

## *Approved Minutes*

*June 22, 2010*

### *Call to Order*

The 396<sup>th</sup> meeting of the New Hampshire Police Standards and Training Council was called to order at 9:02 a.m. by Chairman Michael L. Prozzo, Jr., Sheriff of Sullivan County, at the John O. Morton conference room at Police Standards and Training in Concord, New Hampshire.

**Members Present:** Chairman Michael Prozzo, Sheriff of Sullivan County; Chief James Sullivan, Hampton Police Department; Associate Justice Stephen H. Roberts, Dover District Court; Associate Justice Norman E. Champagne, Manchester District Court;; Colonel Robert Quinn, New Hampshire State Police; Chief Anthony Colarusso, Dover Police Department; Chief Gregory C. Dodge, Epping Police Department; William L. Wrenn, Jr., Commissioner of the New Hampshire Department of Corrections; Richard Foote, Sheriff of Cheshire County; and, Attorney General Michael Delaney

**Members Absent:** No representative from the Community College System of NH was present. Chief Peter Morency, Berlin Police Department did not attend.

**Staff Present:** Director Donald Vittum, Chief (ret.) Timothy Merrill, Lieutenant Mark Bodanza, Captain Benjamin Jean, Captain Thomas McCabe, Captain Robert Stafford, Captain Mark Varney, Investigative Paralegal Anne Paquin, and Council Secretary Kathryn Day

**Others Present:** Chief Nicholas Halias of the University of New Hampshire Police Department; Mr. Robert Webb and four staff members of the NH Department of Corrections;

### *Approval of Minutes*

Upon a motion by Chief Dodge, seconded by Chief Colarusso, the Council approved the minutes of May 4, 2010, in unanimous voice vote.

### *Director's Report*

Hearing no discussion on the Director's report, Chairman Prozzo asked Director Vittum if he had any comments to add to the report.

Director Vittum referenced the alternative location chosen for the July 2010 graduation of the 152<sup>nd</sup> Full-Time Police Officer Academy. Because the Tactical Center has no air conditioning, the Director has proposed that the graduation be held at an alternative location. An agreement has been reached with the Community College System that will cover the expense of leasing the Capital Center for the Arts for a total cost of \$2,800; the Community College System will pay \$1,000 of this expense. Director Vittum asked the Council to approve an expense of \$1,800 from Police Standards and Training operating funds to cover the balance of this cost. Director Vittum stated that the lack of air conditioning in the Tactical Center could present health issues for family members and others attending the graduation on July 30, 2010; the Director also confirmed that there were sufficient funds to cover the expense if the Council moves to approve it.

Commissioner Wrenn, with a second by Sheriff Foote, moved that the Council grant the Director the authority to expend \$1,800 for the cost of holding the graduation for the 152<sup>nd</sup> Academy at the Capitol Center for the Arts. Without discussion, the members voted 9-1 in favor of the motion, with Chief Dodge voting no. Motion carried.

In his monthly report, the Director listed the activities during the month that necessitated the use of his State owned/leased vehicle to travel to various locations throughout the state. He stated that he felt that his use of the agency's vehicle had been and continues to be entirely appropriate, and if the Council had any questions about an anonymous complaint that was received regarding this issue, he was happy to discuss it with them. Commissioner Wrenn stated that he finds the Director's use of the agency vehicle justified and appropriate; in particular, if the Director traveled to a meeting related to Police Standards and Training and before returning home for the evening on a work day he made an intervening stop to do physical training, Commissioner Wrenn had no objection. Chief Colarusso agreed and he pointed out that maintaining physical fitness was "a part of the job" and that the physical training had taken place during the course of official business, so this purpose was entirely appropriate.

The Director advised that his response to an inquiry from "Fleet Maintenance" was that he would bring it to the Council and ask them to determine if his use of the Police Standards and Training vehicle was appropriate or not and he would follow up with Fleet Maintenance by providing this decision in writing.

Commissioner Wrenn moved that, after a review of the matter involving the Director's use of a State vehicle, the Council finds no violation of the policy of the State of New Hampshire regarding the use of State vehicles. After a second by Chief Dodge, the voice vote of the Council was unanimous in support.

### ***Previous and/or Unfinished Business***

#### **Request for Consideration (Tabled May 4, 2010)**

At the Council meeting on May 4, 2010, Deputy Attorney General Fitch moved that this matter be tabled and that the Plymouth State University Police Department be invited to submit a supplemental request to the Director, in light of learning about the statute (RSA 188-F:26) and the limitations of waiver being tied to the ADA. Further, the Director shall forward this request to the Attorney General's Office for opinion of legal counsel to be considered at a future Council meeting. Following a second by Commissioner Wrenn, the Council voted 11-0 in support of the motion to table.

#### **NONPUBLIC SESSION: Plymouth State University Police Department**

On a motion by Chief Dodge, seconded by Sheriff Foote, to take the matter from the table and enter into a nonpublic session to discuss personnel issues, as provided in RSA 91-A:3, II (a), the roll call vote of the Council members was 10-0. The nonpublic session commenced at 9:42 a.m.

Chief Dodge moved to seal the minutes of the nonpublic session. Following a second by Commissioner Wrenn, the Council voiced unanimous support.

Chief Dodge moved further that the Council exit the nonpublic session. Chief Colarusso seconded the motion; the roll call vote of the Council was 10-0 in favor. The nonpublic session concluded at 9:48 a.m.

