

**IN THE MATTER OF  
GRIEVANCE ARBITRATION  
BETWEEN**

**ROCKPORT POLICE ASSOCIATION,  
MCOP, LOCAL 154**

**-AND-**

**TOWN OF ROCKPORT**

**NATIONAL GUARD PAY**

**AWARD**

The Town violated the parties' Collective Bargaining Agreement, specifically Article XXIX in or around January of 2015 when the Town stopped paying Officers Balzarini and Ludovicz full pay while they were on leave for National Guard training. They shall forthwith be made whole with full pay without deduction of National Guard training pay from January, 2015 when the Town stopped paying full salaries to them while they were on such leave. Furthermore, the statutory rate of interest shall be applied to their make whole relief from the date of this award. The Town shall reinstate the past practice of paying full salaries without military pay deduction to all Police Officers who attend National Guard training. The arbitrator retains jurisdiction of the case for remedial calculation purposes for a period of thirty (30) calendar days after the award is issued.

Dated: 8/3/16

  
/s/ Richard G. Boulanger, Esq.  
Arbitrator

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The grievance was heard by Arbitrator Richard G. Boulanger, Esq. on March 3, 2016 at the Town of Rockport Public Library, Rockport, Massachusetts.

Mr. John Becker, Esq. represented Rockport Police Association, MCOP, Local 154 (Union). The Union called the following witnesses: Patrolman Jason Balzarini, Officer Adam Ludovicz, and Patrolman Gregory George as witnesses. Ms. Colleen Daniels, Local 154 President, was in attendance for the Union.

The Town of Rockport (Town) was represented by Mr. Darren Klein, Esq. The Town called former Interim Police Chief James Mulligan and Lieutenant Mark Schmink as witnesses. Mr. Jolen Horvath, Police Chief, and Mr. Mitchell Vieira, Assistant Town Administrator/Human Resources Director, were in attendance for the Town.

The parties were given full opportunity to present evidence and make arguments.

Witnesses were sworn

The stipulated issue is as follows:

Did the Town violate the parties' Collective Bargaining Agreement,

specifically Article XXIX in or around January of 2015 when the Town stopped paying Officers Balzarini and Ludovicz full pay while they were on leave for National Guard training? If so, what shall be the remedy?<sup>1</sup>

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<sup>1</sup> In addition to an issue similar to the one specified above, the Town proposed the following statement: "Can the Arbitrator order the Town to continue to make payments that violate the law?" That statement is not explicitly included in the issue, but whether the Town is legally barred from paying full salaries to Police Officers while they attend National Guard training is implicit in the issue.

**I. COLLECTIVE BARGAINING AGREEMENT**

A. **ARTICLE XXIV: GRIEVANCE AND ARBITRATION**

B. **ARTICLE XXVIII: SEPARABILITY AND SUBORDINATION TO EXISTING LAW**

C. **ARTICLE XXIX: EMPLOYER RIGHTS**

## **II. SUMMARY OF THE CASE**

On or about January 6, 2015, Officers Jason Balzarini and Adam Ludovicz were informed by then Interim Police Chief Mulligan that the Town was discontinuing its practice of providing full pay to them while they were engaged in National Guard training. Thereafter, Officers Balzarini and Ludovicz were paid the difference between their National Guard training pay and their Town salaries.

The Union argues that the discontinuation of full Town salaries to Officers Balzarini and Ludovicz is a violation of Article XXIX and the parties' practice. The Union seeks restoration of full-time Town pay to Officers Balzarini and Ludovicz, other officers similarly situated, and make whole relief.

The Town contends that it is a violation of law to pay Officers Balzarini and Ludovicz their full-time Town salaries when they attend National Guard training. The Town's payment of the difference between National Guard pay, and their Town salaries is a reasonable compromise, and ensures that they do not lose any wages while on leave for National Guard training.

The arbitrator ruled that the Town violated the Collective Bargaining Agreement by failing to compensate Officers Balzarini and Ludovicz with their full pay while they are on leave for National Guard training.

