



**STATE OF NEW HAMPSHIRE**  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**New England Police Benevolent Association,  
Auburn Police Union**

v.

**Town of Auburn**

**Case No. G-0195-2  
Decision No. 2014-011**

**Appearances:**

Peter J. Perroni, Esq., Nolan Perroni Harrington, LLP, Lowell, Massachusetts, for New England Police Benevolent Association, Auburn Police Union

Kathleen C. Peahl, Esq., Wadleigh, Starr & Peters, PLLC, Manchester, New Hampshire, for the Town of Auburn

**Background:**

On November 19, 2012 the New England Police Benevolent Association, Auburn Police Union (Union) filed an unfair labor practice complaint claiming that the Town of Auburn (Town) violated RSA 273-A:5, I (a), (b), (e), and (g) when, during the status quo period following the filing of Union's petition for certification, it unilaterally amended the Town traffic control ordinance, thereby changing the existing police detail<sup>1</sup> policy. The Union argues, among other things, that the traffic control ordinance is a mandatory subject of bargaining and that the Town's actions violated the existing past practice and the status quo doctrine. The Union requests that the PELRB order the Town to cease and desist from implementing the ordinance, return to the status quo, order the Town to bargain with the Union regarding the ordinance, and pay the costs and attorney fees incurred by the Union in pursuing this claim.

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<sup>1</sup> A police detail generally involves police officers providing traffic control at roadway work project sites.

The Town denies the charges and asserts, among other things, that it had begun considering changes to the ordinance before the Union commenced its organizing efforts; that the disputed change is within the Town's management rights and does not affect mandatory subjects of bargaining; and that the Town offered to bargain "over the impact which the new ordinance might have on the terms and conditions of employment" but the Union failed to request impact bargaining. The Town requests that the PELRB dismiss the complaint.

The adjudicatory hearing was originally scheduled for January 3, 2013 but was rescheduled when the Town's assented to motion to continue was granted. On January 8, 2013 the parties jointly filed a Motion to Temporarily Suspend ULP Proceedings for 90 days on the ground that they were in process of negotiating and on January 3, 2013 reached a tentative agreement, ratified by both parties, which included an agreement that the parties would negotiate in good faith "regarding the standards of conduct for police officers assigned to work traffic details." The parties' joint motion and two subsequent requests for extension were granted. On May 29, 2013 the Union requested that the PELRB schedule a pre-hearing and a hearing.

The Board conducted an adjudicatory hearing on July 25, 2013 at the Public Employee Labor Relations Board offices in Concord. The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. The parties filed post-hearing briefs on September 9, 2013. The parties' factual stipulations are incorporated into the Findings of Facts below; and the decision is as follows.

#### **Findings of Fact**

1. The Town is a municipality governed by the Board of Selectmen (BOS).
2. In 1991, the Police Department presented a draft of a traffic control ordinance titled "Flagman Ordinance" to the BOS. This ordinance was intended to address the unsafe conditions on the Town roads. The Police Department's representative Lieutenant Eaton, who

presented the ordinance to the BOS at the August 12, 1991 Selectmen's meeting, stated that the Police Department was "looking to benefit public safety, not extra pay for police officers" and that the ordinance did not "prohibit private companies from using their own flag persons." See Exhibits B.

3. The BOS passed the "Flagman Ordinance" on August 12, 1991. The Ordinance provided as follows:

Let it be known to all that any person, persons or businesses that intend to impede travel on any right of way in the Town of Auburn, must notify the Auburn Police Department forty-eight (48) hours in advance of such act or acts. Such steps as deemed necessary by the Auburn Police Department to ensure safe travel of said right of way shall be detailed to the organization/person in a manner consistent with those standard operating procedures approved by the Board of Selectmen.

See Exhibit A.

4. The Town established a Police Commission after the issuance of the "Flagman Ordinance." The Police Commission's responsibilities include approval of police standard operating procedures (SOPs).

