State of New Hampshire Supreme Court

NO. 98-586

2000 TERM

AUGUST SESSION

STATE OF NEW HAMPSHIRE

v.

STEVEN DIAMOND

RULE 7 APPEAL FROM FINAL DECISION

BRIEF OF DEFENDANT/APPELLANT, STEVEN DIAMOND

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1. The New Hampshire and United States Constitutions, as well as the Declaration of Independence, bar the exercise of police powers that are not controlled by democratic civilian authority. The University of New Hampshire police department, so called, wields the state's power to arrest without benefit of a statute allowing it, and only by a contract with the town of Durham which has no authority to delegate it. Was Mr. Diamond's arrest therefore unconstitutional?

2. The contract between the University of New Hampshire and the town of Durham provides that the Durham police chief can fire a UNH officer, but only after consultation with an unelected *ad hoc* town/gown committee. The Durham police chief has no ability to oversee UNH officers on a day-by-day basis, no way to effectively administer the UNH police department, and no way to learn information about officers' misconduct that would otherwise lead to suspension or firing. Did the court err in finding that UNH police officers are "ultimately accountable to and under the control of the Durham police chief"?

3. To be guilty of obstructing governmental administration, one must obstruct the operation of some part of the government. Police officers generally are considered state actors, but UNH police officers, so called, are merely private security guards. Was the conduct for which Mr. Diamond was found guilty beyond the reach of the statute?

4. To be guilty of obstructing governmental administration, the obstruction must be the product of some "unlawful act," as defined by some source of law. Standing in front of an officer is not unlawful by any definition, and only by circular logic. Was the conduct for which Mr. Diamond was found guilty beyond the reach of the statute?

5. The legislative history of the obstructing governmental administration statute shows that the legislature did not intend to criminalize pacifist political action. Mr. Diamond was protesting Walt Disney's employment practices by pacifist means in a public place. Was the conduct for which Mr. Diamond was found guilty beyond the reach of the statute?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

On March 26, 1999, Steven Diamond was arrested, along with some others, during a meeting at the University of New Hampshire in which the Walt Disney company was recruiting applicants for its internship program. The meeting took place on the University campus in a large room in the student union building, and was attended by UNH students. The meeting was conducted by Walt Disney officials who described the program and played a video promoting the company, and by former interns who presented testimonials about their experience. *8/19/99 Trn.* at 14-15, 23.

Mr. Diamond sought to educate students about Walt Disney's third-world employment practices, which include paying 28 cents per hour or less, hazardous working conditions, and repression of union organizing. During the meeting some of the protesters, who wore masks with white skull-and-crossbones over a likeness of Mickey Mouse, held signs, distributed leaflets, and spoke up, for which they were arrested. *8/19/99 Trn.* at 14-16.

Mr. Diamond was apparently appalled at the arrests and attempted to arouse the attendees against the police for their violation of the protesters' free speech rights. Holding a sign, in his efforts Mr. Diamond stood in the way of one of the police officers, *8/19/99 Trn.* at 22. The UNH officer told Mr. Diamond to move. *8/19/99 Trn.* at 26, 35. When he didn't, the officer loudly and sternly told Mr. Diamond "You need to move out of my way or you're going to be arrested." *8/19/99 Trn.* at 36. This threat of arrest was for obstructing government administration. *8/19/99 Trn.* at 40.

Mr. Diamond was arrested by a member of the UNH police department. He was charged with misdemeanor-B obstructing governmental administration.

Prior to trial, the defendant filed several motions contesting the legality of the arrest.

The first motion asserted that the Mr. Diamond's arrest was extra-constitutional because the UNH police (so called) have no authority to wield the state's power of arrest. It argued that UNH has no statutory permission to operate a police department, but that the UNH police instead claim

their purported power from a contract with the town of Durham. The motion showed that municipalities, however, do not have the authority to delegate such core functions as the power to arrest, and that UNH police officers are in effect merely private security guards without the power to arrest.

The second motion pointed out that because the UNH officer who made the arrest was not a state actor, there was no government administration which Mr. Diamond could be alleged to have obstructed.

The third motion noted that the obstructing charge requires the state prove the defendant committed some "unlawful act." Because there was no allegation or evidence of an "unlawful act," Mr. Diamond's conduct was not criminal. Moreover, because the unlawful activity was, in the officer's view, obstructing governmental operation, basing the charge on the unlawful act of doing the same thing is circular. Based on the legislative history, the motion also argued that the legislature exempted from the statute passive political activity.

The Durham District Court (*G. Taube*, J.) held a hearing on the motions in June 1999. The court denied the first, *N.O.A.* at 47, and scheduled a bench trial. After trial, in August 1999, the other motions were denied, *8/19/99 Trn.* at 69-70, and Mr. Diamond was found guilty. He was thereafter sentenced to a $500 fine with $200 of it suspended. *N.O.A.* at 7-8.

This appeal followed.

Mr. Diamond's co-defendant, Patricia Welsh, attended the June hearing, and the issues concerning UNH police power pressed here apply to her. She was not present at Mr. Diamond's August trial, however, and was found guilty of the charges against her at a later date. She has also filed an appeal, N.H. S.Ct. No. 2000-069, based in part on some of the issues raised in here.

SUMMARY OF ARGUMENT

Mr. Diamond first shows that there are two police departments currently operating in Durham. He argues that while the Durham Police Chief has theoretical control over the University of New Hampshire police department, he has no ability to exercise day-to-day oversight of its operation.

The defendant then shows that this situation violates statutes which recognize towns, create UNH, delegate the police power, allow for a police chief who may supervise officers, and several others.

Mr. Diamond then argues that towns cannot privatize core governmental functions such as police protection because they do not have legislative authority to do so, and because the constitution does not allow delegation of them without legislative authority. He also notes that delegation of the police power without legislative authority is in derogation of constitutional norms, the separation of powers, and the republican form of government.

The defendant thus asserts that his conviction must be reversed, but points out that UNH's lack of police authority can be remedied by legislation.

Finally, Mr. Diamond addresses several problems with his conviction stemming from the construction of the obstructing government administration statute. He argues that because there was no proof of an "unlawful" act, he cannot be found guilty of obstructing. Pointing to the legislative history, he then argues that passive political agitation cannot be the basis of an obstructing conviction.

In his conclusion, Mr. Diamond attempts an analogy to a worst-case example of a police force that is beyond civilian political control.

ARGUMENT

I. There Are Two Separate Police Departments in Durham

Durham has a police department. UNH also has a police department, in the town of Durham, which is responsible for law enforcement on the UNH campus. By contract, Durham has purported to give to UNH its power, which it enjoys by statute, to operate its police department. In effect, Durham has privatized a portion of its police force, in violation of the law.

A. Law Allows Towns to Have One Police Department and One Police Chief

New Hampshire law allows towns to form a single police department and appoint a single police chief.

> The selectmen *of a town*, when they deem it necessary, may appoint . . . police officers. . . . The selectmen may designate *one of* the police officers as chief of police or superintendent and as such officer the chief of police or superintendent *shall exercise authority over and supervise or superintend* other police officers . . ., and said police officers . . . shall be accountable and responsible to said chief of police or superintendent.

RSA 105:1(emphasis added). Thus, towns, but not other entities, may have "a" police department. There can be only "one" chief. In addition, the chief is required to "superintend" the officers.

The law also specifies that:

> "The *selectmen*, or *superintendent* under their direction, may *employ* police officers in the detection and conviction of criminals and the prevention of crime in their *town*. . . ."

RSA 105:4. Thus, police must be employed by a town, its selectmen, or the officer's superintendent. A town's police officers may not be employed by some other entity.

The law further provides that "All police officers . . . shall receive such compensation as may be voted *by the town*." RSA 105:3 (emphasis added). Thus, police officers' paycheck must come

from the town, and not some other entity.

Finally, New Hampshire law provides that police, while on duty, must wear a name tag. "The tag shall be furnished to the officer *by the state or political subdivision thereof which employs the officer* at no cost to the officer." RSA 105:3-a (emphasis added). Thus, the officer's badge must be given to the officer by the town. Appointment of officers and of the chief must be in writing. RSA 105:2.

Several constitutional provisions, and even the Declaration of Independence, guarantee civilian political control of the police power, thus barring privatization of the police.

B. Durham Has Two Police Departments, and Two Police Chiefs

Durham, however, has two separate police department, and two police chiefs.[1] David Kurz, the only witness who testified at the hearing concerning this issue, is the duly appointed Chief of the Durham Police Department. *6/24/99 Trn.* at 12-13. Roger Beaudoin[2] is the "chief" of the purported University of New Hampshire police department.[3] *6/24/99 Trn.* at 19.

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[1]Documents produced by the Town of Durham concur that there are two separate police departments. *Town of Durham Master Plan 2000, Final Draft*, Nov. 1999, at 10.5. ("Both the Town and UNH operate separate police departments").

[2]Though spelled "Bowdoin" in the transcript, it is believed that the UNH chief's name is properly spelled "Beaudoin."

[3]Any words used by the defendants here or any time during the pendency of this case referring to the *plaintiffs* in this case in their purported official capacity, such as "officer," "chief," "police department," "sergeant," "state," etc., are inadvertent and mere matters of habit, and do not waive the allegations or claims made herein.

1. Separate Operation

The Durham Police Department and its UNH counterpart have completely separate operations. The UNH police department is not part of Durham's budget, and Durham's is not part of UNH's. *6/24/99 Trn.* at 15. Durham provides its officers all the equipment necessary for the operation of its police department, such as cruisers, uniforms, weapons, computers, name badges, and office space. *6/24/99 Trn.* at 16, but does not provide these for the UNH police. *6/24/99 Trn.* at 20-21.

The UNH police department prosecutes its own cases, has its own attorney prosecutor, and does not rely on Durham for this function. *6/24/99 Trn.* at 14-15, 20.