After considering the legal opinion provided by Assistant Attorney General Nancy Smith, the consensus of the Council was that in RSA 188-F:26 there is no statutory authority for the Council to grant Officer Avery's request for a waiver of initial fitness requirements. Further, providing accommodations that are required by the Americans with Disabilities Act is the obligation of the employer; Police Standards and Training Council is not Officer Avery's employer.

Commissioner Wrenn put forth the following motion:

MOVED: That the Council deny the request of Officer Randall Avery of the Plymouth State University Police Department to be exempt from having to pass part of the fitness test involving the 1.5 mile run or the Air-Dyne bicycle test.

Chief Sullivan seconded the motion. Hearing no discussion on the motion, Chairman Prozzo asked the staff if Officer Avery would still be eligible for further extensions of time to pass the fitness test. Lieutenant Bodanza responded that the Rules permit Officer Avery to request further extensions; the Council has granted Officer Avery two extensions so far.

Discussion concluded and the voice vote of the Council was unanimous in support of the motion.

### *New Business*

#### **Hearings**

##### **Continuance**

A hearing scheduled pursuant to Pol 402.02 and 403.01, concerning a police chief submitting false documents regarding training and noncompliance with requirements for annual refresher training, is continued until July 27, 2010. Pursuant to RSA 91-A:3, II (a), this hearing is scheduled to be heard in nonpublic session.

##### **Continuance**

A hearing scheduled for an officer to show cause why the Council should not suspend or revoke his certification pursuant to Pol 402.02 (a) (12) is continued until the next regular meeting of the Council on Tuesday, July 27, 2010. Pursuant to RSA 91-A:3, II (a), this hearing is scheduled to be heard in nonpublic session.

##### **Petition for Rescission: Robert N. Webb, Sr.**

A hearing was convened pursuant to a Petition for Rescission concerning the revocation of Mr. Webb's certification as a corrections officer. On July 28, 2009, the Council moved to revoke Mr. Webb's certification for violation of Pol 402.02 (a) (12) for a period of one year with the opportunity for certification to be reinstated upon completion of a batterer intervention course, but not sooner than 36 weeks.

On June 22, 2010, Mr. Webb appeared with four staff members from the New Hampshire Department of Corrections to address the Council in support of his Petition for Rescission. Mr. Webb stated that it was his desire for the matter to be heard in a nonpublic session. At this time, Commissioner Wrenn recused himself from the hearing and informed the Chairman that he would abstain from voting on this Petition.

##### **NONPUBLIC SESSION: CO Robert N. Webb Sr.**

Chief Dodge, with a second by Chief Sullivan, moved that the Council enter into a nonpublic session, pursuant to RSA 91-A:3, II (a). The Council affirmed the motion unanimously in a roll call vote, and the nonpublic session commenced at 10:16 a.m.

Chief Dodge moved that the minutes of the nonpublic session be sealed; Chief Colarusso seconded the motion. The Council voiced unanimous support.

Chief Dodge further moved that the Council exit the nonpublic session. After a second by Chief Sullivan, in a roll call the Council voted 10-0 in favor. The nonpublic session concluded at 10:30 a.m.

Upon return to public session, Justice Roberts complimented the members of the DOC staff who had spoken during the nonpublic session in support of Mr. Webb's Petition for Rescission. Further, Justice Roberts moved that the Council reinstate the corrections officer certification of Robert N. Webb, based on his demonstrating that he has satisfied the conditions the Council placed upon his reinstatement in July 2009. Chief Dodge seconded the motion.

Hearing no further discussion, Chairman Prozzo thanked CO Webb and his colleagues for their presentation and called for the vote of the Council; the vote was unanimous in favor.

### **RECESS**

The meeting was in recess from 10:32 a.m. until 10:40 a.m.

### **CONSENT CALENDAR**

The Council considered staff recommendations for items presented on the Consent Calendar. With a motion by Chief Dodge and a second by Chief Colarusso, the Council approved all requests presented on the Consent Calendar, 10-0.

### **APPROVED CONSENT CALENDAR**

#### **PT&E Requests**

##### **Part-Time Police Officer**

**Mark J. Smigielski, Chester Police Department** will be granted part-time certification with unlimited hours based upon prior training and experience upon successful completion of the entrance fitness test, medical exam, and the Law Package of the Part-Time Police Officer Academy.

##### **Requests for Extensions**

Note: Extensions granted until fitness testing for requested Academy, and, if testing is successful, through the end of the requested Academy.

The following officers were granted extensions.

##### **Full-Time Police Officer**

**153<sup>rd</sup> Academy 08/30/10 -12/03/10 (fitness test 08/16/10)**

**Officer William M. Goulet, Meredith Police Department**, through the end of the 153<sup>rd</sup> Full-Time Police Officer Academy.

**Officer Denis A. Messier II, Somersworth Police Department**, through the end of the 153<sup>rd</sup> Full-Time Police Officer Academy with the stipulation that Officer Messier continue working only in the direct presence of a certified officer.

**Officer Jacquelyn A. Parker, Winchester Police Department**, through the end of the 153<sup>rd</sup> Full-Time Police Officer Academy with the stipulation that Officer Parker continue working only in the direct presence of a certified officer.

**Officer Christopher T. Remillard, Dunbarton Police Department**, through the end of the 153<sup>rd</sup> Full-Time Police Officer Academy.