5. On May 26, 1992, as required by the "Flagman Ordinance," the Police Department adopted, and the Board of Selectmen approved, an SOP for "Highway Work Projects - Police Required or Flag Persons Authorized." The purpose of the 1992 SOP was to "establish guidelines to be used when an Auburn Police Officer or a flag person is required on any commercial work project in the Town of Auburn, or when a project may be identified by the Chief of Police, or his designee, as needing a flag person or a uniformed police officer to direct Traffic." See Exhibit C. The 1992 SOP provides in relevant part:

### III. PROCEDURE

A. The Chief of Police or his designee may require any person or company engaged in a work project ... to utilize a police officer in uniform with a marked police cruiser, for the control of traffic.

B. Any person or company engaged in any work project ... shall utilize a uniformed police officer or a flag person for traffic control for the duration of work project.

C. Should the Chief of Police, or his designee, determine an unsafe condition exists at any work project in the Town of Auburn, he may:

1. Require flag persons to be engaged or changed.
2. Require a uniformed officer and/or police cruiser to be employed.
3. Require the stoppage of work until such time as public safety can be ensured.

Should any action be taken under Section C of this procedure, the Chief of Police shall file a report, in writing, with the Police Commission. Upon request, the Police Commission shall supply, in writing, to any person or company conducting the work project, the reasons for such action. Should this written explanation be unsatisfactory, the persons or company conducting the work project may appeal to the Auburn Board of Selectmen.

Exemption: This procedure shall not apply to work conducted by the New Hampshire Highway Department, work being conducted by the Auburn Road Agent for the Town of Auburn or any other work authorized by official Town of Auburn contracts, work orders or directive. If a uniformed officer is required, due to the hazardous nature of a work project being conducted for or by the Town of Auburn, the Chief of Police shall supply an officer at no additional charge to the Town.

#### IV. FEES

Should fees be charged for a uniformed police officer and/or a police cruiser, they will be from a schedule proposed by the Chief of Police, endorsed by the Police Commission and approved by the Board of Selectmen.

See Exhibit C.

6. The funding for police details evolved over time. From 2001 to 2007, the Town placed funding for police details on the warrant. In 2008, the Town switched to a revolving fund process and no longer had to appropriate funds.

7. On February 10, 2012, the Police Chief issued an SOP on the subject of "Highway Work Projects – Police Required or Flag Persons Authorized." The 2012 SOP provides in part:

#### IV. PROCEDURE

B. Any person or company engaged in any work project ... shall utilize a uniformed police officer for traffic control for the duration of the work project.

C. In the event of exhausting all attempts to assign a uniformed police officer to any work project requiring said police officer for the control of traffic, the Chief of Police shall determine if a flag person may be utilized to control traffic at the work project.

D. Should the Chief of Police, or his designee, determine an unsafe condition exists at any work project in the Town of Auburn, he may require the stoppage of work until such time as public safety can be ensured.

#### V. EXEMPTION

This procedure shall not apply to work conducted by the State of New Hampshire Department of Transportation on state designated roadways maintained by the State of New Hampshire Department of Transportation.

#### VI. FEES

Should fees be charged for a uniformed police officer and/or police cruiser, they will be from a schedule proposed by the Chief of Police, endorsed and approved by the Auburn Police Commission.

See Exhibit Q.

8. As opposed to the 1992 SOP, which authorized either a uniformed police officer or a flag person to be used for traffic control, the 2012 SOP mandated that a uniformed police officer be utilized for traffic control. See Exhibit C, III-B and Exhibit Q, Section IV-B. Also, the 2012 SOP differed from the 1992 SOP because, among other things, it no longer exempted the Town and its Road Agent from following the procedure and it no longer required the Police Chief to file a report with the Police Commission regarding his determinations under the SOP.

9. The 2012 SOP was approved by the Auburn Police Commission but not by the BOS. According to Vice Chair of the BOS James Headd, the BOS did not approve the 2012 SOP because it believed that the Police Commission had no authority to control the Town roadways.