The Durham Police Department maintains its office in Durham. *6/24/99 Trn.* at 13. The UNH police department has a separate office on the UNH campus, also in Durham. *6/24/99 Trn.* at 19. The UNH police department has its own phone number, letterhead, budget, and administrative processes, none of which involve the Durham Police Department. *6/24/99 Trn.* at 20. The Durham Police Department often mistakenly gets mail intended for the UNH police department, and routinely forwards its. *6/24/99 Trn.* at 22. Likewise, the Durham Police Department often mistakenly gets phone calls intended for the UNH police department's, which are routinely referred to the UNH police. *6/24/99 Trn.* at 22.

2. Separate Pay and Benefits

UNH officers get paid by UNH, not by Durham. *6/24/99 Trn.* at 21. While Durham provides various insurance and benefits for Durham officers, *6/24/99 Trn.* at 16-17, the UNH officers are not covered by these programs, *6/24/99 Trn.* at 17, and Durham does not pay any portion of the benefits enjoyed by UNH officers. *6/24/99 Trn.* at 21. UNH officers, if they have a grievance, go through

UNH's grievance procedure, not Durham's. *6/24/99 Trn.* at 39-40.

3. Separate Patrol Areas

The contract between Durham and UNH which purports to delegate police protection functions to the UNH police department directs that

> "The primary responsibility for law enforcement on all University of New Hampshire property shall rest with the Public Safety Division[4] of the University of New Hampshire."

POLICY ON TOWN OF DURHAM - UNIVERSITY OF NEW HAMPSHIRE, LAW ENFORCEMENT PROCEDURES & RELATIONSHIPS,[5] ¶ 1(Aug. 1977),[6] *N.O.A.* at 33; *see 6/24/99 Trn.* at 25.

Accordingly, the Durham Police Department and the UNH police department have separate patrolling areas. Durham Police Chief David Kurz testified that while the contract does not bar Durham officers from enforcing the law on UNH property, *6/24/99 Trn.* at 27, in practical terms UNH officers are responsible for law enforcement on University property and roads contiguous to it, *6/24/99 Trn.* at 21-22, and Durham officers are responsible for law enforcement on non-University property. *6/24/99 Trn.* at 27.

UNH does not provide protection for Durham, *6/24/99 Trn.* at 15-16, and Durham does not rely on the UNH department to patrol Durham. *6/24/99 Trn.* at 15. Chief Kurz testified that the

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[4]The "Public Safety Division" was renamed the "UNH police department" in 1985. *See 6/24/99 Trn.* at 61.

[5] The document will hereinafter be cited as "CONTRACT."

[6]The contract, which was signed in 1977 by Eugene Mills, then President of the University of New Hampshire; Owen Durgin, then Chairman of the Durham Board of Selectman; and two members of the Joint Town-University Advisory Committee. *6/24/99 Trn.* at 35; CONTRACT, *N.O.A.* at 33-34. It was admitted as State's exhibit 1, *6/24/99 Trn.* at 26, and has been transferred to this Court.

Durham Police Department itself is adequate to provide police protection to the town of Durham. *6/24/99 Trn.* at 15. The Durham Police Department prides itself on being a full-service department, *see* Jill Hoffman, *Durham Police May Receive National Accreditation*, FOSTERS DAILY DEMOCRAT, July 30, 1999 at 2, and UNH does not take part in providing these services. *6/24/99 Trn.* at 17-18.

Beyond some inter-departmental cooperation, *6/24/99 Trn.* at 22-24, however, there is no agreement between the two police departments regarding police protection. *6/24/99 Trn.* at 24.

In short, UNH is not a "subsidiary organization" of the Durham Police Department. *6/24/99 Trn.* at 15.

4. Separate Police Chiefs

David Kurz is the Chief of the Durham Police Department. *6/24/99 Trn.* at 12-13. His job entails all the responsibilities associated with the chief of a police department, including hiring and firing officers, setting budgets and policies, formulating the payscale of officers and evaluating their performance, working on insurance matters, complying with federal, state, and local regulations, overseeing weapon safety, ensuring the lack of sexual harassment on the job, directing discipline and grievance matters, and overseeing administrative procedures. *6/24/99 Trn.* at 13-15. Chief Kurz has "overall control" of the Durham Police Department. *6/24/99 Trn.* at 13.

Roger Beaudoin is the "chief" of the purported University of New Hampshire police department. *6/24/99 Trn.* at 19. According to Chief Kurz, Mr. Beaudoin "serves in a similar function in supervising his people." *6/24/99 Trn.* at 32. Also according to Kurz, the Durham Chief performs none of the functions of chief for the UNH department. *6/24/99 Trn.* at 15.

Durham Chief Kurz concurs with the defendant that there are two police departments within the town of Durham, and that there are two separate chiefs. *6/24/99 Trn.* at 23.

5. Interdepartmental Reporting

Durham Chief Kurz testified that he has a close working relationship with Mr. Beaudoin. *6/24/99 Trn.* at 31-32. He noted that information on crimes and arrests is shared freely with the Durham department, *6/24/99 Trn.* at 32, but that it is generally given only upon request and not part of any regular reporting for the purpose of oversight. *6/24/99 Trn.* at 38.

6. Interdepartmental Cooperation

While the two departments do from time to time cooperate, neither department gets involved with the other unless there is a specific request for assistance, *6/24/99 Trn.* at 22. Durham Police Chief Kurz believes that that is the meaning of the contract. *6/24/99 Trn.* at 40. The two departments do cooperate

> "when there's a common denominator between us, when it deals with students in some capacity; when school is opening in September through October, or when school is closing in the month of May, we try to team up with university police officers, on bike patrol and foot beat, in the area of Durham, and that would be accompanied by a Durham police officer. So those types of things, we try to create a high visibility for the public and for the students. So when our mission does overlap, I think it's important that we do those things together."

6/24/99 Trn. at 23-24. Several New Hampshire statutes permit, and even encourage, this sort of interdepartmental cooperation. See RSA 53-A (cooperation among personnel already authorized to exercise state's power); RSA 53-A:3 (inter-agency agreements approved by Attorney General); RSA 106-C (inter-community police agreements among counties or municipalities, and requiring that the cooperating agencies be comprised of "duly authorized police officer, constable or watchman of any town," RSA 48:11-a); RSA 105:13 and RSA 105:13-a (allowing police to exercise authority outside of jurisdiction if procedural requirements are met). But they do not purport to authorize the formation of a police department, and the University is not mentioned.

The Durham town ordinances provide that among the duties of the Durham Police Department are that it must "[m]aintain liaison with the University of New Hampshire Security Department." CODE OF THE TOWN OF DURHAM, Ch. 4, *Administrative Code*, Art. III, § 4-14, B. 7. In addition, the Contract between Durham and UNH calls for interdepartmental reporting of certain crimes and incidents. CONTRACT, ¶¶ 2-7, ¶ 10, *N.O.A.* at 33-34

In any case, the cooperation between the Durham and UNH police departments, in apparent procedural conformity with the cooperation statutes, Durham ordinances, and the Contract, belies any claim that the two departments are somehow just one.

C. Durham Has Merely Theoretical Control Over The UNH Police Department, But Has No Ability to Exercise Day-To-Day Oversight

It is clear that the Chief of the Durham Police has theoretical control over the UNH police department. When pressed, Durham Chief Kurz said he could "take action" if he found out about egregious or unlawful acts by a UNH officer which went unaddressed by the UNH administration. *6/24/99 Trn.* at 30; *6/24/99 Trn.* at 18, 31, 33-34.

But Durham does not have the practical day-to-day control of UNH officers associated with the duties of a police chief.

1. Hiring

Hiring of UNH officers is a process of deputization. The Durham Police Chief gets a letter from the UNH chief indicating that UNH wants to hire a named person. The Durham Chief signs the letter, presents it to the town administrator for signature, and returns the signed letter to the UNH chief. At that point, UNH is free to hire the now deputized officer. *6/24/99 Trn.* at 28.

Durham Chief Kurz testified that he could refuse to sign-off on a UNH nominee. *6/24/99*

Trn. at 28-29.

The Durham Chief, however, does not have any say over who the job is offered to, or who is nominated. The hiring process, as far as Durham is concerned, does not reflect any policy choices made by Durham, its voters, its administrators, or its police chief. The Durham Chief can only say "yea" or "nay" to the UNH nominee.

Moreover, it is not clear that the Durham Chief has the discretion to refuse to sign the nomination letter. The Contract says that the

> "Town of Durham *shall*, upon request of the University of New Hampshire . . . deputize those qualified members of the [UNH police department] as police officers."

CONTRACT, ¶ 9, *N.O.A.* at 34 (emphasis added). Because the contract *mandates* deputization, as long as the nominee is "qualified," the Durham Chief has no discretion to refuse. The Durham Chief noted, moreover, that he is not free to ignore the Contract, as the town has indicted to him that it is to be enforced and abided by. *6/24/99 Trn.* at 37.

Thus, the contract provides the appearance of control over hiring UNH officers, but bars Durham from exercising any policy judgment or discretion over the process.

2. Firing

If the Durham Chief wishes to fire a UNH officer, the process is convoluted, and even more attenuated than hiring.

The Contract provides that

> "The Town of Durham shall . . . have the right to suspend [UNH officers'] police powers immediately for cause, and to revoke their police powers for cause. Final revocation of their police powers shall only be made after presentation of reasons to the Joint Town-University of New Hampshire Advisory Committee within a reasonable length of time."

CONTRACT, ¶ 9, *N.O.A.* at 34

If the Contract said no more than the first sentence quoted, UNH might reasonably argue that Durham has the ability to fire officers like any employer. The second sentence, however, takes it away. In order to fire, the Durham Chief must make a "presentation" of reasons to the town/gown committee whose membership is a mystery,[7] but which is clearly unelected, and is clearly answerable (at least in part) to the UNH administration. *6/24/99 Trn.* at 42.