**Officer John C. Sutton, Bartlett Police Department**, through the end of the 153<sup>rd</sup> Full-Time Police Officer Academy with the stipulation that Officer Sutton continue working only in the direct presence of a certified officer.

**Part-Time Police Officer**

**258<sup>th</sup> Academy 08/14/10 – 11/19/10 (fitness test 07/31/10)**

**Officer Tyler D. Hewes, Walpole Police Department**, through the end of 258<sup>th</sup> Part-Time Police Officer Academy with the stipulation that Officer Hewes continue working only in the direct presence of a certified officer.

**Officer Steven F. Hyde, Middleton Police Department**, through the end of 258<sup>th</sup> Part-Time Police Officer Academy with the stipulation that Officer Hyde continue working only in the direct presence of a certified officer.

**Officer Noreen A. Murray, Madbury Police Department**, through the end of 258<sup>th</sup> Part-Time Police Officer Academy with the stipulation that Officer Murray continue working only in the direct presence of a certified officer.

**Officer Derek P. Poirier, New Castle Police Department**, through the end of 258<sup>th</sup> Part-Time Police Officer Academy with the stipulation that Officer Poirier continue working only in the direct presence of a certified officer.

**Requests for Fitness Testing Extension**

The Council approved requests for extension for the following officers to comply with requirements for ongoing fitness testing through January 1, 2011:

- Chief Stuart M. Chase, Wolfeboro Police Department**
- Corporal Laura Desautelle, New Hampshire Department of Corrections**
- Officer William Duffy, Weare Police Department**
- Officer Paul Gibbons, New Hampshire Marine Patrol**
- CO Paul Hyson, New Hampshire Department of Corrections**
- Officer Jessie Jennings, New Hampton Police Department**
- Officer Brian Landry, Windham Police Department**
- Officer Sean McCarty, Belmont & Gilmanton Police Departments**
- Officer Peter Moisakis, Hampton Police Department**
- Officer Scott Naismith, Salem Police Department**
- Officer Patrick Payer, Campton Police Department**
- CO Silvia Preda, New Hampshire Department of Corrections**
- Officer Amie Prescott-Colbeth, Northumberland Police Department**
- Officer Scott Talbot, Surry Police Department**

**(END APPROVED CONSENT CALENDAR)**

**Requests for Specialized Training Grant Funds**

No requests were brought forward at this meeting.

### **Status of Compliance with Ongoing Physical Fitness Testing**

Director Vittum advised the Council that two individuals whose current fitness testing extensions will expire on June 30, 2010, have not provided documentation that they have completed the requirement, nor have they requested an additional extension of time. The Director stated that the staff has been diligent in communicating the deadlines for officers who are due to comply and what action they must take to be granted an extension; these efforts include letters to the officers, letters to their chief law enforcement officers, and phone calls to their agencies as recently as the week prior to this meeting.

Commissioner Wrenn asked what the consequence would be for the two individuals whose extensions will expire on June 30. Director Vittum replied that under the Rules their certifications will be automatically suspended as of July 1, 2010. Commissioner Wrenn asked what the effective duration of the suspension would be; would their certification be automatically reinstated once they come into compliance? And, if noncompliance is a violation of the Rules, should the Council impose a sanction for that violation, as well?

Chief Colarusso agreed that additional sanctions should be considered in part because of the staff time invested in efforts to improve the rate of compliance with ongoing fitness testing is valuable time and should not be “wasted.” He stated that these officers should be compelled to appear before the Council to address their failure to respond and possibly face additional sanctions.

Chairman Prozzo suggested that, rather than automatically reinstating certification upon compliance, perhaps the Council should establish a policy that the suspension should continue until the officer appears before the Council in order for their certification to be reinstated.

Justice Champagne asked the staff to explain how these individuals are notified that their certifications have been suspended. Lieutenant Bodanza answered that written notice of the suspension from the Director includes a reference to the statute, RSA 188-F:27, III (g), that states in part, “...*If following the two-year period, the officer is still unable to meet the standards, the officer’s certification shall be suspended until such time as such officer is able to pass the physical performance test.*”

Attorney General Delaney asked, “So, you’re proposing thirty days after such time ...?”

Commissioner Wrenn insisted that the suspended officer should be compelled to appear at the next Council meeting, because noncompliance is a violation of the Rules and in fairness to those who comply with the Rules, a violation should not be without consequence.

Justice Champagne asked, “Is it a Rule? Is it a statute? Does it say when you pass it, we reinstate it? Or, is it just a Rule, or is it something you put in a letter ...?” Director Vittum confirmed that automatic reinstatement of certification is under the statute.

Commissioner Wrenn contended, “We’re saying that the penalty is that your suspension that you will get anyway, because you ...”: and, Justice Champagne interjected, “But, if the Rules said ... if the statute says that that happens, then, there’s nothing we can do about that.” Commissioner Wrenn stressed that, “Beyond that, there’s a violation and we should be doing ... to add on to that.” Justice Roberts concurred, “So the mere fact that they did not (comply) is a violation in and of itself, in addition to the statutory suspension.”

Colonel Quinn agreed with Commissioner Wrenn, and he asked, “Is this (rate of noncompliance) increasing?” Director Vittum confirmed that noncompliance has become an issue as more people have to comply with the requirements (i.e., certified after 2001).