10. In February of 2012 the BOS commenced a process of amending the "Flagman

Ordinance.” One of the incidents that triggered the process happened in the aftermath of a 2011 hurricane when the Town was without power. Public Service of New Hampshire (PSNH), a private utility company, was repairing power lines when the police closed down the repair operation because there was no police detail on site. PSNH called Town Administrator William Herman to complain. The Town Administrator called the Police Department and talked to the Police Captain (Police Chief was absent). The Captain agreed that police detail was not necessary. This incident and similar complaints by utility companies prompted the BOS to review the “Flagman Ordinance.”

11. The other factor that prompted the Board of Selectmen to review the ordinance was the cost of police details to the Town. See Exhibit I, March 19, 2012 Minutes, page 2. The 2012 SOP did not exempt the Town from using police officers for traffic control. This raised budget concerns for the Road Agent who complained that the expense for such police detail comes out of his budget. When the police detail funding process was changed from warrant to a revolving fund, cost became an issue. When the Road Agent was asked during the April 5, 2012 ordinance Committee meeting what was the driving force for changing the ordinance, he indicated that “the changing of the rate for special details for town highway work following by the change in the standard Operating Procedure for Police Details is what drove the Road Agent and Board of Selectmen to look at this issue.” See Exhibit H, page 2.

12. Other factors that prompted the BOS to review the “Flagman Ordinance” were changes in Town population numbers and the fact that the Town took over new roads.

13. According to Vice Chair Headd, the BOS did not try to influence the Union election process and did not intend to change terms and conditions of employment when it initiated a review of the “Flagman Ordinance.”

14. Town Administrator Herman prepared a draft of a new traffic control ordinance in

February of 2012 after the conversation with the BOS and the Road Agent.

15. On March 4, 2012 the BOS held a Public Hearing on a proposed traffic control ordinance entitled "Traffic Control in Construction Work Zones." Stipulated Facts at 6.

16. The BOS discussed the draft of the new ordinance at its March 19, 2012 meeting. The BOS did not adopt the draft in part because of the public input. At that meeting, the Police Department representative, Lt. Ray Penton, asked that the adoption of a draft be tabled until a committee was formed to review the ordinance and to receive input from Town citizens and the Police Department. The Vice Chair Headd agreed and stated that "he would like to move forward with forming a committee to discuss the matter of traffic control." Other board members agreed. The BOS decided that the ordinance as drafted was not ready for adoption and decided to appoint a Traffic Control Ordinance Committee (Committee). See Exhibit I, March 19, 2012 Minutes, pages 2 & 4.

17. On March 26, 2012 the BOS appointed a Committee to review and recommend the ordinance. The Committee had nine members including representatives of utility companies, neighborhood watch, the Police Department, and the public. A Chair of the Police Commission and one member of the Police Department were appointed to the Committee. See Stipulated Facts at 7 & 8. The Town Administrator and Road Agent Michael Dross were members of the Committee.

18. Stephen Vanni served as the Committee Chair. He is a resident of the Town of Auburn and owns and operates a broadcast engineering company. He is a volunteer Fire Fighter (Captain) but was never employed by the Town. Mr. Vanni was one of four or five Town residents who volunteered to be on the Committee. According to Mr. Vanni, the Town Administrator asked him to volunteer to serve on the Committee because he was a Town resident

and a volunteer Fire Fighter for many years and because his background was beneficial. Mr. Vanni has not served on any other Town Committee.

19. The Committee held four or five public meetings.

20. The Town Administrator prepared a packet of information for the Committee. The packet included a spread sheet analyzing wages paid to police officers for special details, cost to taxpayers, and total wages paid to police officers. See page 1 of Exhibit H. The Town Administrator provided the same information to the BOS. The Town Administrator claims that the Committee did not take any of the documents he provided into consideration.

21. The Committee was provided with the background information and history but was given a "clean slate" to redraft the ordinance "from scratch." According to Committee Chair Vanni, the Committee was asked to write a new traffic control ordinance and to base it on safety considerations only. The Committee put all history aside and started from scratch. The members of the Committee believed that the new ordinance needed to be based on factual data and conducted extensive research as to street/road identification, speed limit, traffic volume on each road, and accident data to identify what level of traffic control would be appropriate for each street/road. They compared this information with other Towns' safety requirements. They found that in some cases different sections of the same street would require different levels of traffic control at different times.

