

**1. FACT FINDER'S REPORT AND RECOMMENDATIONS**

**In the Matter of Fact Finding** ) **New Hampshire, PELRB**  
 ) **Case # G-0088-2**  
**Between** )  
 )  
**American Federation of State** )  
**County and Municipal Employees** )  
**Council 93, (AFL-CIO) Police and** )  
**Safety Employees, Local 3657** )  
**Chapter 001 Amherst, NH** )  
**Police Department Employees [Union]** )  
 )  
**And** )  
 )  
**Town of Amherst, NH [Employer]** )  
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**Before:** **GEORGE R. SHEA, Jr.**  
**Appearances:**  
**For Union:** **Steven D. Lyons**  
**For Employer:** **Paul T. Fitzgerald**  
**Location of Hearing:** **Amherst, NH**  
**Date of Hearing:** **January 4, 2010**  
**Date of Report:** **January 8, 2010**

**STATEMENT OF PROCEEDINGS:**

The Union requested the N.H. Public Employee Labor Relations Board [PELRB / Board] commence the statutory Fact Find process in the above captioned matter. The undersigned was designated as the Fact Finder. The Fact Finder held a hearing on and at the previously referred to date and location. The Parties' representatives appeared. The Employer called no witnesses. The Union called no witnesses. Both Parties submitted Fact Finding briefs and made oral arguments consistent with their respective submissions. Neither Party challenged the factual assertions made in the opposing Party's brief; however, both Parties challenged the relevance, applicability and the completeness of some of the facts set forth in their opponent's brief.

## **BACKGROUND and GENERAL FINDING OF FACTS:**

1. The Town of Amherst, NH [Employer / Town], a town of approximately 11,000 residents, is situated in the southern section of the state. The Town has a substantial commercial area in which retail stores, businesses, professional offices, restaurants and entertainment facilities are located. The Town's tax rate is \$20.19 per thousand dollars of evaluation. The Town has adopted SB2; consequently, is limited in the funding of contractual agreements to the submission of warrant articles to a regular annual Town Meeting. Such warrants must be submitted prior to the second Tuesday of January. The requirement requires such submission regarding the issues before the Fact Finder to be made on or before January 12, 2010.
2. AFSCME, Council 93, Local 3657, Chapter 001 [Union] represents the bargaining unit of all full-time patrolmen and sergeants in the Town's police department. At times relevant to this matter, the bargaining unit consisted of six Patrolmen, seven Senior Patrolmen and two Sergeants.
3. The Parties' most recent collective bargaining agreement was a three-year agreement with an expiration date of June 30, 2009 [Previous Agreement]. The instant proceeding involves the Parties' negotiations for a Successor Agreement [Successor Agreement].
4. The Parties commenced negotiations for the Successor Agreement during August 2008. Actual negotiation sessions commenced in November 2008. ~~The Parties' negotiators reached a three-year tentative agreement on all items on or before December 12, 2008. The tentative agreement provided for a "re-opener" for the second and third contract year on the sole issue of "wages". The bargaining unit employees rejected the tentative agreement on or about January 5, 2009~~ and the Parties commenced subsequent negotiations on or about January 27, 2009. These negotiations resulted in an impasse and pursuant to applicable state law, the Parties petitioned the N.H. PELRB for the appointment of a mediator. Mediation sessions commenced on April 2, 2009.
5. The Parties were unable to reach a mutual understanding on the following three issues: Wages, Ballistic Vests (body armor) and Radio Equipment Upgrade (mobile repeaters).
6. As a result of this impasse, the Union, by letter dated November 12, 2009, requested the N.H. PELRB initiate the statutory Fact Finding process. The Agency appointed the undersigned as Fact Finder by letter dated December 14, 2009 and the Parties agreed to a hearing date of January 4, 2010

**ISSUES:**

At the January 4, 2010 hearing on this matter, the Union withdrew the Radio equipment upgrade (mobile repeaters) issue from negotiations, consequently, the only issues submitted to Fact Finder were the Wage issue and the Protective Armor issue.

