Affirms PELRB Decision No. 2012-209

MANDATE
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THE SUPREME COURT OF NEW HAMPSHIRE

Public Employee Labor Relations Board
No. 2012-798

APPEAL OF TOWN OF NORTH HAMPTON
(New Hampshire Public Employee Labor Relations Board)

Argued: November 13, 2013
Opinion Issued: May 7, 2014

McKittrick Law Offices, of North Hampton (J. Joseph McKittrick on the brief and orally), for the petitioner.

Molan, Milner & Krupski, PLLC, of Concord (John S. Krupski on the brief and orally), for the respondent.

HICKS, J. The petitioner, the Town of North Hampton (Town), appeals a decision of the New Hampshire Public Employee Labor Relations Board (PELRB), finding that the Town engaged in unfair labor practices in dealing with the respondent, the North Hampton Professional Fire Fighters, Local 3211, IAFF (Union). We affirm.

The following facts were found by the PELRB or are supported in the record. The Town is a public employer. See RSA 273-A:1, X (2010). The Union is certified by the PELRB as the exclusive representative, for purposes of collective bargaining and settling grievances, of a bargaining unit comprised of "[f]ull time firefighters, EMT personnel and lieutenants."

The term "[e]mergency medical technician (EMT)" is defined by administrative regulation to mean "an emergency medical care provider, specifically trained at the EMT-basic, EMT-intermediate or EMT-paramedic level of certification to administer life support care to injured and sick persons in prehospital settings, overseen and directed by physicians." N.H. Admin. Rules, Saf-C 5901.50. EMTs are licensed by the department of safety. See RSA 153-A:11 (Supp. 2013); N.H. Admin. Rules, Saf-C ch. 5903.

The parties' most recent collective bargaining agreement was for the period beginning July 1, 2010, and ending June 30, 2011 (the CBA). After the expiration of the CBA, the parties' relationship was governed by the status quo doctrine. See Appeal of Alton School Dist., 140 N.H. 303, 307 (1995).

The CBA contained wage scales for firefighters and lieutenants, respectively, each consisting of five steps. It provided that "[m]ovement through [the] steps is dependent on achieving certain professional certifications" as set forth therein. The requirements for each step included: a firefighter or company officer level; an EMT level; and, after step 1, a specified number of years. For example, the requirements for a firefighter to reach step five were listed as "Firefighter II and Emergency Medical Technician Intermediate + 15 years."

During bargaining over the CBA, the Union submitted a wage proposal that provided for, among other things, a "[s]tipend for paramedic level EMT [that] will be 5% over actual step (base pay) whether hired as or a current employee has received the certification." The Town rejected the proposal and the parties put the paramedic program issue on hold. The Town remained interested in a paramedic program, however, and the Union informed the Town in June 2011 that it was willing to resume negotiations over the program. The Town responded that a vacancy on the selectboard was delaying the process. Nevertheless, in August 2011, the Town adopted a paramedic program that was not produced through bargaining with the Union. The program established a wage schedule and conditions of employment similar to those previously proposed by the Union and rejected by the Town.

By letter dated September 6, 2011, counsel for the Town contacted the Union's counsel regarding the new paramedic program. The letter stated that the Town had "voted to establish a paramedic program including that position's initial wages (stipend) and working conditions." It further stated that "it is most logical that this new category be included in the current Firefighter's bargaining Unit. As such the Board recognizes the right of the Union to request to bargain over the wages, hours and working conditions of that position." The letter invited the Union to contact the Town if it wished to engage in such bargaining.

At that time, pending before the PELRB was an unfair labor practice charge stemming from the Town's alleged unilateral offer of different health insurance options to Union members. On September 13, 2011, the Union moved to amend its unfair labor practice complaint to include a charge based upon the Town's unilateral adoption of "a plan to increase the pay of firefighters for obtaining additional training" – in other words, the paramedic program. The PELRB granted the motion. Following a hearing, the PELRB found, in pertinent part, that "the Town committed an unfair labor practice on account of its unilateral adoption and establishment of a wage schedule and other conditions of employment for a firefighter EMT with a paramedic licensure level."