22. The Committee asked the Police Department for input when it discussed designation of appropriate level of traffic control to Town streets/roads. The Police Department provided its input. The Committee invited the Police Chief to testify. The Police Chief's main concern was time frames: how much notification was needed for a police officer to be available for traffic control detail. In his opinion, the Police Department was a good point of contact for utility companies. The Police Chief did not state that every street/road required police detail for

traffic control but he expressed opinion that the proposed ordinance "opens up the town to liability." During the July 23, 2012 Committee meeting Mr. Alan Cote questioned the Police Chief as to whether police detail was needed on certain streets/roads. The Chief's response indicated that police detail was not required on every street/road. See Exhibit I, page 3 of the July 23, 2012 minutes.

23. When Road Agent Dross, who was a member of the Committee, brought up funding-related concerns, Committee Chair Vanni stopped him. See for example Exhibit H, April 12, 2012, page 2. The Committee and Chair Vanni did not allow any discussion of money issues. According to Mr. Vanni, the Committee members believed that they were working on a safety ordinance. See Exhibit H, page 2 of April 12, 2012 Minutes ("Vanni did not want the committee to get bogged down with the history and past actions concerning details... He felt questions regarding wages, [where] budget expenses come from, etc., are not issues for the committee to address").

24. According to Mr. Vanni, extensive guidance regarding traffic control is available on state and federal levels. The Committee used the federal guidelines, which are very detailed, to draft some sections of the new ordinance. See Exhibit D, page 2 (citing state and federal guidelines). The Committee also reviewed traffic control ordinances in other towns and much of the new ordinance comes from similar ordinances in other towns.

25. The Committee members felt that safety was important and that its recommendations are in compliance with State law and consistent with regulations in other towns.

26. The Committee proposed to exempt both the State and the Town from the ordinance requirements.

27. The Union filed its Petition for Certification on May 24, 2012 seeking to represent

certain employees of the Town of Auburn Police Department.

28. A representative of the Union wrote to the BOS on July 13, 2012 and asserted that the proposed ordinance was a change in working conditions. Stipulated Facts at 11.

29. Town Counsel wrote to the representative of the Union on July 19, 2012 and expressed the opinion that the subject of the ordinance was a matter reserved to the authority of the Selectmen and was not a mandatory subject of bargaining. Counsel further offered to discuss a perceived impact which the ordinance might have on the police officers. Stipulated Facts at 12.

30. The Union was certified as the exclusive representative for all full and part time Police Officers and Sergeants in the Town of Auburn on July 23, 2012. Stipulated Facts at 1 & 2.

31. The final version of the proposed ordinance was discussed at public hearings on July 23, 2012 and August 13, 2012. At the August 13, 2012 meeting, Committee Chair Vanni presented Committee's recommendations to the BOS and the BOS adopted them as new ordinance. See Stipulated Facts at 9 & 10. The new ordinance went into effect on August 27, 2012. See Exhibit U.

32. The new traffic control ordinance designates the minimum required levels of traffic control, including police officers, flaggers, cones, and traffic signs, for each Town street/road. See Exhibit D (Appendix A of the ordinance is a map of the Town and Appendix B lists each Town road/street designating the required level of traffic control).

33. Section 6.2 of the new ordinance provides:

The Town of Auburn shall be exempt from the provisions of this ordinance when performing construction work on its own streets and bridges, either contracted or with the Town of Auburn Road Agent. However, the Town will adhere to the minimum type of work zone traffic control outlined in Appendix A and Appendix B.

See Exhibit D.

34. Under the new ordinance, private utility companies are allowed to use a higher

than required level of traffic control if necessary. Under section 5.4 of the new ordinance, the Police Chief, after personally reviewing the site, "may require that a higher level of traffic control be implemented." The Chief must provide a written report of reasons to the BOS within 48 hours. See Exhibit D. The Police Chief has not required higher levels of traffic control since the adoption of the new ordinance.