Commissioner Wrenn suggested that it is a separate violation when an officer fails to complete the fitness requirement in the specified time and/or fail to provide the required documentation for a fitness testing extension within the specified time, because it is a violation of the Rules, as opposed to a noncompliance with the statute.

Justice Champagne opined that if there's a "self-healing" provision in the statute the Council may not be able to impose a longer suspension period. Lieutenant Bodanza suggested that there were two separate issues: First, the officer who has not passed the fitness test within the two-year period allowed in the statute is suspended and is reinstated upon passing the test. Second, there is no provision in the statute for the certification of individuals who have failed to comply but are within the two-year "window" following their initial compliance date but are subsequently able to pass the test.

Justice Champagne asked Lieutenant Bodanza to define the current status for the two officers currently not in compliance. Lieutenant Bodanza confirmed that the medical extensions for these officers will expire on June 30, 2010, and they are both eligible for further extension. Justice Champagne asked, "So why couldn't the letter you send out say instead ... "until you are reinstated by the Council," rather than saying, "...until you comply"?"

Commissioner Wrenn stated that those officers who exceed the two-year "window" and then comply afterward should also be subject to additional sanctions. They are also in violation of Council Rules and, under the statute, will face no consequences before they are reinstated.

Attorney General Delaney suggested that, "The argument that we would need to make is that the statute directly contemplated a public safety function to ensure that somebody could not perform the job in absence of compliance, but was not designed to restrict the Council's ability to address violations of the Rule and appropriate recourse for it."

**COUNCIL ACTION:** Commissioner Wrenn moved that the letter of suspension for noncompliance with ongoing physical fitness testing include a statement that certification will not be automatically reinstated, that they have to come back to the Council to get their certification reinstated. Justice Champagne seconded the motion and said that, "I would just add to the letter that it would be reinstated upon approval of the Council."

The amended motion, therefore, is:

**MOVED:** That the letter of suspension for noncompliance with ongoing physical fitness testing requirements will include a statement that certification will be reinstated upon approval of the Council.

Chairman Prozzo asked if the motion would be effective immediately, and Commissioner Wrenn agreed to make the motion effective June 22, 2010.

The Council voted unanimously in favor of the amended motion.

### ***Other New Business***

#### **Other Requests for Extension**

The Council considered the following additional requests for extension and acted on each request separately:

**Officer Randall K. Avery, Plymouth State University Police Department** requested an extension through September 30, 2010, pending the Council's decision on his request for a waiver of physical fitness testing requirements.

A motion by Commissioner Wrenn, seconded by Chief Dodge, to approve Officer Avery's request for an extension to complete the physical fitness testing requirements was discussed. During the discussion, Chief Timothy Merrill clarified that the Council granted Officer Avery an extension in September 2009 for him to pass the entrance fitness test for the 257<sup>th</sup> Part-Time Police Officer Academy on January 23, 2010, and if successful, through the end of the 257<sup>th</sup> Part-Time Academy (May 7, 2010).

When Officer Avery failed to successfully complete the fitness testing on January 23, 2010, his extension of time effectively expired and he should have stopped working as a police officer until such time as he became certified or unless the Council granted another extension of time. In fact, when Officer Avery appeared in uniform at the Council meeting held in Littleton on May 4, 2010, he was in violation of the Rules. Director Vittum assured that he acknowledged this issue with Colonel Doyle at the time.

Ultimately, Commissioner Wrenn withdrew his motion and the Council declined to take any action on Officer Avery's request for an extension, because the Council concluded that since they have already denied to grant his request for an exemption from the requirement to successfully complete the entrance fitness test and because Officer Avery's physician has stated that he cannot participate in the test at this time. (Please reference in these minutes *Previous/Unfinished Business*.) Additionally, the Council cannot consider a request for an exemption under the ADA because they are not the "employer" thus rendering the request for an extension moot.

**Officer Brandon D. Gagnon, Merrimack Police Department** requested an extension through the 258<sup>th</sup> Part-Time Police Officer Academy.

Captain Varney advised the Council that no documentation has been received that verifies that Officer Gagnon has completed the initial requirements of Pol 302.03, as documented in the Request for Extension submitted by Merrimack Police Department. The request reads, "Officer Gagnon has not performed any training or duties as of this date. It was our department's intention to have him attend the Part-Time Academy then train with an FTO. We will have his pre-service training completed by June 22, 2010." No further documentation has been received as of this day.

Chief Dodge, with a second by Chief Colarusso, moved that the Council deny Officer Gagnon's request for an extension, because he has failed to complete the initial requirements set forth in Pol 302.03. The voice vote of the Council was unanimous in support, 10-0.

**Deputy Kaleb B. Jacob, Hillsborough County Sheriff's Office** requested an extension through July 31, 2010, the date of the next entrance fitness test for the Part-Time Academy.

Captain Varney explained that, based on the note from his physician, "This time frame will allow the patient to improve his overall range of motion, static and dynamic stability, as well as loading capacity of the leg and lower back. Furthermore, I feel that Mr. Jacob has not reached MMI (maximum medical improvement) and, therefore, is not in a state where he would be able to carry out his regular work duties without having occasional difficulty. Based on the type of work that he would have to perform, it is not in his best interest to have him on full duty until he has reached MMI."

Director Vittum stated that the Sheriff of Hillsborough County was advised that the Council would be addressing this request on June 22 and that he was welcome to attend and comment on the issue.