**ISSUE #1 WAGES:**

The current salary schedule for the Amherst Police Department bargaining unit personnel is the following:

|                  | Step 1   | Step 2   | Step 3   | Step 4   | Step 5   | Step 6   | Step 7                    |
|------------------|----------|----------|----------|----------|----------|----------|---------------------------|
| Patrolmen        | \$19.80  | \$ 20.61 | \$ 21.48 | \$ 22.37 | \$ 23.31 | \$ 23.78 | <del>\$ 27.27</del> 24.27 |
| Senior Patrolmen | \$ 21.15 | \$ 22.03 | \$ 22.95 | \$ 23.51 | \$ 24.49 | \$ 24.99 | \$ 25.50                  |
| Sergeants        | \$ 25.69 | \$ 26.77 | \$ 27.87 | \$ 28.57 | \$ 29.75 | \$ 30.36 | \$ 30.97                  |

The Parties' Previous Agreement provided the following:

**Article 10 Salaries**

“Effective July 1, 2006, employees covered by this Agreement shall receive a wage adjustment of 4.25%. Effective July 1, 2007, employees covered by this agreement shall receive a wage adjustment based on the annual average of the Nashua CPI-U and the Northeast Urban CPI-U published for September 2006. This wage adjustment shall not exceed 5 percent. Effective July 1, 2008, employees covered by this agreement shall receive a wage adjustment based on the annual average Nashua CPI-U and the Northeast Urban CPI-U published for September 2007. This wage adjustment shall not exceed 5 percent...”

~~The application of this formula to the month of September 2008 indicates a 4.95% increase in the CPI and if applied to the salary schedule, would result in a comparable increase in that schedule effective July 1, 2009. (Union Brief, page 4)~~

The CPI Summary published by the Bureau of Labor Statistics of the U.S. Department of Labor released on December 16, 2009, referring to the November 2009 CPI, indicated that over the last twelve months the index increased by 1.8%. <sup>1</sup> (See Employer's brief, page 5.

<sup>1</sup> The Fact Finder observes that these figures apply to the national economy as a whole and are inconsistent with CPI figures specifically applicable to the Amherst, NH economic region.

## **UNION'S POSITION:**

The Union asserted that the following proposal would establish the appropriate salary schedule for the bargaining unit employees during the term of a three-year collective bargaining agreement effective July 1, 2009 through June 30, 2012 [Successor Agreement]:

The inclusion in the Successor Agreement of the Employer's proposed modification of the existing Step schedule which would eliminate the current first step and add a two percent (2%) step to the upper end of the scale. Employees who are currently at the maximum step of the existing scale shall receive this two percent (2%) step increase retroactive to July 1, 2009 but otherwise movement through the step scale shall remain tied to the employee's anniversary date. (Union Brief, page 5)

The implementation of the following cost of living [COLA] increases on the designated dates:

4.95 % Across-the-Board increase retroactive to July 1, 2009

0% Across-the-Board increase effective July 1, 2010

Range of zero to 5% increase effective July 1, 2011

## **UNION'S SUPPORTIVE ARGUMENTS**

The Union argued that its proposal nearly mirrors the Employer's proposal with regard to years two and three of the proposed Successor Agreement; in that, it provides for no COLA increase in year two of the agreement and a limited reopener on the issue of the salaries to be paid to bargaining unit employees in year three of the agreement.

The Union further argued that its salary proposal reflects the fact-based COLA adjustment formula previously agreed to by the Parties and in consideration of the low adjustments resulting from the application of that formula during the term of the Previous Agreement, the employees should not be deprived of the benefit of the formula when it results in a higher COLA adjustment to the salary schedule. The Union further argued that its proposal is justified when considered in conjunction with the Union's agreement to increase the employees' share of the health care costs under the insurance offered by the Town to unit employees during the Successor Agreement. (Union's Brief, page 2 and Tab 4)

## **EMPLOYER'S POSITION**

The Employer asserted that the following was the appropriate salary schedule for the bargaining unit employees during the term of a three-year Successor Agreement effective July 1, 2009 through June 30, 2012:

Employees covered by the CBA shall receive a wage increase retroactive to July 1, 2009 of one percent (1%). Additionally, the salary schedule for the Department will be adjusted to eliminate the current first step and add a two percent (2%) step to the upper end of the scale. Employees who are currently at the maximum step of the existing scale shall receive this two percent (2%) increase retroactive to July 1, 2009.

The Town offered no COLA increase effective July 1, 2010 but proposed that Union members would continue to move through the step system as prescribed in the Parties' Previous Agreement.

