assisted Dispatch System (CAD System) that generates documents like Association Exhibit #3, Unit Log. Capt. Wiggin believes that it is a management responsibility to determine if "we are paying our people in an efficient way" and that they should only be paid for "time worked". Capt. Wiggin also expressed the opinion that in the matter of "call backs" the supervisor making the call backs should be paid for time used to make them and those receiving them, in this instance Sgt. White, should not be paid.
30. No other documentary or testimonial evidence was produced by either party to show consistency or variance between the start times indicated on Weekly Duty Reports and radio log Unit Reports for other Association members either prior to January 19, 2002.
31. The parties have previously agreed to the following language in their CBA:

" 18.1 Waiver by either Party of the other's non-performance or violations of any term or condition of this Agreement shall not constitute a waiver of any other nonperformance or violation of any other term or conditions of this Agreement, or of the same nonperformance of (sic) in the future."

#### DECISION AND ORDER

The Public Employee Labor Relations Board ("PELRB") has primary jurisdiction to adjudicate unfair labor practices and makes its determination in this matter pursuant to the authority vested in it under the provisions of RSA 273-A:6. The Association alleges that by reducing the number of reported hours worked by Sgt. White and other members of the Major Crimes Unit on January 19, 2002, thereby reducing the amount of compensation received by these individuals, the Division committed statutory violations. The alleged violations are that such an act constitutes a refusal to negotiate in good faith (RSA 273-A:5, I(e), a breach of the parties' agreement (RSA 273-A:5, I(h) and the establishment of a law, regulation or rule invalidating any portion of an agreement between the parties (RSA 273-A:5, I(i).

The greater weight of the testimony, taking into consideration the credibility of the witnesses most familiar with operations within the Major Crime Unit, established that many, if not all members followed a procedure among sworn personnel within the Major Crimes Unit of fixing the time at which they received their initial "call back" to work, by telephone call, as the beginning of their work time. This manner of reporting the starting time for time worked when called back has existed for many years within the Major Crimes Unit and, it also appears, in other units and Troops within the Division. (Finding of Fact #12 and #13). Credible testimony of a former commander of the Major Crimes Unit indicated that he utilized that manner of reporting as he was promoted through the ranks and until his retirement in July of 2001 (Finding of Fact #12). Many witnesses who had diverse career service assignments, including within the Major Crimes Unit, testified and others whose testimony was summarized as offers of proof (Finding of Fact #20 and #21) established, that during their tenure with various units within the Division they reported the start time for hours worked on a call back as that time when they first received the call to work. (Finding of Fact #14 and #15). One witness who had served for approximately five and one half years in the Major Crime Unit and had served as a Field Training Officer testified that he could not specifically recall telling subordinates how to report their start time. (Finding of Fact #26). This evidence leads us to conclude that the manner of reporting the start time for hours worked as that time when personnel received their initial telephone call was, within the Major Crimes Unit if not the entire Division, pervasive and frequent, and well known by troopers and officers over a long period of time preceding January 19, 2002. Of the nine individuals that received calls on that day to assist in the investigation, seven were in similar duty status as was Sgt. White. All seven reported the initial call as their start time.

That the personnel within the Major Crimes Unit would report their start time on January 19, 2002 as that time when they received the initial telephone call is understandable given the testimony. They had done so previously and in some other units and Troops within the Division without incident and had done so over a long period of time. The supervisory personnel that made the telephone calls to them were being paid for their time in making the calls. (Finding of Fact #22). Also, the discussion between the caller and the individual called involved work related information including status report, personnel requirements and strategy related to the investigation. (Finding of Fact #10).

In January 2002, the Division installed a reporting technology that generated a radio log Unit Report (Association Exhibit #2). Using this technology, Major Hunter reviewed the amount of overtime expended by members of the Division on the investigation of the particular "suspicious death" case occurring on January 19, 2002, including members of the Major Crime Unit who had responded to call backs to work. (Finding of Fact #9). It does not appear to us that a comparative review of Weekly Duty Reports (Association Exhibit #1) submitted by individual members with the radio log Unit Reports (Association Exhibit #2) compiled from electronic reports that indicated when a member activated, i.e. "signed on", using their vehicle's radio had ever previously been undertaken. Major Hunter's review revealed a difference in the start times on the two documents recording Sgt. White's start time on January 19, 2002. The



Weekly Duty Report completed by Sgt. White indicated a start time of 0600 hrs. and the computerized radio log Unit Report indicated a start time of 0632 hrs. ). (Finding of Fact #7 and #9). In response to a request from Lt. Russell Conte for an explanation of the difference in these two start times, Sgt. White wrote that he had been instructed by field training officers and supervisors throughout his varied service since 1989 that his start time when responding to call backs was to be listed as the time he received the initial telephone call. (Association Exhibit #3 and Finding of Fact #10). Sgt. White indicated that he had received an estimated 20-30 "call backs" since joining the Major Crimes Unit in 1998 and his manner of reporting the initial telephone call as the start time had never been questioned.

The Association claims that the evidence demonstrates the existence of a past practice entitling its members to continue to establish the beginning of their work hours as that time at which they receive the initial call. For a "practice" to be binding on both parties it "must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as fixed, and established practice accepted by both parties." Elkouri and Elkouri, How Arbitration Works p.632 (5<sup>th</sup> ed. 1997). We believe that to have a practice "accepted" by both parties both must know of the existence of the practice and accept it. (See PELRB Decision No.1998-084). While there was sufficient evidence that members of the bargaining unit and even past members of the bargaining unit were aware of its existence we find that there is insufficient evidence that the other party, *i.e.* those managers representing the State's interest at the negotiations table, knew of the practice and accepted the manner by which members were reporting their start time until the newly installed computer program made such comparative analysis easy.

