



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

**New England Police Benevolent Association,  
IUPA, AFL-CIO**

v.

**Town of Goffstown**

**Case No. G-0138-2**

**Decision No. 2014-277**

**Appearances:**

Peter J. Perroni, Esq., and Meghan C. Cooper, Esq.,  
Nolan Perroni Harrington, LLP  
Lowell, Massachusetts for the Complainant

Paul T. Fitzgerald, Esq., Wescott Law  
Laconia, New Hampshire for the Respondent

**Background:**

On June 23, 2014 the New England Police Benevolent Association (Union) filed a complaint under the Public Employee Labor Relations Act (RSA 273-A). The Union alleges that the Town committed an unfair labor practice when it withheld an increase<sup>1</sup> in annual leave time earned by a bargaining unit employee. The Union maintains that annual leave is not a cost item under RSA 273-A:1, IV and that the affected employee is entitled to receive the disputed annual leave pursuant to the evergreen clause of the 2011-13 CBA or the status quo doctrine. The Union charges that the Town has violated RSA 273-A:5, I (a), (b), (c), (d), (e), (g), (i) and/or RSA 273-A:3 (imposing an obligation to bargain in good faith). The Union requests that the PELRB order the Town to cease and desist its withholding of accrued annual leave and make the affected employee whole.

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<sup>1</sup> From two weeks of annual leave to three weeks of annual leave based upon eight years of service.

The Town denies the charges. The Town maintains that annual leave is a cost item, that the parties are in a status quo period, and that under the status quo doctrine the Town is not obligated to provide the disputed annual leave increase. The Town requests that the PELRB dismiss this matter and/or deny all relief sought by the Union.

The undersigned board held a hearing in this matter on August 26, 2014. Both parties filed post-hearing briefs by the established deadline. On October 31, 2014 the Town filed a Motion to Allow Additional Authority and an amended brief based upon the court's recent decision in *Appeal of Professional Fire Fighters of Hudson, IAFF Local 3154*, No. 2013-690 (Oct. 28, 2014). The Union did not object to this motion but did file a reply to the Town's Amended Brief on November 4, 2014. Our decision in this case is as follows.

**Findings of Fact**

1. The Town is a public employer within the meaning of RSA 273-A.
2. The Union is the certified exclusive representative of a bargaining unit comprised of Police Dispatchers and Record Clerks in the Town Police Department.
3. The parties' most recent collective bargaining agreement is dated January 1, 2011 to December 31, 2013 (2011-13 CBA) with an agreement that it "shall remain in full force and effect until superseded by a successor agreement." See Joint Exhibit 1 (Article 23).
4. Under Article 15 of the CBA "[v]acation leave shall accrue and be paid in accordance with the 2010 Town's Personnel Plan."

5. Section 2 of the 2010 Personnel Plan currently provides in relevant part as follows:

Vacation Leave.

.....

Upon completion of each calendar year after the initial year in which the employee is hired, the employee will be credited with annual leave each successive January first for use in that newly beginning year based on the following schedule:

Employment Period	Leave
Second year	Two (2) normal work weeks

Eighth year  
Sixteenth year

Three (3) normal work weeks  
Four (4) normal work weeks

....

The vacation credited for the eighth year will occur on the eighth January 1 on which the employee was employed.

6. In 2014 one bargaining unit employee qualified for an increase in annual leave from two to three weeks. However, the Town withheld the leave increase, stating it was not required under the status quo doctrine.

7. The costs of the 2011-13 CBA are itemized in Warrant Article 5 (Joint Exhibit 6) as follows:

Fiscal Year	Estimated Increase
2011	\$0
2012	\$9,378
2013	\$18,902

The explanation for this warrant article states that “[d]uring the three year term of this contract, there are no Steps. During the first year there is no cost of living adjustment (COLA), second year 3.25% COLA and third year has a 3.25% COLA.” The explanation does not mention or cite any cost or expense associated with increases in annual leave.

8. In 2011 three bargaining unit employees received annual leave increases, in 2012 three received increases, and in 2013 two received increases. See Joint Exhibit 9.