And what happens if the "Joint Town-University of New Hampshire Advisory Committee" determines that the "reasons" are not sufficient for firing? The Contract appears to constrain the Durham Chief's authority to issue a "final revocation" of the offending officer's police powers. If UNH didn't want a certain officer's powers revoked, its administration could potentially block it, and Durham would have little recourse. In 1991, Durham's then Chief Paul Gowen recognized that the Durham/UNH arrangement constrained his control of UNH officers. Ralph Freedman, *et al.*, RECOMMENDATIONS OF THE TOWN/GOWN COMMITTEE ON POLICING AND DISPATCHING IN DURHAM at 22 (March 5, 1991) (on file at Durham Town Hall)[8]. UNH may thus in fact control the ultimate firing of its officers.

[7]Durham ordinances provide that at least some members of the Committee are to appointed by the Durham town Council. CODE OF THE TOWN OF DURHAM, Ch. 4, *Administrative Code*, Art. IV, § 4-17, A.7.

[8]This report will hereinafter be cited as "TOWN/GOWN RECOMMENDATIONS."

3. Terms of Employment

Durham Chief Kurz testified that his department has no control over the terms and conditions of UNH officers' employment *6/24/99 Trn.* at 21. Each department is responsible for its own discipline and oversight. *6/24/99 Trn.* at 24.

4. Supervisory Authority

Each department has its own chain of command, and they are not intertwined. The Durham Police Chief cannot command UNH officers, *6/24/99 Trn.* at 18-19, and UNH cannot command Durham officers. *6/24/99 Trn.* at 19.

The Durham Chief does not perform the duties commonly associated with a police chief for the UNH dept. *6/24/99 Trn.* at 15. Although he exercises daily supervision over his own Durham officers, *6/24/99 Trn.* at 30-31, the Durham Chief has no day-to-day supervisory authority over the UNH chief or UNH officers. *6/24/99 Trn.* at 20, 39.

5. Setting Policing Policy

Part of the Durham Chief's job is to set department policing policy for the Durham department. *6/24/99 Trn.* at 13. Police departments around the country have taken varying different approaches to enforcement of the law. Some have no tolerance for minor "public order" offenses, such as graffiti and loitering, while others have chosen to turn a blind eye to such crimes as small-time drug possession. *See e.g.,* Arleen Jacobius, *Going Gangbusters*, 82 ABA JOURNAL 24 (Oct. 1996). The Durham Chief, however, does not perform any policy-setting for the UNH department. *6/24/99 Trn.* at 13. Thus, even if it were the considered judgment of the Town of Durham, its elected representatives, and its police chief to pursue a certain policing policy, that judgment would have no effect on the UNH campus, which comprises up to 62 percent of the town's population.

Town of Durham Master Plan 2000, Final Draft, Nov. 1999, at 1.2. The Durham and University police have over the years had differences in policing policy. TOWN/GOWN RECOMMENDATIONS at 13.

D. Durham Chief Would Have a Hard Time Discovering UNH Officer Misbehavior

Even if Durham's oversight of UNH officers were effective, the Durham Chief would have a hard time learning of any transgressions by UNH officers.

While the Durham Chief may be able to request information from the UNH department, the Durham Chief does not have routine review of any UNH officer records. The Durham Chief is not privy to personnel files in the UNH department, and is not sent UNH employee evaluations. *6/24/99 Trn.* at 38-39.

Durham Police Chief Kurz testified that if, for example, a UNH officer were padding his mileage records in order to improperly claim extra money or use department property for personal benefit, he could get mileage records if he asked, but that they are not routinely sent to him. *6/24/99 Trn.* at 37-38.

Thus, Chief Kurz testified, the only way he could find out about any misbehavior by UNH officers is if someone told him. *6/24/99 Trn.* at 39.

E. If the Durham Chief Found Out, He Could Do Little

Even if the Durham Chief learned of misbehavior by a UNH officer, the threshold for doing anything is very high, and there might be little he could do.

Durham Chief Kurz testified that if one of his Durham officers behaved inappropriately by, for example, beating a suspect or an arrestee, such behavior would constitute cause for some sort of action. *6/24/99 Trn.* at Replacement Pg. 41. Chief Kurz went on to say, however, that if it were a

UNH officer, he "would do nothing" *6/24/99 Trn.* at Replacement Pg. 41, "because the University police department's controlled by Chief Beaudoin and I would depend on them to do what they needed to do for their agency." *6/24/99 Trn.* at 42.

And even if a UNH officer did something egregious, Chief Kurz confirmed that he would have to go before the town/gown committee in order to take final action. *6/24/99 Trn.* at 42.

Thus, even in the worst case, the Durham Chief has very little power over UNH officers. Combined with his inability to learn about any UNH officer misdeeds, his ability to actually control UNH officers is so slight that it cannot be considered within the supervisory and superintendent duties associated with the Chief of a police department.

F. Name Badges For UNH Officers Are Provided by UNH, and Not Durham

The Town of Durham provides name tags for Durham's Police officers. *6/24/99 Trn.* at 16. Durham does not, however, provide badges for UNH officers. *6/24/99 Trn.* at 21. During Steven Diamond's arrest, officer Clancy McMahon, who is employed by the UNH police department, was wearing his UNH name badge. *8/19/99 Trn.* at 11.

II. Two Police Departments in One Town Violates New Hampshire Statutes

The arrangement in Durham – two police departments and two police chiefs – violates a number of New Hampshire statutes.

A. UNH is Not a Town

RSA 105:1, RSA 105:3, and RSA 105:4 provide that the selectmen of "a town" may appoint, compensate, and employ police officers. RSA 105:3 further specifies that the amount of officers' compensation must be "voted" by the town.

Durham is a town. CODE OF THE TOWN OF DURHAM, Ch. 1, *Charter of the Town of Durham.* UNH is not a town. UNH is not mentioned in Title 3 of the New Hampshire statutes where towns are recognized, and does not have "selectmen" who could be authorized to appoint police officers.

The statutes setting forth the power of municipalities, RSA 31 through RSA 53-D, give them innumerable ways to wield the state's power, including the power to arrest, but does not mention the University or use any language that might include it.

The State may argue that town and UNH are similar because they are both a "body politic and corporate" RSA 31:1; RSA 187-A:1. Everything else about them is so different however, that they cannot be reasonably compared. *Compare* New Hampshire Revised Statutes Annotated, title 3, RSA 31 through RSA 53-E (powers of towns) *with* RSA 187-A (creation of UNH). Towns have the power of taxation, elections and elected officials, fully functioning local governments, ordinances that carry the force of law, authority to create and implement property use and zoning plans, power to call out an armed militia, and numerous other powers including the power to create and operate a police department. Towns are to be represented in the Legislature. N.H. CONST., pt. II, art. 9.

The purpose of the University, however, is very limited. It is to

> "provide a well coordinated system of public higher education offering liberal undergraduate education encompassing the major branches of learning, emphasizing our cultural heritage, and cultivating the skills of reasoning and communication."

RSA 187-A:1. Towns also have duties for which UNH is not responsible (*e.g.*, seven-year perambulation of town lines, RSA 51:2; constantly updated tax maps, RSA 31:95-a; maintenance of list of taxable property with reporting to the state, RSA 74 through RSA 76), and immunities not enjoyed by the University (*e.g.*, freedom from unfunded mandates, N.H. CONST., pt. I, art. 28-a; self-determination of town charter, N.H. CONST. pt. I, art. 39).

In short, UNH is not a "town," and the laws that apply to towns do not apply to UNH.

Thus, the existence of the UNH police department violates the "town" provision of RSA 105:1, RSA 105:3, and RSA 105:4.

B. The UNH Statute Does Not Authorize Police Functions

The statute creating the University lists many powers. Beyond providing an education and granting degrees, RSA 187-A:1, it can accept legacies and gifts, acquire and manage property, acquire and sell water in and to Durham, construct and maintain sewers, enter into contracts with other colleges for educational purposes, transfer funds for university purposes, borrow against the credit of the university system, acquire risk insurance, maintain and operate housing and dining facilities and bookstores. RSA 187-A:14.

Nothing in the UNH statutes contain the power of arrest or authorize the maintenance of a police department or police chief.

The statute that creates the state's power of arrest mentions many types of officers. RSA 594:1, III. It does not, however, mention the University or use any language that might include it.

RSA 105:4 specifies that police officers are to be employed by a town's "selectmen," or a

chief working under their direction. UNH does not have selectmen.

Thus, regardless of how UNH officers purportedly acquired power to arrest, the existence of the UNH police department violates RSA 187-A, and the selectmen provision of RSA 105:4.

C. Towns Are Not Allowed to Have Entities Other Than Their Own Police Department Enforce the Law in The Town

RSA 105:4 provides that a town may employ a police force for the "detection and conviction of criminals and the prevention of crime in their *town*." The statute does not permit other entities from detecting and convicting criminals and preventing crime in the town. The statute thus prevents a town from contracting with another entity to provide police protection.[9]

Thus, the Contract between Durham and UNH, which purports to make the UNH police department "primary responsible for law enforcement on all University of New Hampshire property" in the town of Durham, violates RSA 105:4.

D. Towns Can't Have Two Police Chiefs

RSA 105:1 provides that "one" of a town's police officers may be designated as chief. RSA 105:4 provides that officer must be employed by their "superintendent" (singular), not "superintendents" (plural).

In Durham, there are two police chiefs. *See Stout v. Stinnett*, 197 S.W.2d 564 (Ark. 1946) (statute creating office of "the chief" not authorize city to appoint day chief and night chief).

Thus, the existence of the UNH police department violates the one-chief provisions of RSA 105:1 and RSA 105:4.