### **III. JOINT STIPULATION OF FACTS**

The Town of Rockport ("Town") and Local 154, Massachusetts Coalition of Police ("Union") hereby stipulate that, for the purposes of this arbitration proceeding, the following facts are true:

1. The Town and the Union are parties to a collective bargaining agreement ("CBA").
2. The CBA contains no written provision regarding the payment of officers who are enrolled in the National Guard or military reserves.
3. Article XXIX of the CBA provides, in relevant part, "All job benefits heretofore enjoyed by the employees will continue under the conditions upon which they have previously been granted unless amended or revised by the provisions hereof." Article XXVIII of the CBA provides as follows: "Should any of the provisions of this Agreement become invalid because of any Federal or State law or a decision by a court of competent jurisdiction, the remainder of this Agreement shall not be affected thereby. In the event that this Agreement or any part or provision thereof conflicts with any State law, Chapter 150E, Section 7(d) shall prevail."
4. On April 3, 2003, the Town adopted Chapter 137 of the Acts of 2003, which provided for pay to Town employees in "active service" of the U.S. Military. This statute did not apply to training in the National Guard. The Town did not adopt the provisions of G.L. c. 33, §59.
5. Members of the National Guard are required to complete a certain amount of training each year, which averages out to approximately one weekend per month (two or three days) and 14 additional days of training per year, although the specific dates and amounts may vary from unit to unit.
6. Officer Adam Ludovicz was a member of the National Guard when he became a reserve officer for the Rockport Police Department in November 2012. Officer Ludovicz began working a full-time schedule in March 2014 and was appointed to a full-time position in October 2014.
7. Officer Jason Balzarini was already a member of the National Guard when he was appointed to a full-time position as a Rockport police officer in December 2013.
8. Both Officer Ludovicz and Officer Balzarini receive health insurance through the National Guard, so neither officer uses the Town's health insurance plan.
9. Prior to January 2015, Officers Balzarini and Ludovicz were permitted to fulfill their military obligations without loss of pay and without deducting any pay received from the National Guard once they were appointed to full-time positions. In Officer Ludovicz's case, he also received full pay when he was appointed to a part-time position but working a full-time schedule between March 2014 and August 2014. This practice of leave with full pay began in or around July of 2012

when former Officer Peter Griffin was working a 4/2 schedule as a Reserve Officer prior to his full-time appointment. When Officer Griffin became a full-time officer in or around February of 2013, this practice continued on most occasions.

10. If an officer was scheduled to work on a shift that qualified for night shift differential, his pay during military training did not include the differential, but only the base pay.
11. The Department received in 2012 the Patriot Award from the Employer Support of the Guard and Reserve (ESGR), a committee of the Department of Defense.
12. On January 6, 2015, Interim Police Commissioner James Mulligan informed Officers Balzarini and Ludovicz that the Department was discontinuing the practice of paying them their full pay during National Guard training, since he believed such payments were in violation of law. Chief Mulligan explained to both officers his opinion that they had been receiving compensation from the Town that they were not entitled to under the law because municipalities could not pay such compensation for their attendance at the National Guard. Instead, Chief Mulligan stated that the officers would receive the difference between their regular pay and the National Guard pay.
13. The Town did not give the Union notice and an opportunity to bargain over this change at the time.
14. For the purposes of this arbitration, rather than continuing to receive full pay while on Military Leave, Officers Ludovicz and Balzarini have received since January of 2015 the difference between their regular pay and their National Guard pay based upon their last submitted pay stub.
15. The Union filed a grievance over the change in military pay practices on February 20, 2015. (See Attachment 1.)
16. Interim Chief Mulligan denied the grievance by letter dated March 10, 2015. (See Attachment 2.)
17. The Union forwarded the grievance to the Board of Selectmen/Town Administrator on March 15, 2015. (See Attachment 3.)
18. Town Administrator Linda Sanders denied the grievance by letter dated May 1, 2015. The letter also invited the Union to engage in bargaining over payment for the first 17 training days per year. (See Attachment 4.)
19. The Union and the Town engaged in bargaining pursuant to the Town's suggestion, during which grievance procedure time limits were suspended, but were unable to reach agreement.

