Appeal withdrawn per May 11, 2010 Supreme Court order in Appeal of Exeter Police Association, NH Supreme Court Case No. 2009-896.

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

EXETER POLICE ASSOCIATION

Complainant

V.

TOWN OF EXETER

Respondent

CASE NO: P-0753-17

DECISION NO. 2009-183

APPEARANCES

Representing: Exeter Police Association
J. Joseph McKittrick, Esq., McKittrick Law Offices,
North Hampton, New Hampshire

Representing: Town of Exeter
Daniel P. Schwarz, Esq., Flygare, Schwarz & Closson, PLLC
Exeter, New Hampshire

BACKGROUND

Exeter Police Association (the "Association") filed an unfair labor practice complaint on August 13, 2008.[1] According to the Association, Town police officers work a 4-2 schedule, resulting in a 32 hour work week every 6 weeks. The Association contends that the practice has

[1] The complaint is, in substance, the same as the complaint filed in Case No. P-0753-15. The earlier complaint was dismissed on November 27, 2007 because the Association had not completed the grievance process, including advisory arbitration, as provided for in the parties' collective bargaining agreement. *See* PELRB Decision No. 2007-162.

always been to pay officers wages based upon a 40 hour week, even during the 32 hour work week. The Association complains that the Town has unilaterally and improperly changed this practice and now pays officers wages based upon 32 hours during the 32 hour work weeks.

The Association also complains that the Town has discontinued established shift swap and flex schedule practices. The Association contends that historically officers have been permitted to shift swap without restriction and regardless of the time period within which the shift swap was completed. Under this arrangement an officer who worked an extra shift in a current pay period might not complete the shift swap until several pay periods or more in the future, when the second officer involved in the shift swap would work one of the first officer's shifts. With respect to the flex schedule issue, the parties resolved this issue as evidenced by their agreement dated May 15, 2009 and filed with the board.

The Association claims that the Town's actions violate RSA 273-A:5, I (a), (c), (d), (e), (g), (h) and (i). As remedies, the Association seeks reinstatement of the previous practices pending satisfactory negotiations, repayment of all lost monies, incidental damages, consequential damages, and attorney fees.

The Town filed its answer on August 28, 2008. The Town does not dispute that prior to early 2007 officers were paid the same amount for the 32 hour work as they were for the 40 hour work week and that the swap and flexible schedules operated as described by the Association. However, the Town claims that the Association decided to unilaterally withdraw from these arrangements by, among other things, prosecuting a complaint with the New Hampshire Department of Labor. According to the Town, the Department of Labor proceedings require that the Town alter the pre-existing arrangements concerning wages paid during the 32 hour work

week, and shift swap in order to remain compliant with applicable wage and hour laws. The Town requests dismissal of the complaint and reimbursement of its fees and expenses.

A hearing in this matter was originally scheduled for October 28, 2008 and but was rescheduled several times upon request of one or both parties. The board held a hearing in this matter on May 7, 2009 at the offices of the PELRB in Concord. The parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Both parties argued their cases at the conclusion of the evidence, and the record was held open until May 22, 2009 to allow the parties to submit post hearing briefs.

FINDINGS OF FACT

1. The Town of Exeter is a public employer within the meaning of RSA-A:1, X.

2. The Exeter Police Association is the exclusive representative of all full time dispatchers, patrolmen, detectives, sergeants, and the animal control officer employed by the Town of Exeter. These bargaining unit employees are hourly rate employees whose compensation rates were negotiated in part by reference to a salary survey.

3. For the past thirty years, officers have worked eight hour shifts on a "4-2 schedule," which means four days of work followed by two days off. Under the 4-2 schedule officers work five 40 hour weeks and one 32 hour "short" week. Over the course of a year officers receive sixteen more days off under a 4-2 schedule than would be true if they worked a "5-2" schedule.

4. According to a 1991 memorandum by then Chief MacKinnon, the 4-2 schedule dates to the 1970's, when then Chief Thomas Powers:

> instituted the present 4-2 schedule with In-Service training...In-Service training has a history of uneven scheduling. We do not mandate an officer to attend a full seven hours of In-Service training each shift rotation, although it would be clearly our right to do so.

