

State of New Hampshire Strafford County Superior Court

ROCHESTER POLICE COMMISSION

v.

CITY OF ROCHESTER,
NEW HAMPSHIRE

Strafford Cnty.Super.Ct. No. _____

PETITION FOR DECLARATORY JUDGMENT

NOW COMES the Rochester Police Commission, by and through its attorney, Joshua L. Gordon, and respectfully requests this honorable court to declare that the Commission has exclusive and plenary authority to fix compensation and terms of employment for sworn officers and unsworn staff of the Rochester Police Department, and to establish and enforce all policies, procedures, rules and regulations relating to the control and operation of the Rochester Police Department.

As grounds it is stated:

Parties to This Action and the Nature of Their Dispute

1. The Rochester Police Commission was established in 1955 by the New Hampshire General Court, and exists now pursuant to the City Charter of the City of Rochester, New Hampshire. Its address is 23 Wakefield St., Rochester, N.H. 03867. It is represented in this action by Joshua L. Gordon, Esq., 26 South Main St., Concord, N.H. 03301, (603) 226-4225, jlgordon@appealslawyer.net.

2. The City of Rochester is a municipal corporation established by its City Charter. Its address is 31 Wakefield St., Rochester, N.H. 03867. It is represented in this matter by Danford J. Wensley, Wensley Wirth & Azarian PLLC, 40 Wakefield St., P.O. Box 1500, Rochester, N.H. 03867, (603) 332-2442.

3. The Rochester, New Hampshire Police Department is not a party here; it is the object of the dispute.

4. The Department employs roughly 90 people. It has a Chief, three Captains, three Lieutenants, six Sergeants, a number of Detectives, numerous Patrolmen, a support staff, and a number of specially-assigned personnel such as crossing guards, K-9 handlers, juvenile officers, and prosecutors. Many of these positions are governed by a negotiated union contract. This controversy concerns non-union *sworn* personnel (the chief, captains, and lieutenants), non-union *unsworn* personnel (mainly the support staff), and negotiation of the collective bargaining agreement (with unionized lower ranks).

5. The issue here is who sets their pay and terms of employment – the Rochester Police Commission, a three-member elected municipal body of limited jurisdiction provided for in the Rochester City Charter, or the Rochester Mayor and City Council, a 13-member elected municipal body of general governance created by the same Charter.

6. This petition seeks to put to rest a simmering controversy between the Rochester Police Commission and the City of Rochester. It requests a declaration, based on the plain text of the Rochester City Charter and the legal history surrounding the creation of its Police Commission, that the Commission – and not the Mayor, City Council, or City Manager – has the exclusive authority to fix compensation and terms of employment for members of the Rochester Police Department.

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I. Legal History of the Rochester Police Commission

7. To make sense of this controversy, reference must be made to a century of New Hampshire history, and a half-century of Rochester politics.

A. Police Commissions in New Hampshire

8. At the end of the nineteenth century, there were eleven cities in New Hampshire, all with strong mayor-and-aldermen forms of government. City employees, including police officers, often lost their jobs at each change of administration. *See* 13 P. Loughlin, *New Hampshire Practice, Local Government Law* § 500, at 400-01 (1995); <http://www.cityofportsmouth.com/police/depart-history.htm> (accessed Apr. 10, 2005) (until the 1895 establishment of Portsmouth Police Commission, “when a new Mayor and council were elected, they would make their political favorites Police Officers and fire those that did not support them”).

9. To address the problem, the Legislature (which before the constitution’s 1966 home rule amendment meddled much more than today in municipal governance) created local police commissions consisting of three members appointed by the Governor and Executive Council. *See e.g., Pollard v. Gregg*, 77 N.H. 190 (1914) (citing separate legislative creation of commissions in Exeter, Dover, Manchester, and Nashua).

10. The purpose of police commissions was to “remove the police departments from the domain of politics”

<http://www.ci.concord.nh.us/Police/concordv2.asp?siteindx=P20,19,01> (accessed Apr. 10, 2005), and to “add some stability to law enforcement in cities.” Loughlin, § 500 at 401. By 1905

there were at least 10 commissions in the state. *Id.*

11. Because special legislation had created a hodge-podge of differing provisions and conflicting language, in 1913 the Legislature passed “An Act to Unify the Laws Relating to the Establishment of Police Commissions.” LAWS 1913, ch. 148.

12. The law provided that commissions would be composed of three members holding staggered three-year terms, no more than two of whom could be from the same political party. Commissioners were appointed (and removed) by the Governor and Council. The law provided:

It shall be the duties of said police commissioners to appoint such police officers, constables and superior officers as they may in their judgment deem necessary, and to fix their compensation.

The police commissioners shall have authority to remove any officer at any time for just cause and after due hearing, which cause shall be specified in the order of removal.

The police commissioners shall have full power to make all rules for the government of the police force and to enforce said rules.

LAWS 1913, ch. 148, §§ 4, 6, 7.¹

B. Creation of the Rochester Police Commission

13. Rochester’s Police Commission was created in 1955 under troubled circumstances.

14. As in other places, the Rochester Police Department had “long been regarded

¹Much more recently, the Legislature created mechanisms by which a municipality can provide for a police commission in its charter, RSA 49-B (1979), or create one by ballot. RSA 105-C (1981).

as fair game for political favoritism.” *Move For Police Commission Follows Mayor’s Summary Dismissal of Marshal Nickerson*, ROCHESTER COURIER, Mar. 17, 1955, at 1.²

15. In 1955 Rochester’s storied mayor, John Shaw, a Democrat surrounded by New Hampshire Republicans, was serving just his second term. Although the City Council had a few years before put police officers on semi-permanent status, the Mayor unexpectedly fired the police chief, who was a 24-year veteran of the force. *Id.* In the running for the now-open job were several men, including one who had been fired by a previous Republican administration. *Threat of Police Commission Seen Pressing on Choice of Marshal*, ROCH.COUR., Mar. 24, 1955. The Mayor was predictably criticized for again making the police department a “political plaything.” *Editorial*, ROCH.COUR., Mar. 17, 1955.

