

NH Supreme Court declined appeal of this decision on November 12, 1999, NH Supreme Court Case No. 99-540.

**State of New Hampshire**

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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NEW HAMPSHIRE TROOPERS ASSOCIATION	:	
	:	
Complainant	:	
	:	
v.	:	CASE NO. P-0754:7
	:	
STATE OF NEW HAMPSHIRE,	:	DECISION NO. 1999-051
DEPARTMENT OF SAFETY	:	
	:	
Respondent	:	

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APPEARANCES

Representing New Hampshire Troopers Association:

James Donchess, Esq.

Representing State of New Hampshire:

Thomas F. Manning, Manager

Also appearing:

- Bruce Twyon, New Hampshire Troopers Association
- Bernie Sparks, New Hampshire Troopers Association
- Dale St. Laurent, New Hampshire Troopers Association
- Russell A. Boynton, New Hampshire Troopers Association
- L. A. Copponi, New Hampshire Troopers Association
- K. O'Brien, State of New Hampshire
- Ian P. Berkeley, New Hampshire Troopers Association
- F. Booth, Executive Major, New Hampshire State Police

BACKGROUND

The New Hampshire Troopers Association (Union) filed unfair labor practice (ULP) charges against the State of New Hampshire, Department of Safety (State) on December 29, 1998 alleging violations of RSA 273-A:5 I (e), (h) and (i) resulting from a unilateral change in working conditions and a breach of contract when a member of the bargaining unit was not paid his four-hour minimum for each of his court appearances on December 17, 1998. The State filed its answer and a motion to dismiss on January 13, 1999. This matter was then heard by the PELRB on April 22, 1999 after a prior intervening continuance sought by and granted to the parties.

FINDINGS OF FACT

1. The State of New Hampshire, through its Department of Safety, employs personnel in its Division of State Police and, thus, is a "public employer" within the meaning of RSA 273-A:1 X.
2. The New Hampshire Troopers Association is the duly certified bargaining agent for sworn personnel employed by the Division of State Police, up to and including the grade of sergeant. Ian Berkeley is a trooper so employed and represented by the Association in these proceedings.
3. The State and the Union are parties to a 1997-1999 collective bargaining agreement (CBA) ending June 30, 1999, "or until such times as a new Agreement is executed." Joint Exhibit No. 1. Article 7.6 thereof provides:

Any employee who is not on duty and is require[sic] 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. Witness fees paid to employees under these circumstances shall become the property of the Employer. Court/administrative hearings for employees who are not on duty shall only be compensated with a four (4) hour minimum when the minimum does not cover on duty hours.

(The effective date of this Section is October 3, 1997.)

In earlier CBA's from 1987 to 1997, this language was:

Any sworn employee who is not on duty and is required by the Employer to appear in court or 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 three (3) hours compensation. Witness fees paid to employees under these circumstances shall become the property of the Employer. (Union Exhibit No. 10.)

4. Article 8.1 of the 1997-99 CBA is captioned "Traffic Control Duty" and provides:

Employees may work approved construction/overtime details on off-duty hours in accordance with Division policy. Employees shall be compensated at one and one half times the rate of pay for a Trooper II at maximum step and shall be guaranteed a minimum of four (4) hours compensation for time worked beyond four (4) hours to be paid in increments of one half (1/2) hour. (Joint Exhibit No. 1.)

In prior CBA's this provision read:

Police employees on off-duty hours, including off hours on duty days shall be permitted, with the authority of the Director which shall not be unreasonably denied, to work traffic control duty related to construction work performed in areas where state police has[*sic*] jurisdiction. The prescribed uniform for such work shall be at the discretion of the Director. Use of state vehicles is permitted. Employees shall be compensated at a rate of one and one-half times the hourly rate for a Trooper at maximum step in range for all hours worked with a four (4) hour minimum.