5. It has been a well established and accepted practice by the parties, until recently, that officers were paid for 40 hours of work during the 32 hour short week, appeared for roll call fifteen minutes prior to the start of their eight hour shift without pay and attended in service training without pay. This occurred throughout a six week 4-2 schedule period, and not just during the 32 hour short week.

6. The record indicates that officers did not demand payment of wages for their attendance at pre-shift briefings and in service training, did not file grievances seeking payment of wages for this time but instead accepted this arrangement, as did the Town, as part of the arrangement under which they were paid for wages based upon 40 hours during the 32 hour short week. Over the course of a year the number of hours officers spent at pre-shift roll call and in service training did not exceed the 128 hours of extra wages paid to officers during the sixteen 32 hour short weeks.

7. It has been a well established and accepted practice by the parties, until recently, that officers who "shift swap" have up to six months in which to complete the swap. For example, an officer may shift swap with a second officer to work one of the second officer's July shifts in exchange for the second officer working one of first officer's shifts in December. However, there was no corresponding adjustment up or down in the amount of pay for the officers, regardless of whether the shift swap results in an officer working more or less than a 40 hour week in a particular pay period.

8. In 2007, in response to an Association complaint, the New Hampshire Department of Labor ("NHDOL") conducted an inspection which resulted in the issuance of NHDOL Inspector Ken O'Shaugnessy's report in August of 2007. The report identifies a

proposed civil penalty of $13,600.00 based upon a finding of 136 violations, described in the inspector's report as follows:

1. Violation RSA 275:43, I (68 violations)

Employer not paying all wages within 8 days of the expiration of the work week and on the designated payday.

- The employer is not paying all officers for roll call prior to each shift. Each officer who is working on a scheduled 8 hour shift is required to attend a 15 minute roll call session for the 7:00 am, 3:00 pm, and 11:00 pm shift prior to going on duty, attendance is mandatory, it is not optional and therefore it must be considered work time at the regular rate of pay. Jan 1, 2006 thru April 30, 2007 = 68 violations.

2. Violation RSA 279:27 (68 violations)

- The employer is not keeping true and accurate record of hours worked by its employees. Because of the scheduled 4 on and 2 off work period, officers in some weeks receive pay for more hours than they actually work. These same officers also do extensive training during the course of the year and this is unpaid time. After extensive interviews with the Chief, the Training Officer and uniformed officers as well as documentation on file at the department, the determination was made that these two categories of time offset each other and no additional wages are due, however it is a record keeping problem because work time is not properly reflected. Number of violations is calculated by the number of pay periods from Jan 1, 2006 thru April 30, 2007 = 68.

Notes:...Mandatory training should be considered work time and should be shown on time records and must also be paid time. Also only those shifts actually worked must be paid as opposed to the method currently used which in some cases pays employees for shifts not worked.

9. The NHDOL waived the civil penalty once the Town corrected the violations cited in the Inspector's report. Town Exhibits D, E and F.

10. Following the NHDOL inspection, Chief Kane issued a September 19, 2007 Memorandum to all department employees which included the following changes:

-You will need to report to work on the hour that you are scheduled. Roll call will be held then.
-Any training you attend will be paid at the overtime rate.
-In compliance with the report, employees will only be paid for the hours that they actually work each week.

-Swaps will no longer be allowed unless they are paid back in the same week. This will allow the department to properly document the correct number of hours on that week's official record of time.

11. According to NHDOL Wage and Hour Administrator Cynthia Flynn, upon the filing of an appropriate request with the NHDOL the Town can expand the time frame in which shift swaps can be accomplished and avoid potential violations of applicable wage and hour laws. The Town has not requested such a change, and the Association has not asked the Town to make such a request.

DECISION AND ORDER

DECISION SUMMARY

The Association's complaint is granted in part and denied in part. The parties had a long established and mutually accepted past practice concerning the operation of the 4-2 schedule, aspects of which included payment of wages, roll call, in service training, and shift swap, all of which was disrupted by the NHDOL inspection. The Association's complaint concerning shift swapping is sustained since the Town can take action to expand the time period in which shift swaps can occur without violating any applicable wage and hour law and is ordered to do so. The Association's remaining claims are denied. The Town's payment of 40 hours of wages during the 32 hour short week to officers working the 4-2 shift was part of an established practice which also included the officer's attendance at pre-shift briefings without pay and in service training without pay, an arrangement the Town is not obligated to continue given the results of the NHDOL inspection which mandates the discontinuance of attendance at pre-shift briefings and in service training without pay.