20. The Union filed a demand for arbitration by letter dated August 21, 2015.



#### **IV. SUMMARIES OF THE PARTIES' ARGUMENTS**

##### **A. UNION:**

The arbitrator should uphold the Union's grievance because in denying full pay to Officers Balzarini and Ludovicz (grievants), the Town violates the parties' past practices in effect since at least 2012, and specifically incorporated into the collective bargaining agreement by virtue of the maintenance of benefits term of Article XXIX. Therefore, when the Town violates the parties' past practices, it also breaches their collective bargaining agreement. Based on the parties' factual stipulations in the instant case, and other evidence, the Town cannot maintain that a past practice of providing full pay to Police Officers attending National Guard training is not a binding one.

It is of no consequence that the four (4) statutes enumerated by the Town are not included in c. 150E §7(d) because there is no substantive conflict between contract terms and the statutory provisions. The statutes do not address the issue of Town compensation to its Police Officers who attend National Guard training. Existence of a local option law addressing a particular subject matter does not preempt contractual provisions addressing the same subject matter. Consequently, the parties' past practices, as incorporated into the collective bargaining agreement, govern and the grievance should be upheld. Moreover, if the statutes are found to be relevant, they support the notion that municipalities may provide full pay to its Police Officers, and other employees, who attend National Guard training. In addition, the parties' past practices are consistent with G.L.c. 33 §59 which provides for "pay without loss of ordinary remuneration as a public employee..."

In any event, no statute governing National Guard training pay applies because, of the four (4) statutes cited by the Town, two (2) have been repealed, one (1) has never been adopted

by the Town and, one (1) only addresses military pay in connection with active military service. Therefore, in the instant case, no statutory analysis is required. Moreover, the parties' past practice requiring the payment of a full Town salary, without deduction, to Police Officers engaged in National Guard training does not run afoul of the Anti-Aid Amendment to the Massachusetts Constitution. The arbitrator should reject the Town's contention that it is legally barred from providing full pay to Police Officers while they attend National Guard training. The grievance must be upheld because the Town violated the parties' past practices of paying full Town compensation, without deduction of military pay, when Police Officers attend National Guard training. As a result thereof, the grievants should be made whole. The statutory rate of interest should be applied to the make whole relief from the date of this award. The Union cites authority in support of its arguments.

**B. TOWN:**

The Town contends that pursuant to the following statutes, it does not have the legal authority to pay salaries to Police Officers who attend National Guard training: G.L.c. 149 §52a; G.L.c. 33, §59; Chapter 137 of the Acts of 2003; and Uniformed Services Employment and Re-employment Rights Acts of 1994 (USERRA). Specifically only c. 137 of the Acts of 2003 and USERRA apply to the Town. As to the determination of paid leave eligibility, Chapter 137 of the Acts of 2003 specifically excludes National Guard training from the definition of "active service." USERRA does not address attendance at National Guard training. Up to its repeal in 2014, G.L.c. 149 §52a provided a maximum of 17 days of annual paid leave at the Town's discretion to attend military training. That statute was repealed in 2014 and does not apply to the facts of the instant case. G.L.c. 33 §59 is of no assistance to issue resolution as it has never been accepted by the Town.

The parties' collective bargaining agreement complies with the legal provisions, and was not meant to run afoul of statutory provisions. An award which obligates the Town to continue making full salary payments to Police Officers while they attend National Guard training is violative of the collective bargaining agreement and the law. Moreover, statutes providing military leave and pay are not included in G.L.c. 150E §7(d). Therefore, their provisions cannot be superseded by contract terms. The Town's payment to Police Officers for National Guard training violates the Massachusetts Anti-Aid Amendment. Furthermore, the arbitrator's limited contractual authority does not allow him to amend contract provisions in any manner, necessary to rule in favor of the Union. The grievance should be denied for all of the reasons specified above. The Town cites authority in support of its arguments.