5. On December 17, 1998, Trooper Berkeley, on a day off, had an appearance in Concord District Court at 8:30 a.m. and in Franklin District Court At 10:00 a.m. He submitted a request for compensation for each court appearance under Article 7.6 (Finding No. 3) but was paid only for 4 1/2 hours total, not the eight (8) hours he sought. Payment for the 4 1/2 overtime hours was portal-to-portal, from leaving home, to Concord, to Franklin and back again. Berkeley testified that he was not paid the full eight hours because the two court appearances overlapped. Once they overlapped, he was paid for the gross time over and above the four

(4) hour minimum. He also testified that this differed from his prior experience, under the three (3) hour minimum language, where he had been paid for each separate court (but not case) appearance, even if the time overlapped. (See Union Exhibit No. 1 for two appearances between 8:30 and 12:30 with 6 hours or overtime pay authorized for August 12, 1997; Union Exhibit No. 6 for a full three hours of pay on August 15, 1997 when court overlapped with a detail; Union Exhibit No. 7 for 4 hours of pay on April 14, 1998 which overlapped with a detail; Union Exhibit No. 8 for 4 hours of pay on May 11, 1998 which overlapped with a detail; and Union Exhibit No. 9 on March 21, 1997 for 4 hours of pay which overlapped with duty hours.)

6. According to unrebutted testimony from Berkeley, Trooper Louis Copponi and former Trooper Bernie Sparks, the practice relating to payments for court appearances dating back to 1990 was based on the number of "courts" where the Trooper was required to appear, not on the number of cases. Berkeley's understanding was that if he had three cases in Concord District Court, for example, and completed all three within a four hour period, then he would only be entitled to one minimum payment under Article 7.6, but if each of these cases had been in a different court, then he would have been entitled to three minimum payments. Berkeley characterized it as "rare" to have two or more court appearances in one day. Boynton who left the Division in November of 1996, said it used to be the practice that he would receive \$30 for each court appearance, i.e., if he had multiple cases in only one court on the same day, he would receive \$30 for each. This was before the 3-hour or 4-hour minimums were implemented.
7. Bernie Sparks has been employed by the Division since 1976 and is currently a patrol supervisor at Troop D. In 1990, he was told the practice was to reimburse each trooper 3 hours of pay for each court appearance. If a trooper went to court at 1:00 p.m. and reported for duty at 2:00 p.m., i.e., not on a day off, he would receive the 3-hour minimum plus his hourly

pay for duty hours, even if they overlapped. This was also true of details where the trooper went to court and then to a detail, where the court time overlapped into the starting time of the detail. The trooper received the full minimum court pay plus his detail pay, each being at overtime rates.

8. Dale St. Laurent, Vice President elect of the Union, helped negotiate the 1997-99 CBA. He recounted how the Association proposed the 4 hour minimum call-back for both court appearances and details and how the State counter-proposed that it would agree to increase the figure to 4 hours if the Union would exclude overlapped time which intruded into a regular duty assignment. Under this exclusion, now memorialized as the last sentence of current Article 7.6, if a trooper were to go to court at 2:00 p.m. and continue on to a regular duty assignment at 3:00 p.m., he would receive portal to portal pay for the court time, at time and a half, to 3:00 p.m. and straight time thereafter for his normal duty hours. St. Laurent said the issue of court appearances or multiple appearances on days off, as contrasted to "regular duty days," was not raised or discussed.
  
9. Bruce Twyon, current President of the Union, testified that he help negotiate the court time provisions of the 1997-99 CBA. He confirmed that the Union originally proposed four (4) hours for Article 7.6 and that the State counter-proposed the four hour minimum, with one-half hour increments thereafter as reflected in Article 8.1, under the condition that when the four hour minimum conflicted or overlapped with a regularly scheduled shift, then the individual qualifying for court appearance pay would be compensated on an hourly basis not to intrude into or overlap with regularly scheduled duty, i.e., on a normal duty day as opposed to a day off. Twyon further testified that there were no negotiations or discussions about what would happen when multiple court appearances overlapped or court appearances and extra details overlapped during a day off. Thus, there were neither proposals nor counter-proposals to change the methodology of compensating troopers for multiple, overlapping court appearances during

the same off-duty day.

10. Fred Booth has 21 years of service and is the Executive Major for the Division of State Police. He testified that the changes noted in the Article 7.6 and 8.1 of the 1997-99 CBA were prompted by a concern that there would be criticism that state police personnel were being paid twice for the same hour(s) of work, i.e., in an overlap situation, albeit from different sources of revenue. In particular, he cited the example of a trooper doing a brief steel escort or blast detail, under Article 8.1 and the compensation provided thereunder, while on a meal break or coffee break. This prompted the concern and impetus to change the minimum four-hour pay entitlement immediately before a regularly scheduled duty shift, effectively eliminating an overlap situation.