16. In response, Rochester’s State Senator J. Paul LaRoche introduced Senate Bill 75, which would create a police commission for Rochester. According to the Senator, its purpose was to ensure that “a man seeking to make a career as a local police officer will have some security.” *Charges Fly in Fight Over Police Control*, ROCH.COUR., Apr. 7, 1955, at 1, 3. A newspaper editorialized that the police

want to be free of the political influence which under the present system may threaten their jobs if they happen to be called upon to take action against persons of power and influence. That ought not to be. An officer should be able to act without fear of reprisal. He ought not to be subject to manipulation like a puppet on a string by some back-stage operator. It lessens his effectiveness and leaves him subject to constant fear.

²The Rochester Courier (hereinafter Roch.Cour.) was in 1955 a paper of record for southeastern New Hampshire. It claimed to be the “largest weekly circulation in New England.” The Courier appears to have ceased publication in 1964. It is available on microfilm at the New Hampshire State Library in Concord, and at the University of New Hampshire Library in Durham.

Does Rochester Want a Police Commission?, ROCH.COUR., Apr. 7, 1955,

17. Mayor Shaw was vehemently opposed to the bill on the grounds that because members of police commissions were appointed by the Governor, a commission was a threat to local control of police affairs – enforcement policies, compensation, municipal budgeting – and would ultimately cost the city money. *Charges Fly in Fight Over Police Control*, ROCH.COUR., Apr. 7, 1955, at 1, 3.

18. Shaw went on the offensive in his effort to maintain the Mayor and City Council's control over Police Department operations. He charged that the outgoing chief refused to investigate an incident in which a student was alleged to have possessed "dope," that he failed to "rid police station cells of lice and bedbugs" and to repair toilets he claimed had been plugged-up for years, that the chief worked only from 8 to 5 and wouldn't work at all on sundays, and that he refused to investigate a report that one of his officers had been offered a bribe. *Id.* at 1. Mayor Shaw also criticized Senator LaRoche, claiming that the Senator had sought no-bid contracts from the City for the purchase of supplies from his gasoline stations. *Id.* at 3.

19. Mayor Shaw alleged that proponents of the commission were using the bill as a way around the City Council to hire additional police, increase their pay, buy new cruisers and equipment, and generally spend more money free of mayoral restraint. *Id.*

20. In order to head off SB 75, Shaw was determined to appoint a new chief. Amidst the name-calling, the City Council voted. It took 87 ballots to chose a man whose name was presented after the 29th ballot. *Pick Police Head After 86 Ballots*, ROCH.COUR., Apr. 7, 1955, at 1. The legislation was not stopped, but a compromise was floated at a legislative hearing

at the Statehouse. It would allow the City to conduct a referendum on establishing a commission and it contained the names of proposed commissioners. Appearing in Concord to voice opposition to the bill, with or without the amendment, was City Solicitor Paul B. Urion. *Hearing on SB 75 Before the Senate Judiciary Committee* (Apr. 13, 1955); *Reach Compromise In Commission Imbroglia*, ROCH.COUR., Apr. 14, 1955, at 1.

21. Other than the referendum compromise, the language of the bill was virtually identical to the 1913 legislation. It provided:

It shall be the duty of the board of police commissioner authorized hereunder to appoint such police officers, constables and superior officers as it may in its judgment deem necessary and to fix their compensation.

The board of police commissioners shall have full power to make all rules and regulations for the government of the police force and to enforce said rules. . . .

The board of police commissioners shall have authority to remove any police officer, constable or superior officer of the force at any time for just cause and after due hearing which cause shall be specified in the order of removal.

“Establishing A Police Commission for the City of Rochester,” LAWS 1955, ch. 449, §§ 3, 5, 6 (effective June 30, 1955).

22. Mayor Shaw then threw down his gauntlet: he threatened to resign if the bill became law. In June, the Rochester City Council accepted the Mayor’s resignation but “only if the General Court refuses to accept an amendment to the controversial police commission bill which would give Rochester voters an opportunity to express their views for or against commission control of local police affairs.” *Legislative Parley May Stall Shaw Resignation*,

ROCH.COUR., June 23, 1955. The Council went so far to as name a successor. *Police Commission Bill in Hands of Governor*, ROCH.COUR., June 30, 1955, at 1, 8.

23. The bill nonetheless passed the Senate and was signed into law. Although it provided for election of commissioners by a vote of the city instead of appointment by the Governor, it wasn't enough for Mayor Shaw. Thus "John Shaw, most controversial public figure in the recent history of the city, resigned as Mayor at the regular meeting of the City Council Tuesday evening, as a gesture of protest against the signing by Governor Dwinell last week of a bill creating a police commission for Rochester." *Shaw Bows Out With Blast At Proponents of Police Commission*, ROCH.COUR., July 7, 1955, at 1.