The Town further offered a provision, which provided that the Parties would reopen negotiations on the sole issue of the cost of living adjustments for the third year of the contract no later than September 15, 2010. (Employer's brief, page 5)

## **EMPLOYER'S SUPPORTIVE ARGUMENTS**

The Employer argued that its position of granting a one percent COLA increase coupled with its adjustment in the step schedule would result in a minimum three percent (3%) increase for all bargaining unit employees and is consistent with or exceeds the raises granted by other similar New Hampshire communities to their police employees. (Employer Brief, pages 4-6)<sup>2</sup> The Employer also asserted that its proposal results in a three percent (3%) increase for a period when the annual CPI increase is either 1.8 % or lower. The Employer further argued that Amherst taxpayers are already paying taxes at a rate higher than many of the surrounding / comparable municipalities, in particular, the New Hampshire communities of Hanover, Merrimack, Milford and Raymond.

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<sup>2</sup> The Employer relies on a comparison with the communities of Berlin, Claremont, Durham, Exeter, Hanover, Hooksett, Lebanon, Milford, Pelham, Raymond, Somersworth and Windham. See Employer's Exhibit #1 New Hampshire Local Government Wage, Salary and Benefit Survey (2009) Part E.

**FACT FINDER'S FINDINGS and RECOMMENDATION:**

The Fact Finder makes the following observations regarding the facts and arguments relied upon by the Parties in support of their respective positions. The Fact Finder is not persuaded that a comparison of salary levels of comparable municipalities for the year 2008 is helpful in determining the appropriate salary levels for the Town's police employees for the contract year commencing on July 1, 2009. In the opinion of the Fact Finder, the inadequacy of such a comparison is heightened by the absence of evidence of the salary schedules effective July 1, 2009 in the those communities, with the possible exception of the communities of Windham and Franklin, New Hampshire.

Similarly, the Fact Finder determines that the comparison of the tax rate of various comparative municipalities is of little assistance in making a determination as to the appropriateness of the Parties' respective wage proposals. The evidentiary record is devoid of a comparison of the actual tax burden on the residents of those communities or of the impact the Parties' wage / salary proposals on the Amherst, NH tax rate or the tax burden on its residents. The Fact Finder, however, does find the COLA evidence persuasive when considered in conjunction with his understanding of the longevity purpose of the "step provisions" incorporated into the Parties' agreed upon salary schedule.

The Fact Finder, based upon the Parties' evidence and arguments, makes the following recommendation regarding the appropriate salary schedule to be included in the Successor Agreement:

1. **The elimination of the first step of the current salary schedule and the addition of a two percent (2%) step to the upper end of the scale;**
2. **The inclusion of a provision in the Successor Agreement which would provide that employees who are currently at the maximum step of the existing scale shall receive this two percent (2%) increase retroactive to July 1, 2009; and otherwise continue the contractual practice of allowing movement through the step scale tied to the employee's anniversary date;**
3. **The implementation of the following wage increases on the designated dates:**
  - a. **0.95% Across the Board retroactive to July 1, 2009**
  - b. **Granting of all earned but outstanding Step increases retroactive to July 1, 2009 pursuant to the contractual practice in effect during the Previous Agreement**
  - c. **0% Across the Board increases effective July 1, 2010**
  - d. **The inclusion of a contractual provision that the Parties reopen negotiations on the sole issue of the cost of living adjustment for the third year of the contract no later than September 15, 2010.**

## **ISSUE #2 ARMORED VESTS:**

The Parties' Previous Agreement contained the following articles relative to the Parties' respective positions on this issue:

### **Article 15. 1**

"During the term of this Agreement, the following uniform allowance shall be in effect:

- a. Officers performing patrol duties, shall be issued the following items in the quantities indicated ...  
Vest Bullet Proof 1 "

### **Article 15. 5**

"The Department shall replace any issued equipment damaged in the line of duty or by fair wear and tear. This shall be a no cost to the officer."

### **Article 21**

"The Department shall have the right to make regulations for the safety and health of its employees during their hours of employment. Representatives of the Department and the Union may meet once in ninety (90) days at the request of either party to discuss such regulations."

### **Article 23.1**

"The parties agree that all rights and responsibilities of the Town which have not been specifically provided for in this Agreement are retained in the sole discretion of the Town whose right to determine the structure and goals, purpose, functions and policies of the Town which shall include but not be limited to the following:

- f. The right to make rules and regulations and policies not inconsistent with the provisions of this Agreement and to require compliance therewith; "

The Fact Finder observes that the Parties' oral arguments at the hearing both presumed that the Employer had mandated officers assigned to certain duties to wear body armor (bullet proof vests). The Fact Finder so finds.