#### DECISION AND ORDER

Our assessment of this case is predicated on three elements, the current and controlling contract language, the bargaining history and exhibited and uncontroverted past practices. With these three elements in mind, we examine two situations: (1) court appearances on duty days and (2) court appearances occurring on off-duty days, i.e., when the trooper is not otherwise "regularly scheduled" to work.

We start with what the practice had been before the pertinent terms of the 1997-99 CBA became effective, namely, that sworn employees received three hours of our time compensation for "each time" they had to appear in court while "not on duty", with "each time" being defined as "each court" and with "not on duty" being defined as a period of time which was not a regularly scheduled work shift. (See Finding Nos. 5, 6, and 7 and "Extra Duty" explanation in Union Exhibit No. 11, page 3, item 6.) During negotiations for the 1997-99 CBA, the Union proposed bringing the 3 hour court minimum up to the 4 hour "extra detail" minimum already existing in Article 8.1. This was accomplished with the negotiation of new Article 7.6 in Joint Exhibit No. 1 which concludes with a new, last sentence, "Court/Administrative hearings for employees who are not on duty shall only be compensated with a four (4) hour minimum when the minimum does not cover on duty hours." Thus, this becomes the new standard

against which the union's, and Berkeley's, claim must be measured. This standard is further supported by the negotiating history, namely, that no proposals or counter-proposals relating to court appearance compensation on days off were raised in negotiations.

Accordingly, we conclude that court appearance compensation for non-duty days or for when "employees are not on duty" is the same as it was before Article 7.6 was renegotiated for the 1997-99 contract, inclusive of the new, last sentence thereof and with the exception that the minimum increased from three to four hours. By the new terms of their 1997-99 CBA, the parties have consciously modified how they treat court appearances which overlap into a regularly scheduled duty day. They have not, however, modified, or even addressed, how they treat court appearances in general, or multiple court appearances in particular, occurring on non-duty days. Thus, past practice under the prior CBA's controls in non-duty day situations.

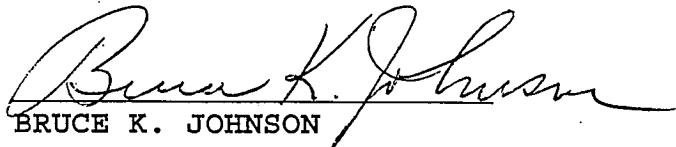
What the new contract language has changed, and according to testimony (Finding Nos. 8, 9 and 10) was intended to change, was compensation for court appearances occurring when an employee is or is going to be on-duty during an overlap period when he or she would benefit from double compensation, although it may be from different sources. (Finding Nos. 8, 9 and 10.) This, however, is not the Berkeley case. He was on a day off when he had his dual Concord and Franklin court appearances. Accordingly, he met the "not on duty" and "when the minimum does not cover duty hours" qualifying exceptions to the last sentence of "new" Article 7.6. He qualified to "only be compensated with a four (4) hour minimum when the minimum does not cover on duty hours." There were no overlapped on-duty hours; therefore, the entitlement is for the equivalent of the traditional, historic and, for lack of a better term, "piece work," minimum rate guaranteed by the contract for each court appearance.

The State's interpretation and construction of "overlapped" court appearance or extra detail hours on regularly scheduled on duty days remains unchanged from the explanations given in testimony before us, i.e., the parties intended by their agreement to eliminate "overlapping" or double compensation with regularly scheduled duty assignments. Conversely, refusal to pay the contractually agreed-to "piecework" rate for court appearances on a non-duty day as required by the current provisions of Article 7.6 of the CBA is a breach of contract and

is violative of RSA 273-A:5 I (e) and (h). Trooper Berkeley's compensation shall be adjusted for December 17, 1998 to be the equivalent of two (2) separate off-duty court appearances at four (4) hours each or eight (8) hours total and the State shall forthwith interpret the provisions of Article 7.6 of the CBA consistently with this decision.

So ordered.

Signed this 4th day of June, 1999.

  
BRUCE K. JOHNSON  
Alternate Chairman

By majority vote, Alternate Chairman Bruce K. Johnson and Member E. Vincent Hall voting in the majority. Member Richard Roulx voting in the minority.