35. The new ordinance does not address police detail wages or the manner of detail assignment. The new ordinance does not prohibit police detail work.

36. The BOS evaluated the new ordinance before the snow season began and was satisfied.

37. In the past, "town job" details were often done by police officers. "Town jobs" are jobs ordered by the Town Road Agent.<sup>2</sup> Sometimes the Town had closed the road and other times the Town had used Road Agent crew or traffic signs instead of police details. Mr. Dross, who has been the Town Road Agent for over seven years, largely used police officers for traffic control during works to improve drainage system, to clear downed trees and flooded roads. See Exhibit H, page 3 (during April 5, 2012 Committee meeting, Road Agent Dross "noted since he has been Road Agent, he has utilized police details for work zones as he felt they generally provided better public awareness of the work zone.") When there was a natural disaster, the Road Agent utilized police to warn the public of danger. The Town jobs were processed through the Town payroll system. In cases of natural disasters, the funding for police details came primarily from the Federal government (around 70% of expenses) and the State with some contribution from the Town. Towns have 18 months to complete disaster related work. There were no such disasters in 2012. For other Town job details, the money came out of the Town budget.

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<sup>2</sup> "Private jobs" are jobs requested and paid for private companies, such as Xfinity/Comcast, FairPoint, and PSNH.

38. The paving companies doing work on the Town roadways were required to provide flaggers under paving contracts. According to the Town Administrator, from at least 2006 to 2012, traffic control on paving projects was mostly performed by flaggers and not police officers.

39. According to Police Sergeant Charles Chabot, who has been employed by the Town for almost 10 years, police superiors told him that, under police procedure, only police officers could provide traffic control detail in Town. Prior to August, 2012, if a private contractor used flaggers without the Town's knowledge, the Police Department was required to call contractors and tell them that flaggers are not allowed in Town and that the police must be used. Sgt. Chabot worked traffic control detail on several paving jobs. Sgt. Chabot concedes that police officers were not used on all jobs.

40. According to the Town Administrator, in the past 85-90% of all traffic control work was done by police officers.

41. In 2011 detail work wages constituted approximately 16 % of police officers' wages. See Exhibit O.

42. The Union and the Town began negotiations on their first CBA on November 14, 2012. See Stipulated Facts at 13.

43. On December 6, 2012, the Union submitted a proposal on Work Details, which encompassed the subject of the ordinance. Stipulated Facts at 14. There is no evidence that this proposal was accepted.

44. The parties signed a CBA on March 25, 2013. The CBA contains sections titled Outside Details, Private Details, and Town and Other Details that cover, among other things, detail pay rate and a manner of detail assignment. See 2013-2014 CBA (Exhibit S).

45. Since the adoption of the new ordinance, police officers have had opportunities to work traffic control details. See Exhibits J, K, and L. The total police detail hours for 2011<sup>3</sup> was 3488.7, including 1265 Town job hours and 2223.8 private job hours. The total for 2012 was 3273.50, including 118 Town job hours and 3155.50 private job hours. For the six months in 2013, from January to June, the total of detail hours was 2125.50, including 4 Town job hours and 2121.50 private job hours. The following are police detail hours for several months between January, 2011 and June, 2013<sup>4</sup>:

January 2011 – 0 Town job hours & 127.5 private job hours (127.9 hours total)  
January 2012 – 12 Town job hours & 408 private job hours (420 total hours)  
**January 2013 – 0 Town job hours & 199.25 private job hours (199.25 total hours)**

February 2011 – 0 Town job hours & 61.5 private job hours (61.5 total hours)  
February 2012 – 0 Town job hours & 440 private job hours (440 total hours)  
**February 2013 – 0 Town job hours & 341.50 private job hours (341.50 total hours)**

March 2011 – 57 Town job hours & 115.5 private job hours (173 total hours)  
March 2012 – 0 Town job hours & 209.25 private job hours (209.25 total hours)  
**March 2013 – 0 Town job hours & 330 private job hours (330 total hours)**