Chief Dodge moved that the Council grant the request to grant Deputy Kaleb Jacob an extension through July 31, 2010. Following a second by Justice Roberts, Chief Dodge stipulated that the extension would be granted because the doctor's recommendation supports the request. The council voted 10-0 to grant the extension.



### **Request for Consideration**

#### **NONPUBLIC SESSION: University of New Hampshire Police Department**

Chief Nicholas J. Halias appeared before the Council on behalf of Officer Sean R. Dolliver concerning a request for a waiver of the fitness testing requirements mandated by RSA 188-F:27. Officer Dolliver was granted full-time certification previous to January 1, 2001. At the request of Chief Halias, Chairman Prozzo moved this item from its scheduled order on the agenda to permit Chief Halias to leave on time for a previously scheduled appointment.

Hearing no objection, Chairman Prozzo asked Chief Halias if he had a preference for the matter to be held in public or nonpublic session. Chief Halias expressed his wish for the matter to be held in a nonpublic session.

Chief Dodge, with a second by Chief Colarusso, moved for the Council to enter into a nonpublic session, pursuant to RSA 91-A:3, II (a). The roll call vote of the Council was 8-0 in favor. The nonpublic session commenced at 9:04 a.m.

NOTE: Commissioner Wrenn and Colonel Quinn were not present at the time the nonpublic session convened at 9:04 a.m. They both arrived at 9:10 a.m.

Prior to the conclusion of the nonpublic session, Chief Dodge moved that the minutes be sealed. After a second by Chief Colarusso, the voice vote of the Council was 8-0, with Commissioner Wrenn and Colonel Quinn requesting to be recused from the hearing and to abstain from voting.

Chief Dodge further moved that the Council exit the nonpublic session; Chief Colarusso seconded the motion. The Council voted 8-0 in agreement in a roll call vote, with Commissioner Wrenn and Colonel Quinn abstaining. The nonpublic session concluded at 9:22 a.m.

Upon return to public session, Attorney General Delaney moved that Council action on Chief Halias' request be tabled and that the Council refer the matter for a review by legal counsel, so that the Council has a complete understanding of their options under RSA 188-F:27.

Justice Roberts seconded the motion and, with Commissioner Wrenn and Colonel Quinn abstaining, the Council voted 8-0 in support.

### **Proposed Rule Changes**

#### **Pol 402.02 Revocation and Suspension**

The staff proposed the following change to Pol 402.02 based on suggestions made by the Council at their planning session in May 2010: At (a) (8) strike the word "chief" so that (a) (8) will read, "*A ~~chief~~ law enforcement officer has willfully violated council rules relative to himself or herself or the officers working under hi-/her control, or submitted false or forge documents, or misrepresented a document or testimony before the council.*"

Justice Roberts stated that he felt there were a couple of different ways to interpret the word "willfully" in this section: In one way, "willfully" applies only to the first clause, "... *relative to himself or herself or the officers under his/her control*"; the other way would be to have the word "willfully" be applicable to that which follows the first clause, namely, "...*or submitted false or forged documents, or misrepresented a document or testimony to the council.*" Justice Roberts suggested that the Rule as written lacks clarity and he suggested that it be revised further. The way the Rule is currently written, "willfully" applies only to the first clause, when it is interpreted by looking at "statutory construction" as it has been defined by the courts. He recommended that this language should be "cleaned up."

Commissioner Wrenn agreed that the language should be further refined before the proposed Rule change is approved by the Council. The consensus of the Council was that “willfully” should apply to the entirety of the statement in Pol 402.02 (a) (8), and that the language should apply to any officer. He suggested that the language should be “reversed” and changed to read, “A law enforcement officer who has willfully violated Council Rules relative to submitting false or forged documents or misrepresented documents or testimony before the council regarding himself/herself or the officers working under his/her control.”

Ultimately, the Council chose to take no action at this time and the staff was advised to make further recommendations/changes and resubmit their proposal for a change to Pol 402.02.

#### **Pol 404.07 Ongoing Physical Fitness Testing**

The staff proposed the following change to Pol 404.07 based on suggestions made by the Council at their planning session in May 2010: After (d), add the following: “(e) *In any case where, in the exercise of its exclusive discretion, the council has reasonable grounds to believe that any ongoing physical fitness test administered within the previous twelve months was not performed according to the protocol adopted by the council, the council, on written notice to the officer, may reject the test and require the officer to submit to an additional test administered by a qualified fitness testing instructor designated by the council, at the Arthur D. Kehas Law Enforcement Training Facility within 60 days of the written notice. If the council rejects a test result and the officer does not pass the additional test, any further extension shall only be available to the extent that the officer has not previously utilized the two-year extension allowed under RSA 188-F:27, III-e and III-g. The total extensions allowed shall not exceed two years. Exercising the right to require additional testing under this section shall not waive any other enforcement action that the council is entitled to pursue under any other section of these rules.*”

At the request of Chairman Prozzo, Chief Merrill elaborated, “We have had some cases in the past where we’ve had allegations that tests submitted were not performed or were not performed according to protocol, and in those cases we would request that Council would have them come here to perform the test. Some provisions in here were added on the recommendation of legal counsel, for instance, the timing “within 60 days” and “conducted within the past year” and, also, by Rule, to make clear that there’s just a two-year period (after the initial testing date) – to put into the Rule, that it’s not two years for a medical issue plus two years (after the initial testing date).”