## **UNION'S POSITION AND SUPPORTIVE ARGUMENTS**

The Union proposed to modify Article 15, Section 5, as it appears in the Parties' Previous Agreement, to read as follows:

"Officers required to wear protective body armor shall be issued body armor which has a warranty period still supported by the manufacturer. Officers will not be required to wear body armor with expired

manufacture warranties. Officers who detect possible defects in the body armor shall bring this defect to the attention of the Chief of Police for replacement.”

The Union urged the Fact Finder to recommend the inclusion of its proposal into the Parties’ Successor Agreement effective July 1, 2009. The Union argued that the proposed provision is needed to contractually ensure that bargaining unit employees are not required to wear body armor that is defective or has expired effectiveness. The Union asserted that the Employer does not contest that the warranty period for such vests is normally five years. The Union further asserted that the cost of a new vest is approximately \$550. The Union further asserted that when that cost is apportioned over the five-year warranty period, the annual cost of its proposal to the Town is \$110 per bargaining unit employee. The Union further argued that its proposal is consistent with the NIJ Interim Requirement for Bullet Resistant Body Armor.<sup>3</sup>

The Union asserted that its proposal assures that the employee receive a death benefit which is attached to the warranty provided by the vest manufacturer. The Union argued that its proposal does not infringe on the Employer’s right to determine the level of armor or the manufacture of the armor but rather provides a mechanism through contractual funding to ensure the funds are available for vest replacement and that such funds are used specifically for this vital element of officer safety.

#### **EMPLOYER’S POSITION AND SUPPORTIVE ARGUMENTS**

The Town has continuously taken the position that the safety of officers is a high priority and should continue to be so; however, the issuance of equipment and its use is clearly a management prerogative (see current contract) and thus is not a subject upon which the Town is compelled to negotiate. The Union’s proposal was that no officer be supplied with body armor for which the manufacturer’s warranty had expired. The Town took the position that simply because the warranty period had expired did not mean that the garments were ineffective. More importantly, the Town took the position that this item was not a mandatory subject of negotiations as it fell into the realm of management rights and the Town continues to maintain that position. (Appeal of State 138 N.H. 716, 1994) The Town, consequently, made no substantive counter proposal.

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<sup>3</sup> See Union Exhibit entitled National Institute of Justice NJI Journal. Issue No. 249. For an in depth discussion of the impact of age on effectiveness of protective bullet proof vests see Union’s entire exhibit

**FACT FINDER'S FINDINGS and RECOMMENDATION:**

The Town asserted that the issuance of equipment and its use is clearly a managerial prerogative pursuant to the Parties' collective bargaining agreement and applicable law.

The Union argued that its proposal directly affects the working conditions of the employees; in that, it ensures that bargaining unit employees are not required to wear body armor which is defective or has expired effectiveness and that its proposal provides for a procedure to implement the provisions of Section 15.5 of the Parties' collective bargaining agreement. The Fact Finder finds the Union's arguments persuasive and, consequently, finds that the subject matter of the Union's proposal on this issue involves a condition of employment within the meaning of New Hampshire Public Employee Labor Relations Act (RSA 273-A).

The evidence submitted to the Fact Finder by the Parties does not include evidence of a constitutional, statutory or statutorily adopted regulation provision that exclusively reserves to the Employer the managerial rights asserted by the Town. Conversely, the Parties' collective bargaining agreement contractually requires the Employer to provide all Officers performing patrol duties a Bullet Proof Vest and to replace that Vest, if it is damaged in the line of duty or by fair wear and tear, at no cost to the officer. (**Article 15. 1 and Article 15. 5**) The Employer has instituted a policy that all officers performing patrol duties must wear a bulletproof vest. The adoption of such a rule does not require that the subject matter be excluded from negotiations. The Fact Finder also determines that, to the extent that the Union's proposal involves or requires a monetary expenditure by the Town, the funding of such expenditures will be a budgetary matter submitted to the Amherst Town Meeting.

Based upon his analysis of the Parties' past and proposed contract provisions, the evidence and arguments submitted to him at the Fact Finding hearing and in the absence of any evidence of a constitutional, statutory or regulatory reservation supportive of the Employer's position that the matter is not negotiable, the Fact Finder finds the subject matter of Union's proposal on this issue to be negotiable.

**Based upon this analysis the Fact Finder recommends that the Union's proposal on this issue, as set forth in this Report, be incorporated into the Parties' Successor Agreement effective July 1, 2009.**

/s/ George R. Shea, Jr.  
**George R. Shea, Jr.**