April 2011 – 19 Town job hours & 51 private job hours (70 total hours)  
April 2012 – 41.50 Town job hours & 56 private job hours (97.50 total hours)  
**April 2013 – 0 Town job hours & 384.50 private job hours (384.50 total hours)**

May 2011 – 181.5 Town job hours & 82 private job hours (263.5 total hours)  
May 2012 – 16 Town job hours & 251.75 private job hours (267.75 total hours)  
**May 2013 – 0 Town job hours & 486 private job hours (486 total hours)**

June 2011 – 159.5 Town job hours & 81 private job hours (240.5 total hours)  
June 2012 – 29 Town job hours & 137.50 private job hours (166.5 total hours)  
**June 2013 – 4 Town job hours & 191.50 private job hours (195.5 total hours)**

September 2011 – 43 Town job hours & 199.5 private job hours (242.5 total hours)  
**September 2012 – 0 Town job hours & 282 private job hours (282 total hours)**

October 2011 – 26 Town job hours & 324.5 private job hours (350.5 total hours)  
**October 2012 – 0 Town job hours & 275.5 private job hours (275.5 total hours)**

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<sup>3</sup> According to the Town Administrator, the police detail use records prior to 2011 have been destroyed because the Town is not obligated to keep records for longer than 3 years.

<sup>4</sup> The police detail hours for the months after the adoption of the new ordinance are set in bold.

November 2011 – 156 Town job hours & 197.5 private job hours (353.5 total hours)  
November 2012 – 0 Town job hours & 288.5 private job hours (288.5 total hours)

See Exhibits J-L. The number of detail hours available and worked depends in part on weather-related conditions and other natural disasters, such as the hurricane of 2011. In 2012 and beginning of 2013, there were no natural disasters similar to the 2011 hurricane. The 2011 hurricane and other weather-related conditions were not taken into consideration in developing the detail hour totals.

46. According to Mr. Herman, the 2012 decrease in detail hours is due to the fact that there was no major natural disaster and, therefore, the Road Agent did not do storm clean-up work and, consequently, did not utilize traffic control detail. Mr. Herman believes that the decrease has nothing to do with new ordinance and if “town hours” are not taken into account, then the records show that there was an increase in police detail hours.

**Decision Summary:**

The evidence is insufficient to establish that the new traffic control ordinance constitutes a change in terms and conditions of employment. The Union’s complaint is denied.

**Jurisdiction:**

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

**Discussion:**

The Union claims that the Town violated the status quo doctrine and the existing past practice concerning police detail work when it unilaterally amended the existing traffic control ordinance. The Union argues, among other things, that the traffic control ordinance is a mandatory subject of bargaining and that the Town’s actions violated RSA 273-A:5, I (a), (b), (e), and (g).

RSA 273-A:5, I provides in relevant part:

It shall be 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; ...
- (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;...
- (g) To fail to comply with this chapter or any rule adopted under this chapter;...

The "status quo" doctrine stems from 273-A:5, I which makes it "an unfair labor practice for either party to refuse to negotiate in good faith the terms and conditions of employment." See *Collins v. City of Manchester*, 147 N.H. 701, 705 (2002). As previously stated by the Supreme Court, "maintaining the status quo during collective bargaining ... is essential to preserving the balance of power guaranteed by RSA chapter 273-A." *Appeal of Milton School Dist.*, 137 N.H. 240, 245 (1993). The doctrine of the "status quo" applies regardless of whether the parties negotiate their first or their successive contract. See *Appeal of Alton Sch. Dist.*, 140 N.H. 303, 315 (1995). The public employer's responsibility "to maintain the status quo derives from its duty to negotiate in good faith the terms and conditions of employment... This duty does not depend on the existence of an expired contract." *Id.* (Citations 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. 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 City of Nashua Bd. of Educ.*,

141 N.H. 768, 772-73 (1997) (citations omitted).

In this case, at the time the new ordinance was adopted, the parties' relationship was governed by the status quo doctrine. Therefore, we focus our analysis on whether the adoption of the new traffic control constitutes a unilateral change in terms and conditions of employment and a refusal to bargain in good faith.