JURISDICTION

The PELRB has primary jurisdiction of all violations of RSA 273-A:5. *See* RSA 273-A:6, I. PELRB jurisdiction is proper in this case as the Association has alleged violations of RSA 273-A:5, I(a), (c), (d), (e), (g), (h) and (i).

DISCUSSION

In this case the board addresses the extent to which the Town is obligated to continue shift swapping and payment of 40 hours of wages for 32 hours of work during the short week, both of which are portions of terms and conditions of employment established by past practice, given the results of the intervening NHDOL inspection. By past practice, the board means a long standing, consistent, repeated, mutually understood and accepted practice which is binding upon the parties even though not contained within the parties' written collective bargaining agreement.

The board sustains the Association's complaint concerning the Town's restriction of shift swaps to a one week pay period and finds that the Town is in violation of RSA 273-A:5, I (e)(to refuse to negotiate in good faith with the exclusive representative of a bargaining unit); (g)(to fail to comply with this chapter – *see* RSA 273-A:3, I, obligation to bargain); and (h)(to breach a collective bargaining agreement). The parties had a long standing past practice under which shift swaps could be completed within a six month period which the Town unilaterally changed by limiting the time period to one week. The change to a one week time period cannot be justified by the results of the NHDOL investigation. Based upon the testimony of NHDOL representatives, it is evident that shift swaps can be accomplished within at least a one month period without violating any applicable wage and hour law. The Town is obligated to adhere to the parties' previously accepted and established practice as to shift swaps as closely as possible

by providing as long a time as possible to complete the swap while remaining in compliance with applicable wage and hour laws. The Town is not, however, obligated to continue the established past practice of allowing shift swaps to occur beyond a one month period when to do so will result in costs the Town did not incur under the established past practice.

The Association's remaining claims are denied. The parties had a long established past practice which addressed a number of aspects of the officers' employment in an interrelated manner. These were the implementation of the 4-2 schedule, the resulting sixteen 32 hour work weeks per year, pre-shift briefings, in service training, and the payment of wages. Under this established practice the payment of 40 hours of wages to officers during the 32 hour short week was offset by officers' attendance at pre-shift roll call and in service training without pay, which in total did not exceed the 128 hours per year in wages paid to officers during the short week. However, the NHDOL inspection is an intervening event which has caused a change in circumstances which directly impacts the parties' established past practice. In accordance with the results of the NHDOL inspection the Town is now obligated to pay officers for attendance at pre-shift briefing and in service training. This represents an additional cost to the Town. There was insufficient evidence that the parties' long standing established practice concerning the 4-2 schedule, the resulting 32 hour work weeks, and the related roll call and training arrangements would continue notwithstanding any relevant and material change in the benefit of that existing arrangement to the Town, such as the cost resulting from the discontinuation of officers' attendance at pre-shift briefings and in service training without pay. Therefore, officers are no longer entitled to 40 hours of wages during the 32 hour short week as they can no longer attend pre-shift briefings and in service training without pay. The Association's contention that the Town has improperly terminated this practice is denied.

In accordance with the foregoing, the Association's complaint concerning the Town's elimination of shift swaps beyond those completed in a one week pay period is granted. The Town shall submit filings with the NHDOL necessary to expand the shift swap period up to one month, as permitted by state law, within thirty days of this order. The Association's other claims are denied. The Town shall post this decision for sixty days in a conspicuous location in the workplace where affected bargaining unit employees work.

It is so ordered.

Signed this 9th day of September, 2009.

Doris M. Desautel, Alternate Chair

By unanimous vote. Alternate Chair Doris M. Desautel presiding with alternate Board Members Sanford Roberts, Esq. and Kevin E. Cash also voting.

Distribution:
Daniel P. Schwarz, Esq.
J. Joseph McKittrick, Esq.