## **V. FINDINGS AND OPINION**

### **A. ISSUE**

The Union proposed the following issue:

1. Did the Town violate the collective bargaining agreement when it stopped paying Jason Balzarini and Adam Ludovicz their full pay during National Guard training beginning in January 2015?
2. If so, what shall be the remedy?

The Town sought the following description of the dispute:

- Did the Town violate Article 29 of the parties' CBA in or around January of 2015 when the Town stopped paying Officers Balzarini and Ludovicz full pay while they were on leave for National Guard Training? If so, what shall be the remedy?
2. Can the Arbitrator order the Town to continue making payments that violate the law?

Based on the facts of the case, and the parties' arguments, including those concerning their issue proposals, the following statement captures the essence of their dispute:

Did the Town violate the parties' Collective Bargaining Agreement, specifically Article XXIX, in or around January of 2015 when the Town stopped paying Officers Balzarini and Ludovicz full pay while they were on leave for National Guard training? If so, what shall be the remedy?

### **B. CONTRACTUAL STANDARD**

The parties agree that the collective bargaining agreement contains no express provision specifically addressing salary payments to Police Officers who take part in National Guard training. (See Joint Stipulation of Facts (JSOF) #2.) Per the parties' issue, the following terms of Article XXIX (**Employer Rights**) must be evaluated to ascertain whether the grievants are entitled to their full Town salaries when they are engaged in National Guard training:

The Agreement has not been designed to violate any Federal, State, County, or Municipal laws, nor shall anything in this Agreement be interpreted as

diminishing the right of the employer to determine and prescribe the methods and means by which its operation of the Police Department shall be conducted, except as has been specifically mentioned by the terms of this Collective Bargaining Agreement.

All job benefits heretofore enjoyed by the employees will continue under the conditions upon which they have previously been granted unless amended or revised by the provisions hereof. The Agreement shall not be construed to deprive employees of any benefits or protections granted by the laws of the Commonwealth of Massachusetts. (See Joint Exhibit #1.)

The second paragraph of Article XXIX is a broad, all-encompassing, past practice provision provision (“All job benefits... will continue under the conditions upon which they have previously been granted unless amended or revised by the provisions hereof”). It is not disputed that the Town’s payment of full salary to its Police Officers involved in National Guard training is a job benefit. The only two (2) conditions precedent to the grievants’ receipt of full Town salary without deduction of military pay are that the benefit existed in the past, and that it has not been contractually modified. Satisfying the first contingency, the job benefit began in July, 2012 when the Town paid to former Police Officer Peter Griffin his full Town salary when he engaged in military training. (See JSOF #9.) Furthermore, the parties agreed that prior to January, 2015, the grievants received their full Town salaries without deduction when they were engaged in National Guard training. (See JSOF #9.) There is no evidence that the parties bargained a modification to the job benefit prior to January, 2015, or thereafter. Therefore, there is no evidence that the benefit was modified, or that the practice of paying full salary was interrupted between July, 2012 and January, 2015, satisfying the second condition precedent. Consequently, by the express terms of the second paragraph of Article XXIX, codifying the intent of the parties relative to job benefits, including the payment of Town salaries to Police Officers undergoing National Guard training, the grievants are entitled to their full Town salaries without deduction

while engaged in National Guard training, unless legally barred.

**B. LEGAL STANDARDS**

The Town contends that there is a legal impediment to the payment of full Town salaries to Police Officers who undergo National Guard training, and that the Town is not authorized to do so. Article XXVIII (**Separability and Subordination to Existing Law**) provides as follows:

Should any of the provisions of this Agreement become invalid because of any Federal or State law or a decision by a court of competent jurisdiction, the remainder of this Agreement shall not be affected thereby.

In the event that this Agreement or any part or provision thereof conflicts with any State law, Chapter 150E, Section 7(d) shall prevail. (See Joint Exhibit #1.)