"A public employer's unilateral change in a term or condition of employment ... is tantamount to a refusal to negotiate that term and destroys the level playing field necessary for productive and fair labor negotiations." *Appeal of Hillsboro-Deering Sch. Dist.*, 144 N.H. 27, 30 (1999). The Supreme Court has adopted the following three-part test to determine the applicability of the managerial policy exception in the context of the obligation to bargain: 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; and 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. See *id.* at 32 "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 Nashua Police Commission*, 149 N.H. 688, 692 (2003) (citations omitted). "Public employers must bargain mandatory subjects, may bargain permissive subjects, and may not bargain prohibited subjects." *Derry Police Patrolman's Association, NEPBA Local 38 v. Town of Derry*, PELRB Decision No. 2011-278. Proposals and actions that primarily affect wages or hours are mandatory subjects of bargaining.

See *Appeal of Nashua Police Commission*, supra, 149 N.H. at 692. See also *Appeal of Hillsboro-Deering Sch. Dist.*, supra, 144 N.H. at 32.

In this case, we find that the evidence is insufficient to prove that the adoption of the new traffic control ordinance primarily affects the terms and conditions of employment. The primary purpose of the new ordinance is safety. The ordinance review process commenced several months prior to the filing of the Union's petition for certification. The ordinance was drafted by the Committee after receiving an input from the police and in accordance with the state and federal guidelines. The Committee was given a "clean slate" to review the existing traffic control ordinance, to conduct research, and to draft recommendations on a new traffic control ordinance. Furthermore, the Committee Chair blocked any consideration of funding/money issues by the Committee, focusing on safety issues instead. The new ordinance itself does not address police detail wages or a method of detail assignment. Neither does it prohibit police officers from working details. Instead, the ordinance designates some of the Town streets/roads as always requiring police officers for traffic control, while traffic control on other streets can be satisfied with the use of flaggers, cones, and/or traffic signs. These designations appear to be based on public safety considerations. The major difference between the old ordinance, with the accompanying 1992 SOP, and the new ordinance appears to be the language that takes away or, rather, limits the Police Chief's authority to decide whether a particular location/situation requires a presence of police officers and sets the final authority to decide this issue with the BOS. This does not involve a mandatory subject of bargaining or a term and condition of employment. Further, the new ordinance does not prohibit the Police Chief from requiring "that a higher level of traffic control be implemented." See Exhibit D. The evidence shows that, since the adoption of the new ordinance, the Chief has yet not required the use of police detail instead of the lower levels of traffic control required under the ordinance.

Furthermore, the evidence is insufficient to prove that the adoption of the new ordinance has caused or will cause a change in the police detail pay rate or the total number of police detail hours. In the past, not all traffic control functions were performed by police officers. For example, paving companies sometimes used their own flaggers and the Road Agent sometimes used his crew, road closures, or traffic cones. In addition, the records tracking the police detail hours for the period from January, 2011 to June, 2013 show no significant change in the number of detail hours worked. In some post-new ordinance months, the number of detail hours has actually increased. In others, it has decreased but, it is unclear whether the decrease was caused by the new ordinance or by differences in weather (i.e. lack of natural disasters in 2012-13 that require extra road works and traffic control). Overall, the evidence is insufficient to establish that the new ordinance prompted a change in police details wages, manner of detail assignment, or in other terms and conditions of police officers' employment.

Based on the foregoing, the evidence is insufficient to prove that the Town violated RSA 273-A:5, I (a), (e), and (g) when it adopted the new traffic control ordinance. Accordingly, the Union's claims and requests for relief are denied.

So ordered.

January 23, 2014



Charles S. Temple, Esq., Chair

By unanimous vote of Chair Charles S. Temple, Esq. and Board Members Kevin E. Cash and James M. O'Mara, Jr.

Distribution:

Peter J. Perroni, Esq.

Kathleen C. Peahl, Esq.