Attorney General asked Chief Merrill to explain the intent of the phrase, “...*in the exercise of its exclusive discretion.*” Chief Merrill attributed that language to Nancy Smith’s recommendation and said he would defer to her for the reason to include this phrase.

Justice Roberts said that he interpreted the language to mean that “we have the discretion to reject a test ... There doesn’t appear to be any appellate process ... that we can reject the test and require the applicant to then submit to a test that we’ve designed, that we propose, and that there’s nothing that they can do to say, “No. Why are you rejecting this?” That’s how I read that. Now, if that’s what we want to do, that’s fine. I think that’s what that means.”

Chairman Prozzo suggested that the change would preclude someone from making the assumption that medical extensions could continue beyond the two years following the initial date for compliance. Colonel Quinn asked, “Is it the right thing to do, to have a certified tester give a test to someone that works with them when that (person) could be “borderline”? Is that the right thing to do, to make that person give a thumbs-up or thumbs-down? And, then, once they do, if we are going to trust these individuals ... are we going to give them that, are we going to trust them to do that, but, then, independently or randomly, say – for whatever reason – now we don’t trust them ... So, is this the right way or is there another approach altogether ... a better way of testing?”

Further discussion brought the majority of the Council to the conclusion that this Rule change was not necessary for the Council to exercise the option to require an additional test when an allegation has been raised or for an officer to request a retest if they felt a fitness instructor did not conduct the test according to protocol. Justice Roberts recalled that it was a majority opinion of those attending the May 2010 planning session that the protocol for fitness testing should be standardized and should be enforced, and this sentiment was the basis for the proposed Rule change.

Justice Champagne moved that the Council take no action on the request for a change in Pol 407.04 at this time. Chief Dodge seconded the motion. In the ensuing discussion, Attorney General asked the staff, "Do you have any observations if the existence of this Rule would increase or decrease your work time in investigations on these issues?" Commissioner Wrenn asked, "Do you have any cases that would have prompted us to want (a Rule) like this?" The Director described a specific incident where an individual probably should have been compelled to repeat the fitness test at PS&T, but the Director had no authority to require it under the Rules. He could not make an assumption about whether the Rule change would decrease or increase the time spent investigating matters like this.

At the end of discussion, the Council voted 8-2 in favor of the motion, with Justice Roberts and Chief Colarusso opposed. Motion carried.

***General (Discussion)***

**Presentation to Sergeant Valerie Brooks**

Sergeant Valerie Brooks has worked with Police Standards and Training Council for the past three years. Sergeant Brooks has informed the Director that she will be leaving her current position as a Law Enforcement Training Specialist to take a position as a Probation/Parole Officer with the New Hampshire Department of Corrections. At this time, Commissioner Wrenn presented to Sergeant Brooks a commendation in honor of her service to the Police Standards and Training Council, which he read into the record:

***NEW HAMPSHIRE  
POLICE STANDARDS & TRAINING COUNCIL  
is pleased to recognize***

***SGT. VALERIE C. BROOKS  
NH Department of Corrections***

***COMMENDATION***

***SGT. BROOKS is presented this commendation in honor of her service to the New Hampshire Police Standards & Training Council during the 3 year training assignment from July 6, 2007 through July 1, 2010. Her dedication, enthusiasm, and work ethic while assigned at PSTC was second to none and was an inspiration to the officers she trained, not only in the basic corrections and police training academies, but also to those attending in-service classes. Her service as an Instructor and Mentor have made a lasting impact on New Hampshire's Law Enforcement and its citizens. On behalf of the New Hampshire law enforcement community, we present this commendation to you with deepest gratitude.***

### **Feedback from Recruits in the Current Police Academy**

At the May planning session, Council members reviewed the exit evaluations submitted by recruits at the conclusion of the 151<sup>st</sup> Full-Time Police Academy. At that time, the Director told the Council members that they would receive similar evaluations during future Academies to keep them informed about the satisfaction or dissatisfaction with the delivery of food service, in particular.

At the June meeting the Council members received a memo from Captain Robert Stafford, Commandant of the 152<sup>nd</sup> Academy, summarizing the food services evaluations completed by the recruits in the first eight weeks of the program. Beginning with Week 4 of the 152<sup>nd</sup> Academy, at the end of each week the recruits are being asked to respond to a brief survey about the overall quality of the food service, including food quality, dining facility, kitchen/service staff, and menu options. Captain Stafford stated in his memo that being able to address the food service issues on a weekly basis has enabled us to work with Chartwell's to provide healthy and satisfactory meals for the recruits.

### **Budget Update**

Chairman Prozzo advised the Council that in the new budget, the Penalty Assessment fund was reduced by \$800,000, in spite of efforts put forth by supporters of this agency, including Chief Cahill, Sheriff Foote, himself and others who met with Senator D'Allesandro and Governor Lynch to mitigate the effect of the budget bill on this agency. The current fiscal situation is dire and Chairman Prozzo estimates that by 2012 the Penalty Assessment fund will not be sufficient to fund this agency. The need for alternative revenue streams has become critical and all Council members should be aware that the future funding of this agency is a very serious concern.

Director Vittum stated that he remains very concerned and has communicated this to the Governor who has offered his assurance that he will continue to support this agency and do what he can to ensure we receive the necessary funding to continue operations.