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[9]The statute does not prevent state authorities, such as state troopers or the Attorney General's office in certain cases, from enforcing the laws, because these organizations have separate statutory authority. Likewise, the statute does not prevent federal authorities from enforcing the law, because of the federal supremacy clause.

E. UNH Officers Wear UNH Badges

RSA 105:3-a requires that police officers wear a name badge while on duty, and that the badge be furnished by the town that employs him. In the UNH-Durham arrangement, UNH officers wear badges designating them as UNH officers. The badges are paid for and furnished by UNH, not by Durham.

Thus, the practice of the UNH police department violates RSA 105:3-a.

F. Durham Does Not Supervise and Superintend UNH Officers

RSA 105:1 mandates that a town's police chief "shall exercise authority over and supervise or superintend" the other officers.

To supervise means "to be able to direct, to oversee and to exercise authority, and is a quality which requires more than mere legal ability and connotes not only knowledge but executive capacity." *Rosenstrauch v. Reavy*, 21 N.Y.S.2d 358, 361 (1940) (internal quotation omitted). To supervise "is to oversee, to have oversight of, to superintend the execution of or the performance of a thing, or the movements or work of a person; to inspect with authority; to inspect and direct the work of others. *Fluet v. McCabe*, 12 N.E.2d 89, 93 (Mass. 1938) (parentheses omitted). Supervisory power is that inherent power, though not specifically granted by statute or constitution, which is necessary for the exercise of all enumerated powers. *United States v. Horn*, 29 F.3d 754 (1st Cir. 1994) (court's supervisory powers to award attorneys fees).

To superintend means "[t]o have charge and direction of; to direct the course and oversee the details; to regulate with authority; to manage; to have or exercise the charge and oversight of; to oversee with the power of direction; to take care of with authority; to oversee; to overlook. *Nederlandsch-Amerikaansche v. Vassallo*, 365 S.W. 650, 656 (Tex. App. 1963). Superintend means

to "exercise the charge and oversight of; to oversee, with the power of direction; to take care of, with authority, as an officer superintends the building of a ship or the construction of a fort." It means "To have charge and direction of, as of a school; direct the course and oversee the details of some work, as the construction of a building, or movement, as of an army; regulate with authority; manage. *Dantzler v. De Bardeleben Coal & Iron Co.*, 14 So. 10, 12-13 (Ala. 1893) (parenthesis omitted).

Supervising and superintending are thus plenary duties. They demand comprehensive ability to direct day-to-day and minute-by-minute work of those supervised and superintended.

In the police context, courts have held that the chief of a police department must have supervisory responsibility over all areas of police activities. *Devin v. Hollywood*, 351 So.2d 1022, 1023 n.1 (Fla. App. 1976) (chief of police has authority over promotion); *Arnold v. Engelbrecht*, 518 N.E.2d 237 (Ill app 1987) (same); *Montgomery County v. Anastasi*, 549 A.2d 753 (Md.App. 1987) (same); *Donofrio v. Hastings*, 401 N.Y.S.2d 935 (Tex.Ct.App. 1978); *Heard v. Houston*, 529 S.W.2d 560 (Tex. Civ. App. 1975) (chief has power over discipline and suspension for conduct unbecoming an officer); *Glendale Professional Policemen's Ass'n v. Glendale*, 264 N.W.2d 594 (Wis. 1978) (police chief has power over hiring).

The Durham Chief, under the current arrangement, has minimal authority over UNH officers, and by contract is not able to and does not "supervise or superintend" them. The Durham Chief does not and can not effectively hire and fire UNH officers; control their pay and benefits, or the terms of their employment; designate who, when, where, and how they patrol; set policy on their enforcement practices and arrest strategies; or learn of or take action to discipline even egregious misdeeds.

Thus, the UNH police department, as currently constituted, violates the supervise and

superintend provision of RSA 105:1.

G. UNH Officers Are Not Accountable and Responsible to the Durham Chief

RSA 105:1 requires that police officers "shall be accountable and responsible to" the town "chief of police or superintendent." UNH officers are accountable primarily to their UNH boss, and have little or no contact with the Durham Chief, who, as noted above, has no control over them.

Thus, the existence of the UNH police department violates the accountable and responsible provision of RSA 105:1.

H. UNH Officers Are Employed by UNH, and Not by Durham

RSA 105:4 provides that the selectmen of a town or its police chief may "employ" police officers. RSA 105:4 does not permit employment of a town's officers by some other entity. RSA 105:3 requires that the town pay its officers.

RSA 105:1, when referring to the relationship between the town and its police officers, uses the words "appoint," "supervise," "superintend," "accountable," and "responsible." These words further indicate an employment relationship. The badge statute, RSA 105:3-a, requires that the badge be furnished by the town that "employs" the officer.

The statutes thus contemplate a employment relation between the town and its police officers.

"[T]he distinguishing features of an employment relationship . . . are the employer's right to the employee's labor and his right to control the employee's performance, and the employee's corresponding right to compensation." *Swiezynski v. Civiello*, 126 N.H. 142 (1985); *Boissonnault v. Bristol Federated Church*, 138 N.H. 476 (1994); *see also LaVallie v. Simplex Wire and Cable Co.*, 135 N.H. 692 (1992); *Porter v. Barton*, 98 N.H. 104 (1953).

In this case, the UNH officers get paid not by Durham, but by UNH. Durham has no right to

the UNH officers' labor nor can Durham control their performance. UNH officers have no claim against Durham for their pay, although Durham officers clearly do. Without doubt, UNH officers are employees of UNH and not of Durham.

Thus, the existence of the UNH police department violates the employment and compensation provisions of RSA 105:4, RSA 105:3, RSA 105:1 and RSA 105:3-a.

J. UNH is Not in Any Judicial District

RSA 502-A:1 creates judicial districts. UNH, 502-A:1, VII creates the Dover-Somersworth-Durham District, which includes Dover, Somersworth, Rollinsford, Durham, Lee, and Madbury. It also provides for special sessions in Durham. The Statute does not mention jurisdiction over cases that arise from UNH as an entity separate from Durham.

Thus, prosecuting cases by the UNH police department, without the involvement of Durham, violates RSA 502-A:1, VII, and belies the claim that UNH has the authority to exercise police authority.

III. Towns Cannot Privatize the Police

Towns' powers are defined and circumscribed by the state legislature. Without specific authority, towns cannot take any action. Their authority to enter into contracts is limited, and does not include the power to delegate essential governmental responsibilities. Any contract that does is *ultra vires* and void.

A. Towns Have Only That Authority Granted to Them by the Legislature

Although "home rule" in public parlance is often used to connote the belief that governmental power springs from New Hampshire towns, it is settled law that municipal corporations have only the power delegated to them by the legislature, and that they are, in effect, agencies of the state government.

> "While the Legislature often defers to the 'home rule tradition' in its proceedings, its exercise of plenary power over municipalities is limited only by provisions of our state constitution which grant municipalities only the right to control the form of their local government as enacted in their charters."

Seabrook Citizens for the Defense of Home Rule v. Yankee Greyhound Racing, Inc., 123 N.H. 103, 108 (1983) (challenge to state's power to disallow local control over dog races on Sundays). This has been repeated by the Supreme Court on many occasions. *Region 10 Client Management, Inc. v. Hampstead*, 120 N.H. 885, 888 (1980) ("state policy . . . may not be frustrated by local zoning restrictions"); *Piper v. Meredith*, 110 N.H. 291, 295 (1970) (municipalities have only "such powers as are expressly granted to them by the Legislature and such as are necessarily implied or incidental thereto"); *Amyot v. Caron*, 88 N.H. 394, 399 (1937); *Clough v. Osgood*, 87 N.H. 444, 447 (1935); *Opinion of the Justices*, 78 N.H. 617, 620 (1917); *Berlin v. Gorham*, 34 N.H. 266, 275 (1856) (legislature has "entire control" over municipalities). State control over municipal power has been

with us since the beginning of New Hampshire jurisprudence. *Bristol v. New Chester*, 3 N.H. 524, 532 (1826) ("Towns are public corporations, created for purposes purely public, empowered to hold property, and invested with many powers and faculties, to enable them to answer the purposes of their creation. In the creation of such corporations, there must, in the nature of things, be reserved, by necessary implication, a power to modify them in such manner, as to meet the public exigencies."); *Trustees of Dartmouth College v. Woodward*, 1 N.H. 111, 133 (1817) ("The legislature . . . have always claimed and exercised the right of dividing towns; of enlarging or diminishing their territorial limits; of imposing new duties or limiting their powers and privileges, as the public good seemed to require; and this without their consent."). The principle has been recognized by the United States Supreme Court. *Hunter v. Pittsburg*, 207 U.S. 161 (1907). In effect, municipalities are mere agencies of the state. *Piper v. Meredith*, 110 N.H. at 295 ("towns are but subdivisions of the state").

There must be enabling legislation for any municipal activity. *Laconia Water Works v. Mooney*, 139 N.H. 621 (1995) ("[A] municipality may not delegate to a municipal board more power than the municipality has."); *Portsmouth v. Karosis*, 126 N.H. 717 (1985) (city did not have authority to collect parking fines through small claims process); *Sedgewick v. Dover*, 122 N.H. 193 (1982) (municipality lacks power to operate and maintain a hospital without grant from the legislature); *Jackson v. Town and Country Motor Inn, Inc.*, 120 N.H. 699 (1980) (town's power to regulate signs limited by legislature); *Dearborn v. Milford*, 120 N.H. 82 (1980) (municipality does not have authority to expand control over site plans beyond that authorized by the legislature); *Chiplin Enterprises, Inc. v. Lebanon*, 120 N.H. 124 (1980) (municipalities exercising delegated power to regulate subdivisions can only do so in manner consistent with enabling legislation); *Tuftonboro v.*

Lakeside Colony, Inc., 119 N.H. 445 (1979) (town limited to using definition of subdivision established by legislature); *Seal Tanning Co. v. Manchester*, 118 N.H. 93 (1978) (city not authorized to assess sewer tax); *Indian Head National Bank v. Portsmouth*, 117 N.H. 954 (1979) (city cannot impose tax on leasehold of bank as it was not authorized by legislature); *Portsmouth v. John T. Clark and Son of New Hampshire, Inc.*, 117 N.H. 797 (1977) (city not have authority to subject state agency to local zoning); *Buxton v. Exeter*, 117 N.H. 27 (1977) (town must regulate subdivision in accord with process set out authorizing legislation); *Eastman v. Meredith*, 36 N.H. 284 (1858) (towns have only that authority given them by the legislature).