24. Among the reasons Shaw gave the City Council for leaving was that SB 75 "interferes with the control of the annual budget by the Mayor and City Council. It violates our City Charter in several sections in regard to money expenditures." He said the bill "den[ies] to a community of fourteen thousand people the right to exercise their judgment on a vital local question that directly affect the people's pocketbook." *Id.*

25. His bluff having been called by his opponents, Shaw considered buying a hotel, *Shaw Uncertain on Future*, ROCH.COUR., July 14, 1955, but he was not gone from Rochester politics. Six weeks later, citing a "barrage of petitions, letters, telephone calls and verbal pleas" "imploing him to return," and relying on a legal opinion by City Solicitor Paul Union that the City Council had never really accepted his resignation, Shaw was back as Mayor. *Shaw Back in Mayor's Chair*, ROCH.COUR., Aug. 18, 1955, at 1; *Rules Shaw Still Mayor*, ROCH.COUR., Aug. 4, 1955.

26. In December 1955 the City held a vote to appoint the police commissioners, and there was a dispute regarding the tenure of existing officers pending the vote. *Choice of Commissioners Sole Object of Referendum*, ROCH.COUR., Nov. 3, 1955; *Urion Rules Commission Cannot Appoint Police*, ROCH.COUR., Nov. 10, 1955; *LaRoche Queries Solicitor's Ruling On Police Status*, ROCH.COUR., Nov. 17, 1955, at 1; *Urion Declares LaRoche Confused Over Police Bill*, ROCH.COUR., Nov. 24, 1955, at 1; *Mayor Re-appoints Four Police Officers*, ROCH.COUR., Dec. 8, 1955. The dispute over interim police appointments is important here only because of statements made by City Solicitor Paul Urion. Responding to allegations by Senator LaRoche that the Mayor had no authority under SB 75 to appoint officers until after the City vote on who will be the commissioners, Urion submitted a letter to the newspaper. In it he wrote:

The true purpose of the bill was to emasculate the traditional powers of the Mayor and Council. The only control that the commissioners will actually have now is the hiring and firing of police officers and setting their rates of pay.

Urion Declares LaRoche Confused Over Police Bill, ROCH.COUR., Nov. 24, 1955, at 1.

27. Mayor Shaw went on to preside over the City for more than 20 years, with a one-term hiatus from 1969 to 1971, and finally left office in 1979 after throwing President Carter's security detail out of his office. He was succeeded by Dick Green, who in 2005 is a State Senator from Rochester. Mayor Shaw died in 1982 from cancer at a Rochester nursing home. *Former Mayor Shaw Dies*, FOSTERS DAILY DEMOCRAT, April 9, 1982.

28. City Solicitor Paul Urion represented the City for years, appearing at the Supreme Court defending Shaw's various antics. *See Bradbury v. Shaw*, 116 N.H. 388 (1976)

(mayor's industrial advisory committee subject to right to know law); *Tappan v. Shaw*, 113 N.H. 353 (1973) (ordering that schoolteacher may simultaneously serve as city councilor); *Lachance v. George*, 111 N.H. 292 (1971) (contesting primary election in which Shaw lost nomination); *Brennan v. Herman*, 109 N.H. 541 (1969) (seeking to remove names from primary ballot in which Shaw lost nomination).

C. 1980 City Charter and 1991 Recodification

29. The Police Commission created in 1955 was put on different legal footing in 1980, when Rochester held a referendum pursuant to the then-recently-enacted RSA 49-B (allowing municipalities to adjust their charters). The voters' guide explanation of the proposed amendment noted the Commission "is not presently a creation of the Rochester City Charter. Rather the Police Commission exists by virtue of a [1955] state statute." EXPLANATION OF PROPOSED [CITY CHARTER] AMENDMENT ON THE SUBJECT OF THE POLICE COMMISSION, Amendment V (1980). The voters' guide stated that the amendment's purpose was to incorporate the Commission into the City Charter, and that the "amendment essentially repeats the existing statutory provisions." *Id.* Specifically, it read:

The commission would be charged with the duty of hiring members of the police department and fixing their compensation; making and enforcing rules and regulations governing the police department; and removing police officers for cause.

Id. The guide then set forth the language of the Charter amendment, which it designated sections 15, 16, and 17. *Id.*

30. The Charter was re-codified in 1990, with the 1980 amendments being

renumbered. Although the method of election of the commissioners was changed, the language setting forth the duties and authority of the Commission was identical to how the Charter reads today:

It shall be the duty of the Board of Police Commissioners authorized hereunder to appoint such police officers, constables, and superior officers as it may in its judgment deem necessary and to fix their compensation; and, to make all rules and regulations of the government of the police force and to enforce the same.

The Board of Police Commissioners shall have authority to remove any police officer, constable, or superior officer of the force at any time for just cause and after due hearing which cause shall be specified in the order of removal.

ROCHESTER CITY CHARTER, §§ 24 & 25 (current version, November 2004).

D. Relevance of the Legal History

31. Besides being a good story, this legal history is important here for several reasons.

32. First, it shows that the primary purposes for establishing a police commission in Rochester – providing stability in the job security and pay rate of police officers, and shielding them from the politics of the City Council – are still germane.

33. Second, the history shows that the issue of who sets the pay rate and terms of employment for members of the Rochester Police Department has been a subject of public dispute for a half-century.

34. Third and fourth, it shows the dispute is in need of resolution, and that it can be settled with reference to the legal history.

35. Fifth, the history shows that the current Rochester City Charter sections 24 and 25 are derived directly from the 1955 legislation, and were intended by their framers to be the same.

36. Sixth, it shows that the current City Charter sections 24 and 25 are the same as the 1913 legislation, and to the extent that they might shed light on this controversy, cases interpreting the 1913 law apply here.