### ***Other Business***

#### **NONPUBLIC SESSION: Personnel Matter (Chief Randy Sobel)**

On June 21, Chairman Prozzo convened an informal conference at the request of Chief Sobel, as provided in Pol 205.04. A related hearing scheduled pursuant to Pol 402.02 and 403.01, concerning a police chief submitting false documents regarding training and noncompliance with requirements for annual refresher training, is continued until July 27, 2010.

At this time, Chairman Prozzo informed the Council that he wished to advise them of issues discussed in the informal conference on June 21, 2010, and asked for a motion to enter into a nonpublic session.

Chief Dodge moved that the Council enter into a nonpublic session to discuss personnel issues, as provided in RSA 91-A:3, II (a); after a second by Commissioner Wrenn, the roll call vote of the Council was unanimous, 10-0. The nonpublic session commenced at 9:50 a.m.

Chief Dodge moved that the minutes of the nonpublic session be sealed. After a second by Chief Colarusso, the voice vote of the Council was unanimous, 10-0.

Chief Dodge further moved, with a second by Chief Sullivan, that the Council exit the nonpublic session. Following a unanimous roll call vote, the nonpublic session concluded at 10:14 a.m.

Upon return to public session, Chairman Prozzo informed that he would not be available to attend the Council meeting on July 27, 2010, and would not be present for the hearing continued to July 27, 2010. Chairman Prozzo requested that in his absence Vice Chairman Wrenn conduct the hearing. Council members were asked to confirm their attendance to ensure a quorum at the

hearing if members decide that the hearing should go forward. Sheriff Foote and Chief Sullivan advised that they would not be in attendance on July 27, 2010.

Chief Dodge moved that the hearing for Chief Sobel, continued to July 27, 2010, go forward as scheduled. Commissioner Wrenn seconded the motion and the Council supported it unanimously in a voice vote, 10-0.

### **Law Enforcement Training in New Hampshire DOT Work Zones**

The Council reviewed an analysis completed by Captain Mark Varney on the “Use of Law Enforcement as Flaggers and Traffic Control” on construction and utility details. Captain Varney described in detail the two types of required training:

1. **Law Enforcement Work Zone Training.** This training is required for any officer that is working in a work zone that has Federal funds attached to it. This training has been developed by NH DOT, and Captain Varney and Lieutenant Bodanza have attended this three-hour class. The class utilizes a manual published by the feds and another manual published by NH DOT, and both of these are quite comprehensive and contain several hundred pages of information. The three-hour training is mandated by the Federal Government since the 1990s. New Hampshire DOT has asked how PS&T can assist with the delivery of this training to New Hampshire law enforcement officers. Initially they proposed that PS&T would train everybody at our facility in Concord and would provide NH DOT with access to our data base to verify that training was completed. Captain Varney advised that providing this access was not practical for PS&T. Police Standards and Training staff proposed to DOT a “train-the-trainer” concept whereby PS&T would train an officer from each local agency and these officers would conduct the training at their departments. This proposal will be reviewed by the Traffic Committee in the last week of June 2010, and we are waiting to hear if they approve.
2. **Law Enforcement as Flagger Training.** NH DOT does not have a training program in place and have referred us to the American Traffic Safety Standards Association (ATSSA), a private company that provides this training for federal employees and state employees. PS&T inquired about what we would need to do in order to offer this training through our agency. This would require us to meet all of the rules of the Federal Manual on Uniform Traffic Control Devices, as well as the NH DOT’s standard for road and bridge construction; and, the Traffic Committee would have to approve the program that Police Standards and Training proposes. Currently, there are only two programs that meet the requirement: the program offered by ATSSA and a class conducted by the Local Government Center. LGC is able to conduct this class because they have an ATSSA certified instructor on staff. Three courses are required to become certified by ATSSA as an instructor.

Currently PS&T does not have a mechanism to deliver flagger training for law enforcement and civilians. Civilian personnel include utility workers and others who are physically on scene, stopping and releasing traffic or diverting traffic to an oncoming traffic lane.

3. **Required Training for Use of “Slow/Stop” Paddles, Reflective Gear**  
The NH Department of Labor rules do not recommend any specific training on how to use the paddles, but they do require that training be completed.

The Council on this day was asked to consider if Police Standards and Training has the capacity to deliver any part of the training developed by NH DOT for Law Enforcement Work Zone Training and recommend whether or not to go forward and implement the training.

Also, the Council was asked to recommend what action to take regarding the “flagger training” and to consider that there are only two programs that are currently approved by NH DOT and the Federal Government. Captain Varney stated that the NH DOT has not yet implemented the training program presented for the Council’s consideration.

Chairman Prozzo asked if the NH DOT would go forward with implementing the training with or without the support of the Police Standards and Training Council. Captain Varney replied that DOT could charge a fee for the training in order to be able to deliver the training without PS&T support. Chairman Prozzo asked if the “paddle training” is available, other than through PS&T and Captain Varney said that it is.

Considering that there are alternatives available to PS&T delivering this training, and considering the dwindling resources which PS&T must continue to preserve for current operations, Chairman Prozzo suggested that the required training is available through other means and should be.

Captain Varney said that the NH DOT Traffic Control Committee must approve any “train-the-trainer” program delivered by an ATSSA certified instructor at PS&T. The “flagger training” would be a component of the three required classes, so a certified instructor could provide “flagger training” as required by the NH Department of Labor.