On appeal, the Town argues that the PELRB erred in: (1) finding that the Town was required to bargain over its paramedic program when the adoption of that program was within the Town's "managerial prerogative"; (2) finding that the Town had previously created a paramedic program; (3) finding that the Town was required to bargain over the wages, hours, and working conditions of a position before the parties agreed to, and the PELRB ordered, the inclusion of that position in a bargaining unit; and (4) finding, on insufficient evidence, that the Town violated its duty to bargain and/or was motivated by anti-union animus.

Our standard of review is governed by RSA 541:13 (2007). See Appeal of Londonderry School Dist., 142 N.H. 677, 680 (1998); RSA 273-A:14 (2010).

> When reviewing a decision of the PELRB, we defer to its findings of fact, and, absent an erroneous ruling of law, we will not set aside its decision unless the appealing party demonstrates by a clear preponderance of the evidence that the order is unjust or unreasonable. Though the PELRB's findings of fact are presumptively lawful and reasonable, we require that the record support its determinations.

Appeal of Town of Hampton, 154 N.H. 132, 134 (2006) (quotation and citations omitted); see RSA 541:13.

The Town's first challenge to the PELRB's decision is based upon the "'managerial policy exception,' which is contained within the statutory definition of 'terms and conditions of employment.'" Appeal of City of Nashua Bd. of Educ., 141 N.H. 768, 773 (1997). That definition is as follows:

> "Terms and conditions of employment" means wages, hours and other conditions of employment other than managerial policy within the exclusive prerogative of the public employer, or confided exclusively to the public employer by statute or regulations

> adopted pursuant to statute. The phrase "managerial policy within the exclusive prerogative of the public employer" shall be construed to include but shall not be limited to the functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and number of its personnel, so as to continue public control of governmental functions.

RSA 273-A:1, XI (2010). The Town contends that "[t]he creation . . . and the parameters of programs" like the paramedic program are the exclusive province of management. Reasoning that the "[c]reation of a new program includes its cost which entails an initial determination of hours and wages and work conditions," the Town concludes that it was not "required to bargain with the Union prior to establishing the initial wages, hours, and other conditions of employment." We disagree.

"[A] public employer's 'greater' power to create or eliminate a position or program does not necessarily include the 'lesser' power to unilaterally determine wages and hours for the position or program." Appeal of City of Nashua Bd. of Educ., 141 N.H. at 775. To determine whether the Town had a managerial prerogative to initially set the wages, hours, and other conditions of employment for firefighter/paramedics, we apply "a three-step analysis for measuring a particular proposal or action against the managerial policy exception." Id. at 773.

> First, to be negotiable, the subject matter of the proposed contract provision must not be reserved to the exclusive managerial authority of the public employer by the constitution, or by statute or statutorily adopted regulation. Second, the proposal must primarily affect the terms and conditions of employment, rather than matters of broad managerial policy. Third, if the proposal were incorporated into a negotiated agreement, neither the resulting contract provision nor the applicable grievance process may interfere with public control of governmental functions contrary to the provisions of RSA 273-A:1, XI.
>
> A proposal that fails to satisfy the first step is a prohibited subject of bargaining. A proposal that satisfies step one, but that fails either step two or step three, is a permissible topic of negotiations. A proposal that satisfies all three steps is a mandatory subject of collective bargaining.

Id. at 773-74 (quotations and citations omitted).

With respect to the first step, the Town has failed to identify any "independent statute, or any constitutional provision or valid regulation," id. at 774, that reserves "establishing the initial wages, hours, and other conditions of employment" of firefighter/paramedics to the Town's exclusive managerial authority. As in Appeal of City of Nashua Board of Education, we reject the Town's "bootstrapping attempt" to find such a reservation of authority in RSA 273-A:1, XI itself. Id.