37. Seventh, it shows that the issue of who pays the police is one of vital municipal concern – important enough to force a political showdown over fiscal control.

38. Finally, the history shows that by both statements and conduct, the City has conceded that the Police Commission is the correct body to set the pay of sworn and unsworn, union and non-union, members of the Rochester Police Department.

II. This Court Can Resolve the Dispute Between the Parties

39. New Hampshire's declaratory judgment statute provides:

Any person claiming a present legal or equitable right or title may maintain a petition against any person claiming adversely to such right or title to determine the question as between the parties, and the court's judgment or decree thereon shall be conclusive.

RSA 491:22, I. The Supreme Court has recognized the Superior Court has jurisdiction to hear declaratory judgment actions concerning the scope of fiscal authority exercised by dueling public boards created by a city charter. *Franklin v. Hinds*, 101 N.H. 344 (1958).

40. The Rochester Police Commission, pursuant to its duties specified in the City Charter, has promulgated a "Benefit Plan For Non-Union Sworn Personnel," which sets police pay classification grades and salary ranges and contains a host of rules and regulations concerning officers' working conditions and benefits. The City Council, pursuant to its duties, has promulgated an "Employee Policy Handbook" which purports to specify the compensation scheme and terms of employment for all city employees. The two documents differ in significant details.

41. There are many examples of the dispute between the parties.

- In June 2003, the Commission awarded Captain Michael Allen a 4.35 percent merit increase, but the City Manager reduced it, in line with the city's Handbook, to 2.5 percent. The City ultimately reversed itself after a complaint was filed with the New Hampshire Department of Labor.
- In 2003 the Commission awarded Chief David Dubois a merit pay increase, but the City Council or City Manager denied it. The City ultimately reversed itself after a complaint was filed with the New Hampshire Department of Labor.

- The Commission attempted to give Chief Dubois a salary increase after his initial six-month probationary period in accord with his employment agreement with the Commission, but in 2003 the City denied the increase. The matter remains unresolved.
- For 25 years sworn command officers have had a separate benefit package that exceeds the City's merit plan. Since 2003 the City has refused to recognize it, and has not made payments for such items as vacation days. The matter lingers.
- Department policies do not distinguish between command officers and others' ability to perform extra assignments such as security for road crews. Even though the practice violates no federal or state law, currently the City is refusing to authorize and pay command officers for this work. This matter also lingers.
- To maintain flexibility in running the Department, command officers from time to time substitute for each other, such as when one is out for vacation. Although the Commission allows additional compensation for these periods, since 2004 the City has refused to pay it. This matter lingers.
- In 2004 the City Manager attempted to conduct an employee evaluation of the Chief, which the Commission believes is part of its role in reviewing his success in his job, his salary, and terms of employment.
- In January 2005 the City Manager was quoted in the newspaper saying he was in charge of running the Police Department.
- The Commission has been in charge of union negotiations for at least 30 years. During the last round of negotiations, concluded just a few weeks ago, the City Manager attempted to influence the talks. At one point, for example, even though the Commission did not need its labor lawyer at a particular meeting, the City Manager insisted, and then paid for the service out of the Commission's budget.
- Over the last 15 years the City Council has lead numerous efforts to abolish the Commission through City Charter revisions and public votes. It has lost every time, most recently in the 2004 elections.
- In 2003 one of the City Councilors tried to stop the construction of Rochester's new police station because the Department refused to alter its policy concerning the minimum amount of money it considers necessary to investigate bad-check crimes. The Councilor owns a small convenience store and was unhappy with the policy. He was caught on tape making the threat and in 2004 plead guilty to criminal charges.

42. The simmering controversy between the Commission and Council colors nearly every aspect of the interaction between these two governmental bodies; and they interact frequently because they are created by the same Charter, because enforcement matters permeate municipal government, and because the Police Department is a significant item in Rochester's annual budget.

43. The parties thus have adverse interests, which are definite and concrete, and which this court is capable of resolving. *Wuelper v. University of New Hampshire*, 112 N.H. 471 (1972).

III. Rochester Police Commission Has Exclusive Authority to Fix Compensation of Officers

A. Dueling Charter Provisions

44. There are various sections of the Rochester City Charter that appear to give the City Council some authority over the police, but close examination reveals they are subsumed by sections 24 and 25.

45. The Rochester City Charter mandates a general merit pay system for city employees. CHARTER § 60. “The compensation of all officers and employees not fixed by this Charter shall be fixed in the . . . merit plan.” CHARTER § 61. “No compensation shall be paid without certification by the City Manager, or such officer as he may direct, that the recipients are employed by the City and that their rates of compensation comply with the pay schedule provided for in Section 61.” CHARTER § 63.

46. As noted, the Police Commission has authority to hire officers and “fix their compensation.” CHARTER § 24.

B. Charter Sections Do Not Conflict

47. Section 61 applies to compensation “not fixed” by the Charter, but section 24 gives the Commission authority to “fix” compensation of police.

48. Section 61 is general: it applies to the entire city, and “all officers and employees.” Section § 24 is specific: it applies only to the Commission, and only to “police officers, constables, and superior officers.” “[I]n the case of conflicting statutory provisions, the specific statute controls over the more general statute.” *Sanborn Regional School Dist. v. Budget*

Committee of Sanborn Regional School Dist., 150 N.H. 241, 242, (2003). Thus to the extent sections 61 and 24 conflict, when setting the compensation of those for whom it specifically provides, compensation must be set according to the more specific provisions of section 24.