When the municipality does not have state authority for an action, a town ordinance purporting to authorize the action has no effect. *See Sedgewick v. Dover*, 122 N.H. 193 (1982) (ordinance authorizing municipality to operate and maintain hospital ineffective unless city has legislative authority for hospital); *Buxton v. Exeter*, 117 N.H. 27 (1977) (town ordinance regulating subdivision ineffective as not in accord with process set out authorizing legislation); *Attorney-General v. Connors*, 9 So. 7 (Fla. 1891) (in absence of law so authorizing, office of chief of police cannot be created by ordinance); *see Dianis v. Waenke*, 330 N.E.2d 302 (Ill.App. 1975). Nonetheless, no Durham ordinance could be found purporting to authorize the delegation of the arrest power to UNH. If one exists, it does not repair the town's lack of authority to do so.

B. A Contract Beyond the Scope of Municipal Authority is Void

Any contract beyond the scope of municipal authority is *ultra vires*, and wholly void. *Marrone v. Hampton*, 123 N.H. 729 (1983) ("Where a municipal governing body enters into a contract which is beyond the scope of the municipality's powers, such an attempt to contract is termed *ultra vires*, and the contract is wholly void."); *Sanborn v. Deerfield*, 2 N.H. 251, 253 (1820)

(selectmen have prudential powers, "[b]ut it does not follow, that, because 'the ordering and managing of all the prudential affairs' of towns is confided to them, there is no limit to their power"). A void contract has no effect. *Marrone*, 123 N.H. at 735.

C. New Hampshire's Municipal Contract Statute Does Not Allow Towns to Contract Away Core Governmental Functions

New Hampshire's municipal contract statute provides that:

> "Towns may purchase and hold real and personal estate for the public uses of the inhabitants, and may sell and convey the same; may recognize unions of employees and make and enter into collective bargaining contracts with such unions; and may make any contracts which may be necessary and convenient for the transaction of the public business of the town."

RSA 31:3.

In *Tremblay v. Berlin Police Union*, 108 N.H. 416 (1968), a member of the Berlin Police Department objected to mandatory joining of the then new police union. He claimed that the town was not authorized to enter a contract that gave away municipal power over such matters as setting wages and hours. The court said that, while that might be true, because there was explicit statutory authorization for this delegation, it was lawful. There is no known explicit permission, however, for municipalities to contract away the power of police.

The language of the municipal contract statute allows towns to enter contracts that are "necessary and convenient" to transact the business of the town. Necessary does not mean compelling, but means more than desirable. *Farmington Library Ass'n v. Trafton*, 84 N.H. 29, 31 (1929) (necessary in easement context means "needed"; *Farmington* is the only construction of "necessary" in New Hampshire law). While it is no doubt convenient for the town of Durham to avoid paying for UNH security needs, it is not necessary.

The municipal contracting statute is intended to allow towns to properly execute municipal services. It is so that towns can have the local garage maintain its police cruisers, buy office supplies for the town administrator, arrange for paving and plowing the roads, and for other items and services needed for its municipal duties. There is a distinction between contracting for services and items needed for efficient municipal services, and wholesale delegation of core governmental purposes with significant impacts on individual liberties. The delegation of the power of arrest by Durham to UNH is beyond the intent of the language of the statute.

D. New Hampshire's Police Statute Requires That Towns Employ Their Police Officers

To the extent the municipal contract statute can be read to allow the arrangement between Durham and UNH, the police power statute modifies it. *See In re Laurie B.*, 125 N.H. 784 (1984) (more specific statute controls).

RSA 105:4 provides that the selectmen or the police chief, may "employ police officers in the detection and conviction of criminals and the prevention of crime *in their town*." The statute allows that the *town* may employ officers for law enforcement of law in that town. The statute does not allow employment of personnel to enforce the law in the town by any other but the town. If an entity other than the town employs a person, that person cannot enforce the law in the town.

Thus, New Hampshire law requires that towns employ their police officers. Here, UNH employs the UNH police department. The UNH police department, according to the Contract, has "primary responsibility for law enforcement on all University of New Hampshire property." That property is in the town of Durham. The Durham/UNH arrangement provides for employment of law enforcement personnel by an entity other than Durham, in violation of the law, and the arrangement

is thus void.

E. The Constitution Requires that Governmental Power Must Spring From the People, be Accountable to the People, and not be Delegated Away From the People

The New Hampshire Constitution ensures that governmental power must spring from the people. Various clauses provide that "all government of right originates from the people," N.H. CONST., pt. I, art. 1; and "[t]he people of this state have the sole and exclusive right of governing themselves . . . and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right, pertaining thereto," N.H. CONST., pt. I, art. 7.

The constitution mandates that governmental power remain accountable to the people: "All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them." N.H. CONST., pt. I, art. 8

For this purpose, several provisions ensure that government jobs be created by law. "No office or place, whatsoever, in government, shall be hereditary," N.H. CONST., pt. I, art. 9; "Government being instituted for the common benefit, . . . and not for the private interest or emolument of any one man, family, or class of men," N.H. CONST., pt. I, art. 10; the general court may "provide by fixed laws for the naming and settling, all civil officers within this state, such officers excepted, the election and appointment of whom [this constitution] otherwise provided for; and to set forth the several duties, powers, and limits, of the several civil and military officers of this state . . . [and] for the execution of their several offices and places," N.H. CONST., pt. II, art. 5; and the general court "shall have the power and the immediate duty to provide for prompt and temporary succession to the powers and duties of public offices, of whatever nature," N.H. CONST., pt. II, art.

5-a.

Conversely, the constitution prevents government from casting off its power to others. "But no part of a man's property shall be taken from him . . . without his own consent, or that of the representative body of the people," N.H. CONST., pt. I, art. 12; "No subsidy, charge, tax, impost, or duty, shall be established, fixed, laid, or levied, under any pretext whatsoever, without the consent of the people, or their representatives in the legislature, or authority derived from that body," N.H. CONST., pt. I, art. 28; "The supreme legislative power, within this state, shall be vested in the senate and house of representatives," N.H. CONST., pt. II, art. 2.

F. Towns Cannot Privatize Core Governmental Functions

Thus, municipalities may not attempt to delegate powers that have the effect of infringing its citizens' rights. In *Del's Big Saver Foods, Inc. v. Carpenter Cook, Inc.*, 795 F.2d 1344 (7th Cir. 1986), the state delegated to a private person the authority to take repossession of property which was the subject of a collection action. The repossession was accomplished without a hearing and basic due process requirements. The Seventh Circuit said "[a] state cannot avoid its obligations under the due process clause by delegating to private persons the authority to deprive people of their property without due process of law." *Del's Big Saver*, 795 F.2d at 1346.

Municipalities may not attempt to delegate their essential governmental powers. In *City of Belleview v. Belleview Fire Fighters, Inc.*, 367 So.2d 1086 (Fla. Dist.Ct.App. 1979), for example, the city entered an agreement whereby it would retain ownership of firefighting equipment, but a private company would provide firefighting services. Under the contract the city "was powerless to direct the exercise of the police power in the fire fighting area." The court noted that "a municipality cannot contract away the exercise of its police powers," and that "exercise of the police powers

includes the right to determine strategy and tactics for the deployment of those powers." *Belleview*, 367 So.2d at 1088. Because the contract effectively gave away these rights, it was unenforceable. In *Ramer v. State*, 530 So.2d 915 (Fla. 1988), the Florida Supreme Court suppressed the fruits of a search by an officer outside his jurisdiction. The state claimed that the officer had authority for the search because he had been appointed "special deputy" by the county sheriff. The court rejected the state's argument because the appointment "would be delegating part of [sheriffs'] law enforcement functions to municipal police officials." *Ramer*, 530 So.2d at 917. In *P.C.B. Partnership v. City of Largo*, 549 So.2d 738 (Fla. Dist. Ct. App. 1989), the court found that the city lacked authority to contract away its power to decide whether to build road, install traffic devices, or permit development of a parking lot and storm drain connections, because a municipality cannot "effectively contract[] away the exercise of its police powers." *P.C.B.*, 549 So.2d at 741. In *Rockingham Square Shopping Center, Inc. v. Town of Madison*, 262 S.E.2d 705 (N.C. Ct. App. 1980), the town had agreed to open a road as an inducement for development of a shopping center, but later reneged and was sued by the developer. The court found that while municipalities may enter agreements for public purposes, "they have no power . . . to make contracts . . . which shall cede away, control, or embarrass their legislative or governmental powers." *Rockingham*, 262 S.E.2d at 708. *See also Wagner v. City of San Antonio*, 559 S.W.2d 672, 674 (Tex.Civ.App. 1977) (city agreed to provide water to landowners from an open viaduct, which was later closed; court found that "City, as a political subdivision of the State, could not contract or surrender away its police or governmental powers"); *North Kansas City Sch. Dist. v. J.P. Peterson-Renner Inc.*, 369 S.W.2d 159, 165 (Mo. 1963) (contract regarding control over public sewers held invalid as against public policy).