Chief Colarusso said that to complete the training currently available, each local agency would probably need to send a minimum of two officers to become certified instructors and would bear the full expense of that training if PS&T decides not to participate.

Commissioner Wrenn asked if the flagger training was an issue at the Federal level; Colonel Quinn said he had not been aware of it becoming an issue until it was raised at today’s meeting. Justice Roberts asked what the sanctions were on police officers found to be working without completing the approved training. Chief Sullivan said that the local agency can be fined by the NH Department of Labor for labor violations and the NH DOT can also sanction individuals.

Colonel Quinn stated that his agency has formed a committee to study the safety issues around flagging and traffic control. This committee has met once and is investigating current practice in New Hampshire and other New England states and evaluating the safety of the techniques used to control traffic under a range of circumstances: at the tolls, from aircraft, in high-speed lanes, etc. Colonel Quinn told the Council that he met with DOT staff on June 21 and extended an invitation for them to partner with the Department of Safety to further the work of this committee. The issue of flagger training was never raised during this discussion, though.

Captain Varney clarified that there are two different aspects to the required training. NH DOT has stated that they will not employ a law enforcement officer as a flagger; they will employ them only for the purpose of “officer presence” and only if they have completed the Law Enforcement Work Zone Training. The flagger training is required “on any way” as stated in the Federal Manual on Uniform Traffic Control Devices. In response to Attorney General Delaney’s question, Captain Varney confirmed that the Law Enforcement Work Zone Training is required to receive federal highway funds, and the flagger training is required for any individual performing a flagging function, stopping and releasing traffic, etc., by NH DOT and the US DOL.

Justice Champagne moved that, unless the Council can find a new source of revenue, due to a lack of funds Police Standards and Training should not deliver the Law Enforcement Work Zone Training. Justice Roberts seconded the motion.

Commissioner Wrenn recommended that the Council spend more time considering the DOT’s proposal before they reach a decision that will impact every agency in the state. Sheriff Prozzo restated that the training would still be available through NH DOT and through LGC and that the local communities realize a financial benefit from providing traffic details for entertainment events and these revenues could pay for the required training. Commissioner Wrenn suggested

that the Council should continue to consider the “train-the-trainer” approach for implementing the DOT Law Enforcement Work Zone Training through PS&T.

Colonel Quinn suggested that there is not a definitive timeframe for meeting the requirements for this training and it would not be practical to require officers to complete the training at the peak season for traffic details. Further, the Council needs to be able to more clearly define “any detail” as it is expressed by the federal agency and the NH DOT, as this will have a huge impact on the ability to conduct traffic details in the state.

Sheriff Foote asked if the classes could be completed on line. Captain Varney said that the initial ATSSA training to become a certified instructor is not delivered on line, but it is possible to complete refresher training on line every four years to maintain certification.

After more discussion, the Chairman called the question and asked for a vote on the pending motion. Motion failed 5-5, with Justice Roberts, Justice Champagne, Sheriff Foote, Sheriff Prozzo, and Chief Dodge voting YES; and, Chief Colarusso, Chief Sullivan, Colonel Quinn, Commissioner Wrenn, and Attorney General Delaney voting NO.

Commissioner Wrenn put forth a new motion:

MOVED: That the Council continue to receive information from staff on the legal requirements for this training (clarify “any detail”) and the funding and the resources required to deliver the training, specifically a “train-the-trainer” approach, and that the Council continue to discuss these issues at a future meeting.

Chief Sullivan seconded the motion. After a brief discussion, the voice vote of the Council was unanimous in support of further study, 10-0.

#### **Election of Vice Chairman**

Chief Dodge moved that the Council, pursuant to RSA 188-F:24, III, elect Commissioner William Wrenn to another one-year term as Vice Chairman of the Police Standards and Training Council. Following a second by Chief Sullivan, all of the members voted yes.

#### **Training Calendar Proposed for FY 11**

Chief Sullivan, with a second by Commissioner Wrenn, moved that the Council approve the calendar of training for the next fiscal year as presented by staff. The voice vote of the Council was in favor, without exception.

#### **NONPUBLIC SESSION: Reappointment of the Director**

Director Vittum’s current term will expire in February 2011. At this time, Commissioner Wrenn moved that the Council enter into a nonpublic session to consider a personnel matter, as provided in RSA 91-A:3, II (a). Chief Dodge seconded the motion, and the roll call vote of the Council was 10-0. The nonpublic session commenced at 12:17 p.m.

A motion to exit the nonpublic session was moved by Commissioner Wrenn and seconded by Chief Dodge. The roll call vote of the Council was unanimous in favor, and the nonpublic session concluded at 12:25 p.m.

Justice Champagne moved, and Justice Roberts seconded the motion, that the Council appoint Donald Vittum to serve another four-year term as Director, beginning in February 2011. The Council approved without exception in a voice vote, 10-0.

***Next Meeting Date/Adjournment***

The next meeting of the New Hampshire Police Standards and Training Council will be held on Tuesday July 27, 2010, at nine o'clock in the morning, at 17 Institute Drive in Concord, New Hampshire.

Upon a motion by Chief Dodge, seconded by Commissioner Wrenn, the Council voted unanimously to adjourn the meeting at 12:26 p.m.

Respectfully submitted,

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Chairman Michael L. Prozzo, Jr.