C. Merit Plan Exempts Charter Compensation Provisions

49. But they don't conflict. Section 61 sets out the general rules of the merit plan, but specifically exempts from its provisions compensation that is otherwise "fixed" by the Charter. Section 24 fixes the compensation of police officers. Section 61 therefore carves out of the merit plan the compensation of the police. It is apparent that the drafters of section 61 – which came later – were aware of section 24 and took care to not create a conflict within the Charter.

50. And the Police Commission is not the only provision of the Charter that section 61 exempts:

- Section 11 provides that "[t]he City Council shall fix the City Manager's salary and compensation." The Manager's salary is thus exempt from the merit plan.
- Section 19 creates an independent water works and sewer department, separately governed by a utility advisory board, and separately funded by water and sewer revenues. Presumably its employees are not governed by the merit plan, although this is less clear than section 24 because section 19 does not authorize the utility advisory board to fix the compensation of water and sewer department employees.
- Section 69 provides that salaries of elected officials "may be designated by ordinance." Their compensation is therefore fixed by the City Council and exempt from the merit plan.
- Section 77 provides that in the event there is no city manager, the City Council appoints an acting manager and that the "City Council shall determine the rate of compensation" for the temporary position. The compensation for an acting city manager is therefore fixed by the City Council and exempt from the merit plan.
- Section 79 sets the mayor's salary, and provides that the "City Council may vote

to change the Mayor's salary." The mayor's compensation is thus fixed by the City Council within the provisions of section 79, and not by the merit plan.

51. These provisions, governing the compensation of specific city employees, are carved out of the merit plan. The Police Department, having a separate governing body, with separate authority to fix the compensation of police officers, is likewise exempt.

D. Compensation of Police Officers Is "Fixed by this Charter" Within the Meaning of the Merit Plan

52. It is significant that both sections 61 and 24, in discussing authority over compensation, use the word "fix." By use of the common word, it is apparent that the Charter's drafters intended a cross-reference. *In re Denton*, 147 N.H. 259, 260 (2001) ("Words used with plain meaning in one part of a statute are to be given the same meaning in other parts of the statute, unless a contrary intention is clearly shown.").

53. In exempting salaries "fixed" by the Charter, section 61 does not narrowly refer to only compensation which is specified by a particular dollar amount in the language of the Charter. If there were such a provision in the Charter (there isn't), that salary would clearly be exempt from the merit plan. For instance, the New Hampshire Constitution specifically sets forth the dollar amounts that members of the Legislature are compensated. N.H. CONST., pt. II, art. 15 ("presiding officers of both houses . . . shall severally receive . . . as compensation . . . the sum of \$250, and all other members . . . the sum of \$200"). If such a provision existed in the Rochester City Charter, those to whom it applied would certainly be exempt from the merit plan.

54. The Charter term "fixed" must be read more broadly. In *State of New Jersey v. Anderson*, 203 U.S. 483, 492 (1906), for example, the Court held that the phrase "fixed by

statute” includes a scheme by which New Jersey could alter the monetary taxation amount provided it did so in accord with its statute. *See also Boston Regional Medical Center, Inc. v. Massachusetts Div. of Health Care Finance and Policy*, 365 F.3d 51 (1st Cir. 2004) (assessments levied against debtor in bankruptcy were “fixed by statute” where governing statute specified formula by which amount of assessment could be determined); *UNUM Corp. v. U.S.*, 929 F.Supp. 15, 25 (D.Me. 1996) (amount is “fixed in the contract” when contract provisions set amount by formula); *Alabama-Tennessee Natural Gas Co. v. Southern Natural Gas Co.*, 694 So.2d 1344 (Ala. 1997) (rates for utility services are “fixed by regulation” where agency may approve range of rates rather than a single rate).

55. Thus “fixed” is not narrowly construed to mean the specification of a certain dollar amount. Obviously there is not a comprehensive police department personnel payment schedule contained in the Charter – it is, after all, a City Charter, and not a code of labor regulations. But because section 24 provides the method by which it is to be determined, compensation of police officers is “fixed by this Charter” within the meaning of section 61.

E. Had the Legislature Intended the City Council to Fix Compensation, it Would Have Said So

56. Before the 1913 legislation unifying police commissions in the state, the various legislative creations differed in who set officers’ pay.

The act establishing the board of police commissioners of Portsmouth provides that the compensation of the marshal shall be \$1,000 a year, and of the other police officers \$2.50 a day, to be paid by the city. The acts relating to Concord, Manchester, and Laconia, respectively, delegate to the city councils of the city authority to fix the pay of officers appointed under them, and provide that the amounts so expended shall not exceed the

amounts appropriated for the purpose. The act under consideration [for Exeter] delegates the authority to the board of commissioners.

Gooch v. Town of Exeter, 70 N.H. 413 (1901) (citations omitted).

57. It is thus clear that had the 1955 General Court and the 1980 Charter Amendment voters intended for the Rochester City Council to be in charge of fixing compensation for Rochester police officers, they could have done so. They provided instead that the Commission has the duty.

F. The City Council is the Paying Agent of the Police Commission for the Compensation of Officers

58. After the 1913 legislation which “unif[ied] the laws relating to the establishment of police commissions,” LAWS 1913, ch. 148, a body of law naturally developed. For the historical reasons noted above, the cases are relevant here.