G. Durham's Contract With UNH is Void

The power of arrest is a core governmental function. As such, it may not be privatized – that is, delegated to those who do not have the state's explicit authority to exercise it. The Contract between Durham and the University of New Hampshire, however, does just that. UNH does not have the authority to wield the powers of the police. Yet the Contract purports to make UNH responsible for police protection on its campus. CONTRACT, ¶ 1, *N.O.A.* at 33. Because the Contract is beyond the scope of the municipal contract statute, and because it violates the constitution, it is void. Any action taken in accordance with it is ineffective. Accordingly, the action taken against the defendant here was not an arrest, and cannot have the effect of an arrest.

IV. The Privatization of Police Violates the Principle of Civilian Political Control of Police Power

A. Who Is Allowed to Exercise Police Power

The power of the police, and the immunities that go with it, are awesome. Police officers have a duty to act as "conservators of the peace," *State v. Theodosopoulos*, 119 N.H. 573, *cert. denied*, 446 U.S. 983 (1980); *State v. Grant*, 107 N.H. 1 (1966), and as such have the authority to detain "any person abroad," RSA 594:2, make arrests, RSA 105:12, use deadly force to effect an arrest, RSA 594:4; RSA 627:5, IV, and search people and their belongings, RSA 594:3. Police concomitantly are immune from prosecution for conduct in performance of their duties.

The power, however, is carefully prescribed by the constitution.

> "No subject shall be *arrested*, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, . . . or deprived of his . . . liberty, . . . but by . . . the law of the land."

N.H. CONST., pt. I, art. 15 (emphasis added).

In New Hampshire, police officers are considered officers of the state, and not officers of the municipality. *Pollard v. Gregg*, 77 N.H. 190 (1914); *Gooch v. Exeter*, 70 N.H. 413 (1900). They receive their power from the state. RSA 105:1 *et seq*.

Hence, criminal cases are brought as "*State of New Hampshire v. Defendant*," and not as *Town of ____ v. Defendant*." *See, e.g., State (Hass, Complainant) v. Rollins*, 129 N.H. 684 (1987).

The list of those who are officers and thus may wield the power of arrest is long, but not unlimited. Any "peace officer" may make an arrest. Peace officer defined broadly as "any sheriff or deputy sheriff, mayor or city marshal, constable, police officer or watchman, member of the national guard . . . or other person authorized to make arrests in a criminal case." RSA 594:1, III. In *State v.*

Swan, 116 N.H. 132 (1976), for instance, an officer from the town of Waterville arrested the defendant in Plymouth, who claimed the arrest was unlawful. The Waterville officer, however, was an "auxiliary policeman" of the town of Plymouth, duly appointed by the selectmen of Plymouth. The court found that to wield the power of the state, the officer had to have authority by statute. It held that the broad definition in RSA 594:1,III and RSA 105:3 indicated this officer had the authority by virtue of his appointment by Plymouth, the arresting town.

If an arrest is done by someone not named in the statutes, it is a citizen's arrest. In *State v. McCloud*, 652 S.W.2d 235 (Mo.App. 1983), an arrest was made by university security guards, which the court held was a valid citizen's arrest. Although citizens can effect an arrest, they do not have the powers or immunities of state officers. *See e.g., State v. Keyser*, 117 N.H. 45 (1977) (store security guard may make citizen's arrest, but may not conduct a search without involvement of police officer); *State (Hass, Complainant) v. Rollins*, 129 N.H. 684 (1987) (private prosecution allowed, but citizen-prosecutor does not enjoy prosecutorial immunity).

B. The Constitution and the American Form of Government Require Political Control of the Police

It is a fundamental principle of American liberty and republican democracy that those charged with enforcing the law be subject and accountable to civilian political control.

The founders were aware of dictatorships, which sprung from otherwise legitimate regimes because of the dangerous mix of political power and military might: Julius Ceaser, who morphed himself from elected official to dictator; Caligula, who became emperor of Rome in at least defensible circumstances, then ruled with incredible cruelty. The reign of Robespierre, who was elected in France, but who subsequently beheaded thousands, was current events during the

American constitution-writing era. Modern examples abound – Suharto in Indonesia, Mohmmar Qadaffi in Libya, Idi Amin in Uganda, Hitler in Germany.

In the Declaration of Independence the founders justified their break with Britain on a lengthy list of complaints about the king's despotism. They wrote: "He has affected to render the Military independent of and superior to the Civil power." THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

Because of this, both the federal and New Hampshire constitutions contain clauses preventing it. U.S. CONST., art. I, § 8 (elected *legislature* has power to raise and support armies, maintain a navy, make rules for land and naval forces, to provide for calling for the militia, and for organizing, arming, and disciplining the militia); U.S. CONST., art. II, § 2 (the elected *president* is commander in chief of the army, navy, and state militias); U.S. CONST., art. IV, § 4, (guaranteeing states republican form of government); N.H. CONST., pt. I, art. 34 ("No person can, in any case, be subjected to law martial . . . but by authority of the *legislature*") (emphases added); N.H. CONST., pt. I, art. 8 ("All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them.").

These notions have been recognized by courts. In *In re Templeton*, 159 A.2d 725 (Pa. 1960), for instance, a Pennsylvania town's chief of police contested his removal. The court held it was his burden to show he had been appropriately appointed to the position, but he could produce no record of the creation of the police department. "The creation of a . . . police department or force is a legislative function. Such may come into being only through legislative enactment." Because he was not properly employed, he was subject to removal. *See also State v. Bergin*, 183 A.2d 607 (Conn. 1962) (police officer's promotion invalid when position not created by legislature). In *State*

v. Lamb, 299 N.E.2d 317 (Ohio.Misc. 1973), the court suppressed the fruits of a search incident to arrest because the arrest was conducted by a private security guard who did not have power to make an arrest.

Police authority is a power of the politically-controlled state, and can be delegated only by the people through their elected representatives. It does not, and cannot, exist without political authority.

This case raises the issue of delegation of executive power. But in terms of governmental structure, it is little different from the other branches contracting away their functions.

Take the legislative power: Could Durham, through a contract, give to the University of New Hampshire the power to make binding ordinances? Certainly the Legislature can – any number of administrative agencies have rulemaking authority. As long as the legislative power is not delegated wholesale – as long as the agency is merely filling in legislative gaps – the Legislature can delegate to agencies the power to make binding law. *See e.g., Kimball v. N.H. Bd. Of Accountancy*, 118 N.H. 567 (1978). But without legislative authority to do so, towns do not have that authority, and Durham clearly could not delegate its ordinance-making power to UNH.

Likewise with the judicial branch: Could the Durham District Court, through a contract, give the University of New Hampshire the authority to set up a "UNH District Court" to hear cases arising there? Certainly the Legislature can – currently there are several dozen judicial districts in the state, which the Legislature adjusts from time to time. Parties can agree to opt out of the judicial system by agreeing, for instance, to enter binding arbitration. But the legislature cannot privatize the administration of justice by, for example, compelling citizens to bypass the court system for resolving their disputes. *See e.g., Estabrook v. American Hoist & Derrick, Inc.*, 127 N.H. 162 (1985).

And while courts can encourage private settlements, they cannot – certainly without legislative and constitutional permission – delegate the resolution of criminal cases to some sort of private justice system. *See e.g., Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568 (1985) (allowing delegation of adjudication to private arbitrators, but with legislative authorization).

So it is with the executive branch. The power to arrest is a core part of its police power, and it cannot be cavalierly delegated, at least not without statutory and constitutional permission. *See e.g., Morrison v. Olson*, 487 U.S. 654 (1988) (federal special prosecutor position constitutionally accountable to executive branch); Ronald A. Cass, Privatization: Politics, Law, and Theory, 71 MARQ. L. REV. 449, 497-522 (1988) (discussing privatization of various governmental functions, but based on assumption that the privatization is legislatively authorized).

It is an axiom of republican government that

> "All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all time accountable to them."

N.H. CONST. pt. I, art. 8. Power is given to the "state" "[w]hen men enter into a state of society," N.H. CONST. pt. I, art. 3, by their adoption of the constitution. The power resides in the people's elected representatives until delegated as the Legislature determines.

To exercise the power of the state, an alleged agent must be able to trace his line of authority to the people in whom it originally resides. An officer of the town of Durham can trace her authority vertically from herself, to her Chief, to the Selectmen, to the Legislature, to the Constitution, and ultimately to the people.

An "officer" of the University of New Hampshire, however, cannot trace that vertical line. He can trace his line to his "chief," and to UNH, but there the line breaks because UNH has not been

given the power by the Legislature. In the alternative, he can trace his line to his "chief," to UNH, and then horizontally to the town of Durham, where it then breaks because towns do not have the power to delegate to any but their own officers. In either case, there is not the clear, vertical line of power from the alleged agent to the people.

The exercise of private police power without legislative permission is unconstitutional, and violates the principles of the American republican form of government. Thus, the "officer" who arrested the defendant here did not have the authority of the state, and the defendant therefore was not made subject to the state's control. The arrest, unless it is a citizen's arrest, has no effect. Accordingly, his conviction must be reversed.

V. Mr. Diamond's Conviction Must Be Reversed

Because the UNH officers who arrested Mr. Diamond did not have the authority of the state to make an arrest in the name of the state, or the purported authority was unconstitutional, beyond the statute, or *ultra vires*, any purported arrest was beyond their power and has no effect. The remedy is that the charges against the defendants must be dismissed. *State v. Canelo*, 139 N.H. 376 (1995).

In *People v. Perry*, 327 N.E.2d 167 (Ill.App. 1975), the defendant was charged with battery during an arrest made by Chicago Housing Authority security guards. The court found that even though the security guards were public employees, the state did not show that they were either "peace officers" or "special policemen" who are authorized in Chicago to make arrests beyond the power of private citizens. Thus, the court reversed the defendant's conviction.