However, we also believe that the evidence presented (Finding of Fact #10 and #22) establishes that members are performing work during the time that they are receiving the initial call back and during the time they are making any necessary subsequent calls to other personnel involved in the investigation or undertaking other activities directly related to their recently assigned responsibilities. For this time they must be compensated notwithstanding the testimony of Capt. Wiggin. (Finding of Fact #28). The Division has the obligation to implement management controls to ascertain when its employees are at work so that, *inter alia* they may be "efficiently paid." (Finding of Fact #23).

We find that the Division failed to perform its obligation to properly administer its payroll service or to have adequate control devices in place. This failure contributed to its inability to identify what practices exist or do not exist in its command structure. While this does not reflect favorably on management practices, it cannot be said to indicate that the Division had "accepted" a practice. In this regard, we find that over time the Division waived its right to calculate members' hours of work from a point in time at which that member has passed through the "portal" from individual to employee by entering his or her vehicle for purposes of such "call backs" as occurred on January 19, 2002. On that date, the Division had not undertaken the comparative analysis that

eventually revealed the manner of reporting start time by members. Sgt. White and others who reported their start time as that when they received the initial call reported as they had in the past and therefore should receive payment for time commencing with the time of the initial call.

We believe that on January 19, 2002, the Division was still in a period of "waiver" as negotiated and expressed in the parties' CBA in ARTICLE 18.1. That section provides that if a party has waived performance of a condition or term of the CBA by the other party, such a waiver does not constitute a waiver of the same non-performance in the future. As a result of its comparative examination of the hours worked on January 19, 2002, its refusal to accept the start time reported by Sgt. White and others and culminating with its participation in these proceedings, the Division has terminated its "waiver" and provided adequate notice to members that it would no longer pay for time that precedes the member's entry into service by using his or her vehicle's communication unit. Therefore members will no longer be paid for time worked calculated from the time of receipt of the initial telephone call in the call back situation now before us, but from when they sign into service through use of their vehicle communication unit.

We realize, as we hope the parties do, that our decision presents the Division with the situation that members can put the initial caller on hold while they don appropriate apparel to rush to their unit to sign on and then return to the telephone to obtain the necessary work related information required by the call back. We also realize that the parties have the ability to negotiate additional language into their CBA that can establish a mutually agreeable point in time at which a member's start time for such call backs begins.

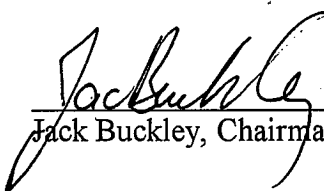
It is uncontroverted that the term "portal to portal" has remained in the CBA since as far back as anyone involved with negotiations could remember.(Finding of Fact #17). It was also uncontroverted that this term has not been the subject of specific negotiations in the context of such call backs as are at issue in these proceedings. (Finding of Fact #16). The term "portal to portal" is not separately defined within the parties' collective bargaining agreement. The term "portal-to-portal pay" is understood in the field of labor relations as payments for time actually spent by an employee at work or in service. Roberts' Dictionary of Industrial Relations, p.603 (4<sup>th</sup> ed. 1994). The term conveys a concept of place, used by the parties in ARTICLE 7.6 of their CBA, as much as a concept of time. So while the parties have had ample opportunity to negotiate a start time free of attachment to an era when employees were not tethered to their place of employment by a vehicle parked in their driveway, they have not. Perhaps they will soon.

In summary, the majority finds that the Division's actions in paying some, but not all, members of the Major Crimes Unit over the course of the CBA at the earlier start time and others at the later start time despite having negotiated to equally treat members who received "call backs" pursuant to ARTICLE 7.4 of the CBA and failing to provide advance notice to members that its prolonged "waiver" regarding start time calculation

constitutes a failure to bargain in good faith and violates RSA 273-A:5, I (e). The majority further finds that Sgt. White and other members of the Major Crime Unit who responded to call backs on January 19, 2002 shall have their work time calculated for that day from the start time reflected on their Weekly Report and compensated accordingly. Members of the Major Crimes Unit shall have their work time, when responding to call backs such as those at issue in these proceedings, calculated from the time they "sign on" using their vehicle communications unit until the parties complete negotiations on new language for ARTICLE 7.4.

So Ordered.

Signed this 31<sup>st</sup> day of *march*, 2003

  
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Jack Buckley, Chairman

By Majority vote, 2-1. Chairman Jack Buckley and Member Seymour Osman voting in favor. Member E. Vincent Hall voting against.

Minority Statement by Mr. Hall:

I respectfully disagree with the findings of the majority and vote against this order. I do so because of the obvious frequency with which the time of the initial telephone call was used to calculate the start time for the members responding to call backs, the many years over which this manner of reporting was used and the admitted use of this manner of reporting by individuals with long service in the Division, including a former commander of the Major Crimes Unit. I find that a "past practice" existed and was known by the Division to be in place on January 19, 2002. A past practice is a benefit that has accrued to the members over time and, as such, must be negotiated out of the parties' collective bargaining agreement. I would order the Division to continue to calculate hours on these call backs from the initial telephone call.