59. In *Baker v. City of Nashua*, 77 N.H. 347 (1914), there was a dispute, as in the Rochester situation, between the Police Commission and the City Council regarding who pays police officers. The City Council had appointed officers, which the Commission fired and replaced with its own. When they claimed their compensation, the City refused to pay. The court held that the only limitation on the Commission’s hiring authority “is its honest judgment as to what the public welfare requires.” *Baker v. Nashua*, 77 N.H. at 348. As to budgeting, the court wrote:

In short, the commission is the city in so far as determining the number of men that should be employed and fixing their compensation is concerned; its acts, in so far as these matters are concerned, are the acts of the city, and its mistakes, if it makes any, are the mistakes of the city. [The 1913 statute] therefore gives the commission the right to pledge the credit of the

city to the extent necessary to pay the men it thinks should be employed to properly police the city, and by necessary implication makes it the duty of the city councils to provide the money necessary for that purpose, as well as to pay all the other necessary expenses of the police department.

Baker v. Nashua, 77 N.H. at 349; *see also, Baker v. Barry*, 77 N.H. 198 (1914) (“That the plaintiffs were regularly appointed by the commissioners . . . , and have performed the duties of their office, authorizes the conclusion that they are entitled to their pay.”).

60. *Quinn v. Badger*, 77 N.H. 119 (1913), presented the opposite question. There police officers were hired by the police commission and their pay was determined by the commission. The mayor requested the officers, outside of their regular hours, to fulfill a warrant ordering the killing of unlicensed dogs, which they did. The court held that because compensation is set by the commission, the officers could not be paid for their overtime work. The holding in *Quinn* is necessitated by the purposes of police commissions generally – they exist to ensure that mayoral and city council politics are taken out of law enforcement.

61. These cases show that as between the Police Commission and the City Council, the Commission is the proper authority to set compensation – when compensation is set by the Commission, it must be paid by the city, in the amount prescribed by the Commission. The City Council is merely the paying agent of the Police Commission for compensation of officers.

62. This situation – a body having spending authority but no power to tax – is not uncommon in New Hampshire municipal government. *See e.g., Board of Selectmen of Town of Pittsfield v. School Bd. of Pittsfield School Dist.*, 113 N.H. 598 (1973) (“school board is charged with managing the school system to the best of its ability”; “selectmen are preoccupied with the overall burden placed on the taxpayers not only by the cost of operating the schools but also by the money needed to render all the other municipal services”).

IV. Rochester Police Commission Has Exclusive Authority to Establish Policies and Procedures, Promulgate Rules and Regulations, and Enforce Them, Relating to the Operation and Control of the Rochester Police Department

63. As noted, the Rochester City Charter provides that

It shall be the duty of the Board of Police Commissioners authorized hereunder to appoint such police officers, constables, and superior officers as it may in its judgment deem necessary and to fix their compensation; and, to *make all rules and regulations of the government of the police force and to enforce the same.*

CHARTER, § 24 (emphasis added).

64. A “rule” is any substantive directive that affects people outside of the agency making it. *See Asmussen v. Commissioner, New Hampshire Dept. of Safety*, 145 N.H. 578 (2000) (direction to staff of agency regarding how to prepare reports not a rule); *Appeal of Marmac*, 130 N.H. 53 (1987) (statements that agency would annually update public utility rates not a rule).

65. A “regulation” is broadly defined as “an exercise of control.” *Cloutier v. State Milk Control Board*, 92 N.H. 199 (1942). “Regulate” is synonymous with “restrict.” *Stone v. Cray*, 89 N.H. 483 (1938). *See Appeal of Clement*, 124 N.H. 503 (1984) (reclassification of highway from secondary to primary a regulation); *State v. Guertin*, 89 N.H. 126 (1937) (setting of taxi rates a regulation); *Hanover v. Atkins*, 78 N.H. 308 (1916) (disallowance of blacksmith shop in downtown area a regulation).

66. To “make” means “[t]o cause to exist, appear or occur.” *United States v. Giles*, 300 U.S. 41 (1937) (making false entry in records of national bank).

67. To “enforce” means to “compel obedience to, to cause to be executed.”

Larson v. New England Tel. & Tel. Co., 44 A.2d 1, 7 (Me. 1945) (quotations omitted), *accord*, *International Paper Co. v. Town of Jay*, 665 A.2d 998 (Me. 1995).

68. “Governance” has been used to mean “mandatory performance standards . . . , management within established principles, performance audits that objectively measure results, and final responsibility upon . . . officials for an effective . . . system. *Claremont School Dist. v. Governor*, 147 N.H. 499, 509 (2002) (in context of state educational accountability) (punctuation altered). Governance implies powers necessary to carry out the duty. *See McCulloch v. Maryland*, 17 U.S. 316 (1819) (Congress’s authority over money issues implies authority to establish a bank).

69. By having been granted the power to make all rules and regulations and to enforce them for effective governance, the Rochester Police Commission has broad and unassailable power to control the Police Department. In *Board of Portsmouth Police Commissioners v. State Dept. of Labor*, 117 N.H. 938 (1977), for instance, the Portsmouth Police Commission required officers who violated its rules to perform “punishment duty.” When officers were found at a restaurant outside of duty area, not wearing their hats, and drinking on the job – all proscribed by Police Commission rules – the Supreme Court upheld their sufferance of 200 hours punishment duty. In *Tremblay v. Berlin Police Union*, 108 N.H. 416 (1968), the Court construed a law giving the police commission “full authority to make and enforce all rules and regulations for the government of the police force” to encompass authority to enter collective bargaining with a police union regarding officers’ compensation and terms of employment. *See also In re City of Manchester*, 144 N.H. 386 (1999) (police commission regulations regarding

police discipline).

70. In short, “[p]olice commissions in this state have broad control of the administration of their departments.” *Sinkevich v. Nashua Police Commission*, 97 N.H. 262, 264 (1952).