9. There was insufficient evidence to support a finding that annual leave has ever required an appropriation for its implementation.

10. Based upon the information presented at hearing, when annual leave usage causes shift vacancies other employees may be scheduled to work the vacant shift and may receive overtime pay.

## Decision and Order

### Decision Summary:

The Town should not have withheld the disputed annual leave increase. The Town's refusal to provide the affected employee with an increase from two to three weeks per year constitutes an unfair labor practice in violation of the Public Employee Labor Relations Act, and the Town is ordered to immediately provide the increase and otherwise make the affected employee whole.

### Jurisdiction:

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

### Discussion:

#### A. Town's Pending Motion:

The Town's Motion to Allow Additional Authority is granted, and the Town's amended brief filed October 31, 2014 and the Union's Reply to Town's Amended Brief filed November 4, 2014 are accepted.

#### B. Provisions of RSA 273 cited by Union:

RSA 273-A:5, I. 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;
- (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;

(g) To fail to comply with this chapter or any rule adopted under this chapter;

(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.

RSA 273-A:3 (Obligation to Bargain) provides in the first sub-section as follows:

I. It is the obligation of the public employer and the employee organization certified by the board as the exclusive representative of the bargaining unit to negotiate in good faith. "Good faith" negotiation involves meeting at reasonable times and places in an effort to reach agreement on the terms of employment, and to cooperate in mediation and fact-finding required by this chapter, but the obligation to negotiate in good faith shall not compel either party to agree to a proposal or to make a concession.

C. Cost Items under RSA 273-A:1, IV:

Under RSA 273-A:1, IV a "cost item" means a benefit acquired through collective bargaining whose implementation requires an appropriation by the legislative body (town meeting in Goffstown). The Union argues that the record and law do not support a finding that implementation of annual leave requires an appropriation and therefore annual leave is not a cost item under the statute. The Town argues that annual leave is a cost item because it is a negotiated benefit. At hearing, the Town also introduced some evidence about overtime paid to employees who cover shifts of other employees on annual leave. The Town's suggestion at hearing was that such evidence is relevant to the second part of the definition of cost item, i.e. whether annual leave requires an appropriation for implementation. However, the Town does not address or make any argument based on this evidence in its post hearing briefs.

We agree with the Union for the following reasons. In general, annual leave is a benefit acquired through collective bargaining, although the arrangement is somewhat different in this case. Here, the parties did not actually negotiate the nature and extent of an annual leave benefit

but instead agreed to continue, and in effect default to, the benefit provided under the 2010 Personnel Plan.

With respect to whether any town meeting appropriation is necessary to implement annual leave we find a lack of any persuasive evidence that such an appropriation has ever been needed. In fact, the record is to the contrary, as reflected by Warrant Article 5, pursuant to which the 2011-2013 cost items are limited to COLA increases in years 2012 and 2013. There was no cost item for the first year (2011) of the contract, and there is no reference to any “annual leave costs” associated with the increases to annual leave awarded in 2011, 2012, and 2013. See Joint Exhibits 6 and 9. To the extent the Town argues that, despite this evidence, overtime paid to employees who fill the shifts of other employees on annual leave should be treated as the appropriation necessary to implement annual leave within the meaning of RSA 273-A:1, IV we are not persuaded. First, the Town does not adequately explain or develop such an argument in its post hearing briefs. Second, the cost item in this example is wages in the form of overtime, not annual leave. This is the characterization of the legal nature of this particular expense that is most consonant with the usual understanding of the terms and conditions of employment in general, and cost items in particular, under the PELRA. It is also consistent with the reality that overtime is commonly worked for a variety of reasons and is not an expense specifically associated with the use of annual leave. The Town has not provided us with any evidence or argument which justifies the application of a different understanding in this case.

Accordingly, the Town cannot withhold the disputed annual leave increase on the grounds that annual leave is a “cost item” under RSA 273-A:1, IV.