Courts have reversed convictions and suppressed evidence based on arrests and searches done by those not authorized to act in the name of the state. *Freeman v. City of DeWitt*, 787 S.W.2d 658 (Ark. 1990) (conviction reversed because arresting officer had not complied with minimum standards of police employment and thus could not be considered an officer); *Grable v. State*, 769 S.W.2d 9 (Ark. 1989) (conviction reversed because arresting officer had not completed psychological examination required for police employment and thus could not be considered an officer); *Dominguez v. State*, 924 S.W.2d 950 (Tex.App. 1996) (conviction reversed because defendant arrested by officer outside his jurisdiction); *Ramer v. State*, 530 So.2d 915 (Fla. 1988) (fruits of search suppressed because conducted by an officer outside his jurisdiction); *State v. Lamb*, 299 N.E.2d 317 (Ohio.Misc. 1973) (fruits of search incident to arrest suppressed because arrest done by private security guard who did not have power to make warrantless arrest); *Phipps v. State*, 841

P.2d 591 (Okla.Crim.App. 1993) (fruits of search suppressed because conducted by an officer outside his jurisdiction); *see Independence One Mortgage Corp. v. Gillespie*, 672 A.2d 1279, 1281 (N.J. Super. 1996) ("An act by a public official that is *ultra vires* is a void act.").

Because the UNH employees lacked the state's power of arrest, the defendants were not properly arrested or charged under the state's criminal code. The charges are therefore void and must be dismissed.

The State may nonetheless argue that once a person is in court, having been brought there unlawfully does not divest the court of jurisdiction. *State v. Fecteau*, 121 N.H. 1003 (1981). In *Fecteau*, the defendant claimed that because the warrant pursuant to which she was arrested was invalid due to its being signed by an improper magistrate, the charges against her must be dismissed. This court rejected her argument, holding that "an illegal arrest, *without more*, is neither a bar to subsequent prosecution nor a defense to a valid conviction." *Fecteau*, 121 N.H. at 1006 (emphasis added, quotations and citations omitted).

Likewise, police officers are often excused for technical violations of law based on their reasonably held knowledge or belief, and generally citizens are entitled to rely on the apparent authority of police officers. In *State v. Barnard*, 67 N.H. 222 (1892), though the officer believed he was authorized to make arrests, it was unclear whether at the time of the defendant's arrest the officer had been sworn into office. This Court excused the possible defect, and upheld the conviction. But *Barnard* does not contemplate anything more than a one-time error in the officer's understanding of his own authority. *See also State v. Boiselle*, 83 N.H. 339 (1928); *Jewell v. Gilbert*, 64 N.H. 13 (1885); *but c.f., City of Concord v. Tompkins*, 124 N.H. 463 (1984) (allowing defense of municipal estoppel in collateral attack on ordinance). *See also Foster v. Geller*, 449 S.E.2d 802,

806 (Va. 1994) ("doctrine of implied authority . . . should never be applied to create a power that does not exist").

Since *Fecteau*, this court has not said what "more" is a bar to prosecution, but the "more" is clearly present here. The defect in the UNH police department's existence was not a one-time occurrence, but an on-going state of affairs. It is not the mistake of a single officer, whose own authority hinges on geography or taking an oath, but the knowing failure of an entire police department to account for its power to act in the name of the state. It is not a ministerial defect, like failing to put sealing wax on a warrant, but an elemental defect in ensuring that officers, wearing badges, guns, and uniforms, have the awesome police power capable of being traced to the people, constitutionally organized. Moreover, it is a defect that has been known for years. The Durham Police Department and the UNH Department of Safety have, for years, doubted the validity of the contract and its lawful authority. *See e.g.,* TOWN/GOWN RECOMMENDATIONS at 4.

Dismissing this case has no retrospective application problems for other defendants. An illegal arrest is a matter that can be waived, and must be raised at or prior to trial, as is the issue of the authority of an agent. *Barclay v. Dublin Lake Club*, 89 N.H. 87 (1937). Thus there should be no concern that decades of criminal defendants arrested under the terms of the Durham-UNH contract are called into question by this case.

VI. Remedy: Legislation

Universities and colleges are in every state, and legislatures are cognizant that they should pay and be responsible for their own law enforcement. Thus many have specifically dealt with the matter. Massachusetts, for instance, provides that upon request from an educational institution, the highest ranking officer of the state police may appoint employees of the institution as "special state police officers" who "shall have the same power to make arrests as regular police officers for any criminal offense committed in or upon lands or structures owned, used or occupied by such . . . institution." M.G.L.A. 22C § 63. Delaware, for another example, provides that the University of Delaware "may appoint such number of police officers as are necessary to preserve the peace and good order of the University." DEL. CODE ANN. tit. 14 § 5104(b). The statue names the department the "University Police," gives it jurisdiction on university property concurrent with the town in which the campus is situated, and specifies that its officers have the authority to investigate and arrest in accordance with the laws of the state. *Id.* Morgantown, the home of the University of West Virginia, has a single police department serving both the town and the school, along with an citizen's advisory board to address the institutions' differing policing needs. Some states provide authority for private security guards to make arrests in some circumstances. *See State v. Swan*, 116 N.H. 132 (1976).

The University of New Hampshire's lack of authority for a police force can be readily repaired by legislative action. *See Sedgewick v. Dover*, 122 N.H. 193 (1982) (municipality's lack of authority to operate and maintain hospital corrected by legislation). UNH's lawyers have already begun drafting proposed legislation. Jill Hoffman, *Case Raises Question of Whether UNH Cops Have Authority,* FOSTERS DAILY DEMOCRAT, Feb. 22, 2000.

VII. Obstructing Government Administration

Steven Diamond was arrested for obstructing governmental administration after he allegedly blocked an officer's passage to the door.

New Hampshire's obstructing statute provides:

> "A person is guilty of a misdemeanor if he uses force, violence, intimidation or engages in any other unlawful act with a purpose to interfere with a public servant, . . . performing or purporting to perform an official function."

RSA 642:1. Mr. Diamond was not charged with having used "force," "violence," or "intimidation," but was charged with the "unlawful act" of "standing in front of Sgt. McMahon thereby preventing him from leaving the room and refusing to move out of the way when ordered to do so by Sgt. McMahon." *State v. Diamond*, CRIMINAL COMPLAINT, *N.O.A.* at 7.

A. Steven Diamond Did No "Unlawful Act"

Even if Mr. Diamond did the acts charged, he did not commit any "unlawful act" on which to base a criminal complaint.

New Hampshire's obstructing statute was enacted in 1971. *See* RSA 642:1 (legislative history note). Its genesis, along with most of New Hampshire's criminal law, was the general recodification of the criminal code in 1971. 1971 LAWS 518:1. In its report to the General Court, the legislative study committee which recommended the statute noted "this section is a modified version of the Model Penal Code, § 242.1." *Report of the Commission to Recommend Recodification of Criminal Law* (Frank R. Kenison, Chairman) at 93 (1969). *See State v. Bergen* 141 N.H. 61 (1996) (use of Model Penal Code and commentary to construe statute); *State v. Dufield*, 131 N.H. 35 (1988) (same).

The Model Penal Code helps to define what is an "unlawful act" for the purposes of the

obstructing statute.

> "Section 242.1 punishes purposeful obstruction of governmental function by 'any other unlawful act.' This phrase requires explication. Generally, it refers to any affirmative violation of legal duty, whether imposed by criminal statute, tort law, or administrative regulation. The rationale for including this form of conduct is to provide a broad residual offense for various unlawful acts, which may not themselves be subject to penal sanctions, when they are engaged in with the purpose and effect of interfering with the operation of government. . . . An important limitation on the reach of this phrase is that the act must be unlawful independently of the actor's purpose to obstruct government. Otherwise, any obstructive conduct would suffice for liability under this section, and policy decisions expressed elsewhere in the Model Code would effectively be nullified."

MODEL PENAL CODE, § 242.1, *commentary* n.5 at 206-07. *Commonwealth v. Shelly*, 703 A.2d 499 (Pa. Super. Ct. 1997) (defendant who gave false name to police did not commit "unlawful act" for purposes of obstructing statute where use of a false name in the circumstances was not a violation of another statute).

Thus, any "unlawful act" alleged under RSA 642:1 must be made unlawful by some source of law. Standing in front of an officer, and declining to move when told to do so, however rude, are not "affirmative violations of legal duty." Nothing in tort law, administrative regulations, or criminal law makes these actions unlawful.

The state may argue that officers' commands must be obeyed, and Mr. Diamond's disregard of the command to move constitutes the "unlawful act" on which to base the obstruction charge.

RSA 644:2, II(e), the disorderly conduct statute, makes it illegal for a person to "knowingly refuse[] to comply with a lawful order of a peace officer to move from any public place." Thus, the state may argue, if what officer McMahon said to Mr. Diamond was a "lawful order," the obstructing charge survives.

New Hampshire's law, however, explicitly defines what constitutes a non-ignorable order.

For the disorderly conduct statute, "lawful order" means:

> "(1) A command issued to any person for the purpose of preventing said person from committing any offense . . . when the officer has reasonable grounds to believe that said person is about to commit any such offense, or when said person is engaged in a course of conduct which makes his commission of such an offense imminent; or
>
> "(2) A command issued to any person to stop him from continuing to commit any offense . . . when the officer has reasonable grounds to believe that said person is presently engaged in conduct which constitutes any such offense."

RSA 644:2, IV(a)

Thus, a lawful command is one that is issued to the offender to stop him from committing a crime. If, for example, Mr. Diamond had been standing with his sign raised in the air, poised to hit the officer over the head, a police command to stop would be a lawful order, because the defendant would be on the brink of committing an assault. If Mr. Diamond were standing in the road with his sign preventing an ambulance from getting to the hospital, a police command to move would be a lawful order, because pedestrians are required to yield the road to emergency vehicles, RSA 265:8, VII.