The Town contends that the payment of full Town salaries, without deduction, to employees engaged in National Guard training is invalid because it conflicts with one (1) or more of the following statutes:

1. G.L.c. 149 §52a;
2. G.L.c. 33 §59
3. Chapter 137 of the Acts of 2003; and
4. Uniformed Services Employment and Re-employment Rights Acts of 1994 (USERRA)

The statutes are not delineated in Chapter 150E, Section 7(d) and therefore, contract terms subordinate to the statutory provisions in the event of a conflict. However, the evidence reveals that there are no material conflicts between the statutes and Article XXIX. G.L.c. 149 §52a was repealed in 2014 and has no applicability to the facts of the instant case. However, prior to its repeal, it provided for up to 17 days of military training, paid or unpaid at the Town's sole discretion to "members of the ready reserve forces." G.L.c. 33 §59A was repealed in 2014. In April, 2003, the Town accepted Chapter 137 of the Acts of 2003, and now relies on its provisions to deny full Town salary to Police Officers enrolled in National Guard training. (See

JSOF #4.) In pertinent part, it provides as follows:

Notwithstanding any general or special law to the contrary, an employee in the service of the commonwealth or a county, city or town that accepts this section as provided in this section, including an employee of a school district, who has been granted a military leave of absence because the employee is a member of the army national guard, the air national guard or a reserve component of the armed forces of the United States called to active service in the armed forces of the United States after September 11, 2001, shall be entitled to receive pay at his regular base salary as such a public employee, and shall not lose any seniority or any accrued vacation leave, sick leave, personal leave, compensation time or earned overtime. An employee eligible under this section shall be paid his regular base salary as such a public employee for each pay period of such military leave of absence after September 11, 2001, reduced by any amount received from the United States as pay or allowance for military service performed during the same pay period, excluding overtime pay, shift differential pay, hazardous duty pay or any other additional compensation. For the purposes of this section, the words "active service" shall not include active duty for training in the army national guard or air national guard or as a reservist in the armed forces of the United States. This section shall take effect in a county, city or town upon its acceptance in a county, by vote of the county commissioners; in a city or town, as provided in section 4 of chapter 4 of the General Laws; and in a regional school district, by vote of the school committee. Nothing in this section shall limit or reduce a person's entitlement to benefits under section 59 of chapter 33 of the General Laws, and nothing in this section shall entitle a person to benefits in excess of the maximum benefit provided under said section 59 of said chapter 33 for any period during which that person is receiving benefits under this section.

Chapter 137 of the Acts of 2003 provides certain benefits and salary guarantees for "employees called to active service in the armed forces of the United States after September 11, 2001."

Pursuant to Chapter 137 of the Acts of 2003, an employee "who has been granted a military leave of absence ... because the employee... called to active service...shall be entitled to receive pay at his regular base salary as such a public employee... reduced by any amount received from the United States as pay or allowance for military service..." It also provides that the words "active service" shall not include active duty for training in the army national guard or air national guard or as a reservist in the armed forces of the United States..." Therefore, it is clear

from the statutory provisions themselves that active service does not include National Guard training. However, it is of considerable significance to the resolution of the instant case that Chapter 137 of the Acts of 2003 does not define the level of salary payment to an employee engaged in National Guard training. Chapter 137 of the Acts of 2003 provisions does not bar full municipal salaries while undergoing National Guard training. It does not conflict with the job benefit past practice guarantee of Article XXIX as it does not identify any specific level of salary payment to public employees enrolled in National Guard training. However, Chapter 137 of the Acts of 2003 includes the following provision:

“Nothing in this section shall limit or reduce a person's entitlement to benefits under section 59 of chapter 33 of the General Laws...”

In pertinent part, G.L.c. 33 §59 provides as follows:

An employee [of a city or town that has adopted this section] in the service of the armed forces of the Commonwealth or a reserve component of the armed forces of the United States shall be entitled to receive pay without loss of ordinary remuneration as a public employee during annual training under section 60 or drills and parades under section 61, not exceeding 34 days in any state fiscal year and not exceeding 17 days in any federal fiscal year, and shall not lose any seniority or any accrued vacation leave, sick leave, personal leave, compensation time or earned overtime.