D. 2011-13 CBA Evergreen Clause and the Status Quo Doctrine:

We also believe the Town is obligated to provide the disputed annual leave increase based on the continuation language in the 2011-13 CBA or, alternatively, under the status quo doctrine. As to the evergreen issue, our examination and application of the continuation

language (the contract “shall remain in full force and effect until superseded by a successor agreement”) is guided by the court’s treatment of virtually identical language in *Appeal of N.H. Department of Safety*, 155 N.H. 201 (2007), another case involving annual leave benefits. In *Appeal of N.H. Department of Safety*, the court reversed the PELRB’s finding that the case was governed by the status quo doctrine. Instead, the court stated the CBA had a valid evergreen clause based upon contract language that the agreement “shall remain in full force and effect through June 30, 2003, or until such time as a new Agreement is executed.” *Id.*<sup>2</sup> There was no evidence provided in this case to establish that we should treat the 2011-13 CBA continuation language any differently than the way the court treated the continuation language in *Appeal of N.H. Department of Safety*. Our conclusion means that in 2014 the affected employee was is entitled to an annual leave increase just like the eight employees who received increases in 2011, 2012, and 2013.

We also find that the Town is obligated to provide the disputed annual leave increase even if this case is decided under the status quo doctrine. In a recent decision the court reviewed the scope of the status quo doctrine as follows:

Maintenance of the status quo demands that all terms and conditions of employment remain the same during collective bargaining. 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. 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. 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. 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.

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<sup>2</sup> *Appeal of N.H. Department of Safety* involved a dispute over the accrual and calculation of leave time, which the court stated is subject to negotiation (and therefore cannot be unilaterally changed by the public employer).

*Appeal of Strafford County Sheriff's Office*, No. 2013-506 (November 13, 2014)(quotations, parentheses and citations omitted). The Town cites the court's recent decision in *Appeal of Professional Fire Fighters of Hudson, IAFF Local 3154*, No. 2013-690 (October 28, 2014) to buttress its argument that denial of the annual leave increase was justified under the status quo doctrine. In that case the court stated that during a status quo period public employers "must maintain salary *levels* at the expiration of the CBA but not *schedules* of projected salary increases contained within the CBA." *Id.* (quotations and citations omitted; emphasis in original). We are not convinced by this particular argument. The annual leave benefit (which we have already stated is not a cost item), is not the equivalent of, interchangeable with, and subject to the same treatment as, the schedules of projected salary increases<sup>3</sup> discussed in *Appeal of Professional Fire Fighters of Hudson*, and the Town's reliance on this decision is therefore somewhat misplaced. Moreover, under the status quo doctrine the annual leave benefit of unit employees is determined by the 2010 Personnel Plan, and annual leave under the 2010 Personnel Plan is a term and condition of employment which must remain in place during collective bargaining.

E. Conclusion and Order:

Accordingly, after due consideration of the record and the parties' post hearing briefs we find that the Town should have granted the disputed annual leave increase. Instead, the Town improperly failed to follow the 2010 Personnel Plan and unilaterally changed the terms and conditions of employment by suspending the award of annual leave increases. This is an improper unilateral change in the terms and conditions of employment and a violation of the Town's obligation to bargain over the terms and conditions of employment in good faith under RSA 273-A:3, I. It is an unfair labor practice under RSA 273-A:5, I (e)(to refuse to negotiate in

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<sup>3</sup> Salary increases, unlike the annual leave benefit, are a cost item.

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) and (g)(to fail to comply with this chapter or any rule adopted under this chapter). The Union's claims that the Town also violated sub-sections (a), (b), (c), (d), and (i) are dismissed. The Town is ordered to provide the three weeks of annual leave earned in 2014 and otherwise make the affected employee whole.

So ordered.

December 23, 2014

/s/ David J.T. Burns

David J.T. Burns, Esq., Alt. Chair

By unanimous vote of Chair David J.T. Burns, Alt. Chair and Board Members James M. O'Mara, Jr., and Senator Mark Hounsell.

Distribution: Peter J. Perroni, Esq.  
Meghan C. Cooper, Esq.  
Paul T. Fitzgerald, Esq.