But officer McMahon testified that the only law Mr. Diamond was likely to break and which formed the alleged basis for the command to move was obstructing governmental administration. *8/19/99 Trn.* at 40.

Thus, the State's argument is circular. To be guilty of obstructing, there must be an unlawful act. The unlawful act is disobeying a command. A non-ignorable command must be one intended to prevent a crime. The crime the officer intended to prevent was obstructing. But to be guilty of obstructing, there must be an unlawful act. The unlawful act is disobeying a command. A non-ignorable command must be one intended to prevent a crime. The crime the officer intended to

prevent was obstructing. But to be guilty of obstructing . . .

Because Mr. Diamond was not on the brink of committing any chargeable crime, the words officer McMahon said to Mr. Diamond were a mere request capable of disregard, and not a command which must be obeyed. Accordingly, there was no "unlawful act" for the purpose of the obstructing statute, and the conviction must be reversed.

The state may also argue that the criminal trespass statute makes it a crime to remain in a place in which the person had no privilege to be after an order to leave. RSA 635:2, II,(b)(2). But there was no trespass – Mr. Diamond was a student at the University of New Hampshire, and had a right to be there.

B. Passive Conduct Was Not Intended by the Legislature to be a Crime

The Model Penal Code from which the New Hampshire obstructing governmental administration statute was adapted provided:

> "A person commits a misdemeanor if he purposely obstructs, impairs or perverts the administration of law or other governmental function by force, violence, *physical interference or obstacle*, breach of official duty, or any other unlawful act."

MODEL PENAL CODE, § 242.1 (emphases added).

When New Hampshire adopted the model code, the legislature dropped "physical interference or obstacle." While the Model Penal Code apparently intended to criminalize some types of passive behavior, the New Hampshire legislature did not. When a legislature considers and rejects a proposal, courts must construe the resulting statute cognizant that the rejected proposal is not included. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.") (quotation and

citations removed).

Thus, passive behavior such as that with which Mr. Diamond's is charged is not a criminal act. A New Jersey case demonstrates what was intended, however. In *State v. Berlow*, 665 A.2d 404 (N.J. Super. 1995), the defendant slammed and locked a door in the faces of police officers who expressed an emergency need to enter the defendant's premises. The court correctly found that defendant guilty of obstructing.

Mr. Diamond merely stood with a picket sign. This was passive, and does not constitute the crime of obstructing. Accordingly, his conviction must be reversed.

C. Political Action Was Not Intended by the Legislature to be a Crime

In explaining the provisions of the model obstructing statute, the drafters of the Model Penal Code wrote:

> "[I]t is necessary to avoid drafting the . . . obstruction offense in terms so expansive that they might be construed to cover political agitation against government policy or other exercise of civil liberties."

MODEL PENAL CODE, § 242.1, *commentary* n.2 at 203.

Thus, the Code explicitly rejects criminalizing conduct that might otherwise be an offense when it occurs in a political context. It is apparent that Mr. Diamond was engaged in political agitation and the lawful exercise of his civil rights when officer McMahon encountered him. Because the legislature did not intend to punish minor obstruction during political action, the conviction must be reversed.

D. There Was No Governmental Administration to be Obstructed

The obstructing governmental administration statute, RSA 642:1, provides that a person is guilty of the crime if there is interference with a "public servant, as defined in RSA 640:2, II. Public servant is there defined as

> "any officer or employee of the state or any political subdivision thereof, including judges, legislators, consultants, jurors, and persons otherwise performing a governmental function. A person is considered a public servant upon his election, appointment or other designation as such, although he may not yet officially occupy that position."

RSA 640:2, II (a).

Mr. Diamond allegedly interfered with officer McMahon. But officer McMahon is an employee of the University of New Hampshire, which has no authority to have a police department. Because he was acting beyond his authority in making an arrest, he was not "performing a governmental function," and interfering with him is not a crime.

CONCLUSION

In Patrick Swayze's movie *Roadhouse* (1989), it is the job of Mr. Swayze's character, "Dalton," to clean up a roadhouse bar. He fires the staff, which raises the ire of the bartender's uncle who runs the entire town – owns the stores, controls the liquor distributor, collects the taxes, and runs his own private police force. To clean up his little piece of it, Dalton finds he has to clean up the whole town, and therein lies the drama of the story.

The movie illuminates how hard it can be to take control away from a private citizen who is armed with force and the appearance of authority.

In New Hampshire there are towns in the lakes region that are comprised largely of associations of lakefront owners. Suppose the lake association is unhappy with the level of security provided by the local police department. The town understandably doesn't want to pay for patrolling association property, and seasonal residents, being fairly wealthy, are willing to hire a private security service. Thus, the town delegates its arrest powers to the association, and swears in its officers (one of whom is designated "chief"), who carry guns, wear badges and police uniforms, maintain an office with its own address and phone, drive police cruisers with blue lights, prosecute offenders in the nearest district court, and operate in every respect as a police department. The chief of the private police force, pursuant to its arrangement with the town, liaisons with the town's police department, cooperates when it is in their mutual interest, and shares information when necessary.

After some time, however, the "officers" begin to abuse their power – they harass those considered undesirable, assault arrestees, plant evidence, detain citizens arbitrarily, make unlawful searches, coerce confessions, charge personal protection fees when they like, and generally violate the civil rights of those with whom they come in contact.

Although the chief of the properly constituted town police department hears rumors of the abuses, he has little ability to correct them because, like *Roadhouse*, the private police force operates outside the law, and has guns to defend its power. The rogue police force is not answerable to the town's selectmen, and is thus not capable of being disbanded by the people through legitimate civilian political means.

The UNH police department has (as far as is known) acted responsibly. But there is a danger posed by private police forces, untethered to constitutional or legislative grants of power, that this court must check.

For the foregoing reasons, this Court should reverse the conviction of the defendant.

Respectfully submitted,
Steven Diamond,
By his Attorney,

Law Office of Joshua L. Gordon

Dated: August 7, 2000

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Steven Diamond requests that Attorney Joshua L. Gordon be allowed that time for oral argument as the court deems appropriate.

I hereby certify that on August 7, 2000, copies of the foregoing will be forwarded to Ann Rice, Assistant Attorney General, and to Barbara Bradshaw, Esq.

Dated: August 7, 2000

Joshua L. Gordon, Esq.

APPENDIX

1. RSA 31:3 . . . . . *52*

2. RSA 105:1 . . . . . *52*

3. RSA 105:3 . . . . . *52*

4. RSA 105:3-a *53*

5. RSA 105:4 . . . . . *53*

6. RSA 642:1 . . . . . *53*

7. The Contract
   POLICY ON TOWN OF DURHAM - UNIVERSITY OF NEW HAMPSHIRE, LAW ENFORCEMENT PROCEDURES & RELATIONSHIPS (Aug. 1977) *54*

§ 31:3 In General. – Towns may purchase and hold real and personal estate for the public uses of the inhabitants, and may sell and convey the same; may recognize unions of employees and make and enter into collective bargaining contracts with such unions; and may make any contracts which may be necessary and convenient for the transaction of the public business of the town.

Source. RS 31:3. CS 32:3. GS 34:3. GL 37:3. PS 40:3. PL 42:3. RL 51:3. RSA 31:3. 1955, 255:1, eff. July 14, 1955.

§ 105:1 Appointment. – The selectmen of a town, when they deem it necessary, may appoint special police officers who shall continue in office during the pleasure of the selectmen, or until their successors are chosen or appointed. The selectmen may designate one of the police officers as chief of police or superintendent and as such officer the chief of police or superintendent shall exercise authority over and supervise or superintend other police officers, police matrons, watchmen or constables appointed under the provisions of this chapter, and said police officers, police matrons, watchmen or constables shall be accountable and responsible to said chief of police or superintendent. Nothing herein shall be construed to preclude or prevent a town from electing constables or police officers at an annual town meeting pursuant to the provisions of RSA 41:47.

Source. 1852, 1226:1. CS 120:1. GS 235:1. GL 253:1, 3. PS 249:1. 1897, 73:1. PL 363:1. RL 422:1. RSA 105:1. 1957, 206:1, eff. July 2, 1957.

§ 105:3 Powers; Compensation. – All police officers are, by virtue of their appointment, constables and conservators of the peace. They shall receive such compensation as may be voted by the town, and the same fees as constables.

Source. RS 114:3. CS 120:5. GS 235:6. GL 253:5. PS 249:3. PL 363:3. RL 422:3.

§ 105:3-a Name Tag Required. – I. Every police officer, while on active duty, shall wear on his uniform in a clearly visible place a name tag printed with his name. The tag shall be furnished to the officer by the state or political subdivision thereof which employs the officer at no cost to the officer.

II. This section shall not apply to a police officer on special duty when such duty requires that his identity as a police officer not be disclosed.

Source. 1975, 289:1, eff. Aug. 6, 1975.

§ 105:4 Employment. – The selectmen, or superintendent under their direction, may employ police officers in the detection and conviction of criminals and the prevention of crime in their town, and in the preservation of order on public or special occasions.

Source. 1852, 1226:2. CS 120:2. GS 235:2. GL 253:2. PS 249:4. PL 363:4. RL 422:4.

§ 642:1 Obstructing Government Administration. – A person is guilty of a misdemeanor if he uses force, violence, intimidation or engages in any other unlawful act with a purpose to interfere with a public servant, as defined in RSA 640:2, II, performing or purporting to perform an official function; provided, however, that flight by a person charged with an offense, refusal by anyone to submit to arrest or any such interference in connection with a labor dispute with the government shall be prosecuted under the statutes governing such matters and not under this section.

Source. 1971, 518:1, eff. Nov. 1, 1973.