It is worthy of note that G.L.c. 33 §59 provides for “pay without loss of ordinary remuneration as a public employee during annual training under section 60 or drills and parades under section 61... not exceeding 34 days in any state fiscal year and not exceeding 17 days in any federal fiscal year...” Consequently, per G.L.c. 33 §59, employees are entitled to full Town salaries without military pay deduction. Although the Town has not accepted G.L.c. 33 §59, it is enlightening that Chapter 137 of the Acts of 2003 was accepted by the Town and refers to G.L.c. 33 §59 and expressly states that its provisions “shall not limit or reduce a person's entitlement to benefits under section 59 of chapter 33 of the General Laws...” Therefore, G.L.c. 33 §59



provides for full salary without deduction when a “reserve component of the armed forces of the United States” undergoes training. The parties’ past practices of full pay without deduction for military training is consistent with the benefits identified in G.L.c. 33 §59.

USERRA does not address payments to employees engaged in National Guard training. USERRA’s failure to address salary payments to a public employee undergoing National Guard training does not therefore conflict with the terms of Article XXIX which includes the job benefit granted by the Town in the past, paying full Town salaries without deduction to Police Officers engaged in National Guard training.

The Town also argues that paying full Town salaries to Police Officers engaged in National Guard training violates the Anti-Aid Amendment to the Massachusetts Constitution which at G.L.c. 40 §5 provides as follows:

[a] town may at any town meeting appropriate money for the exercise of any of its corporate powers; provided, however, that a town shall not appropriate or expend money for any purpose, on any terms, or under any conditions inconsistent with any applicable provision of any general or special law.

The Town also relies on the following provisions of Amend. Article 18 §2 of the Massachusetts Constitution:

n]o grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the Commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents.

It is clear that the Anti-Aid Amendment to the Massachusetts Constitution and Amend. Article 18 §2 of the Massachusetts Constitution were enacted to preclude the disbursement of funds to private institutions, but not to municipal employees. The Town’s payment of full salaries to Police Officers while undergoing National Guard training is not barred by Amend.

Art. 18, §2, of the Massachusetts Constitution nor Chapter 40 §5.

The Town contends that the laws that it has cited either bar the payment of full salary to the grievants while undergoing National Guard training, or that they do not authorize such payments. Chapter 137 of the Acts of 2003 and USERRA do not preclude the payment of full salaries to the grievants while undergoing National Guard training because those statutes do not address payment for National Guard training. Moreover, Chapter 137 of the Acts of 2003, by its own terms, does not “limit or reduce a person's entitlement to benefits under section 59 of chapter 33.” The Town’s authority to pay such benefits is provided in Article XXIX. As discussed in more detail above, there is no legal bar to the Town’s payment of such salaries to Police Officers engaged in National Guard training. Here, the level of compensation must be determined by the collective bargaining process, as in Article XXIX.

In Article XXIV §2, the parties limited my authority as follows:

The arbitrator shall have no power to add to, subtract from or modify any of the terms of the Agreement or to establish new terms or conditions under the Agreement. The decision of the arbitrator shall be final and binding upon the parties.

Therefore, my authorized role is to interpret contract provisions such as Article XXIX and apply them to the facts of the parties’ dispute. However, I am not authorized to alter collective bargaining agreement provisions or to ignore them. To determine that the Town is not required to pay full Town salaries without military pay deduction to the grievants while they participate in National Guard training would require me to alter the provisions of Article XXIX. Not only does Article XXIX authorize the Town to pay Town salaries to Police Officers while engaged in National Guard training, it identifies the Town’s obligation to do so. Therefore, the Town violated the parties’ Collective Bargaining Agreement, specifically Article XXIX in or

around January of 2015 when the Town stopped paying Officers Balzarini and Ludovicz full pay while they were on leave for National Guard training. They shall forthwith be made whole with full pay without deduction of National Guard training pay from January, 2015 when the Town stopped paying their full salaries to them while they were on such leave. Furthermore, the statutory rate of interest shall be applied to their make whole relief from the date of this award. The Town shall reinstate the past practice of paying full salaries without military pay deduction to all Police Officers who attend National Guard training. The arbitrator retains jurisdiction of the case for remedial calculation purposes for a period of thirty (30) calendar days from the award's issuance date.