71. The ability to govern a police department, or any workplace, is contingent on the ability to punish and promote performance that is poor or excellent. A manager unable to promise extra pay for meritorious conduct, or to withhold it for deficient performance, has little control over the quality of the organization’s product. A parsimonious reading of section 24 would make the job impossible. If, say, a senior officer ordered a support personnel to assist a patrolman in filling out a search warrant pursuant to the job’s regulations established by the Commission, and the staffer was able to refuse citing separate regulations established by the City Manager, and when the senior officer insisted the support person could go above the head of the Chief and Commission to the City Council, the chain of command would turn upside-down and the ability to maintain orderly law enforcement would be in peril. Moreover, a primary purpose of police commissions – to keep politics out of the department – would be unfulfilled.

72. Accordingly, the duty of the Rochester Police Commission to “make all rules and regulations of the government of the police force and to enforce the same” means precisely what it says, and does not allow the City Council, the Mayor, or the City Manager to dictate police procedures.

V. City Manager is Not the Executive Officer of the Police Department

73. The duties of the City Manager are specified in section 14 of the Rochester City Charter, which provides:

The City Manager shall be the chief administrative and executive officer of the City. Except . . . as herein established otherwise, the City Manager shall be responsible for the proper administration of all departments of the City of Rochester. The City Manager shall be charged with the preservation of the public peace and health and safety of persons and property, and shall see to the enforcement of the ordinances of the City, this Charter and the laws of the State of New Hampshire.

CHARTER § 14. This is a broad delegation of power, and at first glance appears to conflict with the provisions establishing the duties of the Police Commission. But it doesn't.

74. First, section 14 does not put the City Manager in charge of the police department. The City Manager is responsible for administering all departments, "except . . . as herein established otherwise." Section 14 carves out of itself administration that is otherwise established. The Police Commission's duty to administer the Police Department is adequately set forth in section 24 (Commission required "to make all rules and regulations for the government of the police force and to enforce the same). Thus, the Police Commission and not the City Manager is in charge of administering the Police Department.

75. Second, although section 14 makes the City Manager "responsible" for enforcing the law, the Police Commission is clearly in charge of the police force. Reconciling these two provisions forces the conclusion that while the Manager might have a legitimate concern for police matters, day-to-day management is delegated to the Commission. The Manager's section 14 ultimate responsibilities might thus arise, for instance, upon the nonfeasance

or malfeasance of the Police Department, *and* the simultaneous nonfeasance or malfeasance by the Police Commission in overseeing the Department. As long as the Department is working in an orderly manner according to Commission oversight, the City Manager has “seen” to the enforcement of the laws.

76. Third, regardless of exactly how power over the Police Department is shared between the City Manager and the Police Commission, the Supreme Court has made it clear that the City Council (and the Manager as agent for the Council, *see* CHARTER §§ 11, 14, 17) cannot expect to delegate assignments to police officers. *Quinn v. Badger*, 77 N.H. 119 (1913).

77. Fourth, even if the City Manager is the administrative head of the Police Department, the City Charter gives the Police Commission the exclusive power to fix compensation of officers and provide for the government of its operation. Nothing in section 14 effects the express language of section 24.

78. Consequently, the Charter does not make the City Manager the boss of the Police Department, but puts the Police Commission squarely in charge except in the rarest of circumstances.

VI. Rochester Police Commission's Authority Extends to All Members of the Police Department

79. As quoted above, the Rochester City Charter provides that

It shall be the duty of the Board of Police Commissioners authorized hereunder to appoint such *police officers, constables, and superior officers as it may in its judgment deem necessary* and to fix their compensation; and, to make all rules and regulations of the government of the police force and to enforce the same.

CHARTER, § 24 (emphases added).

80. The charter language does not appear to limit the Commission's authority to just some officers or to just those of certain rank. The Commission's authority applies to all officers it has deemed necessary to appoint.

81. "Superior officers" clearly applies to the non-union command staff – the Chief, Captains and Lieutenants. "Police officers" has been construed extremely broadly. In *State v. Tallard*, 143 N.H. 228 (1998), the Court held that a "law enforcement officer," for the purposes of a statute enhancing sentences for crimes against them, included all who exercise the police power to preserve peace and order, including jailors at the Grafton County House of Corrections. "Constable" is harder to define. They are lesser officers whose duties might be similar to or narrower than those of sheriff, and with a smaller jurisdiction, *State v. Thyfault*, 297 A.2d 873 (N.J.Super. 1972), and may mean a person whose duties are as plebeian as a process server. *Russ v. Kane*, 285 N.W. 472 (Minn. 1939).

82. Whatever the meaning of the more arcane terms, it is apparent that the authority of the Rochester Police Commission extends up and down the entire law enforcement

staff, from the Chief to the newest patrolman.

83. Thus the Commission's duties include authority over hiring, firing, assigning, and managing Rochester's unionized lower-ranking officers. Negotiation of the collective bargaining agreement is squarely within its authority. *Tremblay v. Berlin Police Union*, 108 N.H. 416 (1968); *In re Police Commission of City of Rochester*, 149 N.H. 528 (2003).

84. How many officers to hire is also within the discretion of the Commission. In *Baker v. City of Nashua*, 77 N.H. 347 (1914), the Court construed a police commission grant of authority almost identical to Rochester's ("It shall be the duties of said police commissioners to appoint such police officers . . . as they may in their judgment deem necessary, and to fix their compensation."). The Court held that "[t]he only limitation on [the commission's] power, in so far as these matters are concerned, is its honest judgment as to what the public welfare requires." *Pollard v. Gregg*, 77 N.H. 190 (N.H. 1914) ("It shall be the duties of said police commissioners to appoint such police officers, constables and superior officers, as they may in their judgment deem necessary, and to fix their compensation.").

85. Whether to fire them is also within the authority of the Commission. CHARTER, § 25 ("The Board of Police Commissioners shall have authority to remove any police officer, constable, or superior officer of the force at any time for just cause and after due hearing which cause shall be specified in the order of removal."); *Cheney v. City of Somersworth*, 122 N.H. 130, 132, (1982) ("The superior court must uphold the police commission's orders unless the plaintiff shows that they are illegal, unjust, or unreasonable."); *Clark v. City of Manchester*, 113 N.H. 270 (1973); *Sinkevich v. Nashua Police Commission*, 97 N.H. 262 (1952); *Goodwin v.*

City of Nashua, 91 N.H. 339 (1941); *Labonte v. City of Berlin*, 85 N.H. 89, 154 A. 89 (1931).

86. The Commission's authority over unsworn staff is less well designated, but no less clear. The general New Hampshire statute regarding police commissions' power provides they have authority over "staff." RSA 105-C:4 ("It shall be the duty of the police commissioners to appoint such police personnel, including police officers, *staff*, constables and superior officers, as they deem necessary and to fix such persons' compensation.") (emphasis added). Although the statute does not apply because Rochester has never organized its Commission under its provisions, the statute provides good evidence of the General Court's intent.

87. Regardless, the Rochester Police Commission is the correct body to fix the compensation and direct the duties of its unsworn staff, pursuant to its authority over rules, regulations, governance, and enforcement. Without authority over staff, it would be impossible for the Commission to run an effective Department. Referring to the fictional example used above – a support personnel refusing an officer's order to assist in a warrant, and reporting instead to elected officials – the Chief could not maintain orderly law enforcement, and politics would again infect Rochester's police.

88. If "government of the police force" does not mean the ability to set compensation and terms of employment for the Department's staff, the phrase would be nugatory. *See New Hampshire Dept. of Resources and Economic Development v. Dow*, 148 N.H. 60, 64 (2002) (court "will not construe" statute "rendering its mandatory language meaningless").

89. The Rochester Police Commission concedes it has no power to make significant expenditures on personal property. Unless it were necessary for the governance of the

Department, the Charter vests that in the City Manager. CHARTER § 24 (“The City Manager shall oversee all property, real and personal, owned by the City of Rochester.”); *McShane v. City of Dover*, 80 N.H. 374 (1922); *Pollard Auto Co. v. Nashua*, 80 N.H. 233 (1921); *McShane v. City of Dover*, 78 N.H. 507 (1917); *Foss v. Place*, 78 N.H. 147 (1916).

VII. The City Has Conceded That The Police Commission Has Plenary Control Over the Operation of the Police Department

90. The various players in the Rochester city government have for a half-century acceded to the Police Commission's authority to set compensation for officers, to establish and enforce regulations for the performance of their jobs, to manage the Department, to govern its staff, and to generally exercise plenary control over it. It is too late for them to assert the contrary.

The administrative gloss doctrine . . . applies when the provision in question is ambiguous, the agency responsible for its administration has interpreted it over a period of years in a consistent manner, and the legislature has not interfered with this interpretation.

Appeal of Public Service Co. of New Hampshire, 141 N.H. 13, 22 (1996); *Nash Family Inv. Properties v. Town of Hudson*, 139 N.H. 595, 602 (1995). Although administrative gloss "is neither conclusive nor binding, [it] is entitled to consideration." *Trottier v. City of Lebanon*, 117 N.H. 148, 150 (1977).

91. Rochester's Police Commission was established in 1955. Rochester's merit plan was first promulgated around 1991, was revised in 1994, 1998, and 2002, and its most recent iteration became effective on July 1, 2004.

92. The practice in Rochester from 1955 until recently was for the Commission to set salaries for sworn officers. The first several versions of the merit plan did not mention senior police positions. It was not until a recent revision of the merit plan that sworn officers were included.

93. For nearly 50 years the City acted in conformity with the notion that the Police

Commission was the proper authority to fix compensation of officers and to manage the Department. Without an amendment to the Charter, its new position comes too late to overturn the administrative gloss.

94. As noted in the list of controversies set forth in section II above, from its inception in 1955 the Commission has exercised plenary control over the Police Department – in setting salaries, directing investigations, hiring and firing its members, coordinating its operations, administering its support staff, and generally running what most agree is an effective, ethical, and non-political Police Department. The City Council and Manager’s recent attempts to insert themselves into its affairs is at odds with 50 years of practice, and risks a return to the pre-Commission days in which officers’ futures were determined by the party in power.

WHEREFORE, the Rochester Police Commission respectfully requests this honorable Court to declare that the Rochester Police Commission has the exclusive and plenary authority:

- A. to fix compensation for sworn members of the Rochester Police Department;
- B. to fix compensation for unsworn members of the Rochester Police Department;
and
- C. to establish all policies and procedures, promulgate all rules and regulations, and enforce them, relating to the control and operation of the Rochester Police Department.

Respectfully submitted
for Rochester Police Commission
by its attorney,

Dated: April 20, 2005

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I hereby certify on this 20nd day of April 2005, a copy of the foregoing is being forwarded to Danford J. Wensley, Esq., Rochester City Solicitor.

Dated: April 20, 2005

Joshua L. Gordon, Esq.