We also conclude, under the second step of the managerial policy exception analysis, that "the proposal . . . primarily affect[s] the terms and conditions of employment, rather than matters of broad managerial policy." Id. at 774. Here, as in many cases, the particular paramedic program "touch[es] on significant interests of both the public employer and the employees." Id. We conclude, however, as did the PELRB, that the matters of wages, hours, and conditions of employment for firefighter/paramedics may be considered separately from other aspects of the program. Cf. City of Elizabeth v. Elizabeth Fire Off., 487 A.2d 337, 340 (N.J. Super. Ct. App. Div. 1985) (finding that issues of establishing a sick leave verification policy – a managerial prerogative – and determining "who pays for the required doctors' reports," were, in context of determining public employer's obligation to negotiate, "for all practical purposes entirely severable"). Thus, the PELRB found that while "it is within the Town's managerial prerogative to determine that it wants to promote the provision of EMT services at the paramedic level[,] . . . the Town is obligated to bargain with the Union [over] the compensation and other conditions of employment for an EMT who holds a paramedic license." This finding comports with our case law:

> [O]ur cases have consistently recognized proposals and actions that primarily affect wages and hours as mandatory subjects of bargaining. For example, even though a school board's authority to decide whether to offer extracurricular programs or to determine the number of such programs implicates broad managerial policy, the wages and hours for staff involved in any extracurricular programs constitute mandatory subjects of bargaining.

Appeal of City of Nashua Bd. of Educ., 141 N.H. at 775 (citations omitted); see Appeal of Berlin Educ. Ass'n, 125 N.H. 779, 783-84 (1984).

Finally, having determined that we may analyze the wages and conditions of employment component of the paramedic program separately, we conclude that if this proposal were incorporated into a negotiated agreement, the resulting contract provision would not interfere with public control of governmental functions. See Appeal of City of Nashua Bd. of Educ., 141 N.H. at 774; cf. NJ Transit Auth. v. Transit PBA, 714 A.2d 329, 333 (N.J. Super. Ct. App. Div. 1998) (noting that while "a public employer has a prerogative to

determine training issues[,] . . . it is well-established that employees may negotiate the costs connected with training without significantly impinging on the managerial prerogative"). Because the wages, hours, and employment conditions component of the paramedic program satisfies all three steps of the managerial policy exception analysis, it is a mandatory subject of collective bargaining. See Appeal of City of Nashua Bd. of Educ., 141 N.H. at 774.

The Town next argues that the PELRB erred in finding that the Town had previously created a paramedic program. Specifically, the Town asserts that the PELRB found that, because "the Town had previously employed firefighters who had paramedic certification[,] . . . it[:] [(1)] had already created a Paramedic Program[;] and [(2)] . . . was now obligated to negotiate over a program already in existence." The Union counters that the PELRB made no such finding.

The PELRB found that "[f]irefighters with an EMT-paramedic level of medical licensure/certification have previously worked in the department but without any distinction in pay" and noted that "both the Town and the Union are interested in resuming a paramedic level of service in town on a more permanent basis." The Town asserts that it "has never denied that it had employed firefighters who possessed paramedic certification," but contends that it "never provided paramedic service to its citizens." It acknowledges that there was testimony before the PELRB that an EMT is required by the State to provide a level of service consistent with the level at which he or she is licensed. It then argues that even if this requirement exists, it establishes "only that the individual who possesses paramedic certification must provide 'paramedic care'[,] not that the Town had assumed that responsibility."

While the PELRB's finding with regard to "resuming a paramedic level of service" might be ambiguous, it is immaterial because the PELRB did not find that the Town was obligated to bargain over a paramedic program already in existence. Rather, the PELRB found that the position of "EMT-paramedic is not a new position but is an EMT with the third, or highest, level of training and certification" and that "[a]n EMT in the Town Fire Department is already a bargaining unit position that is represented by the Union." It is this determination that we must review for error.

"The composition of a bargaining unit is limited by law to those positions identified in the recognition clause at the time the original unit is certified by the PELRB and by any subsequent modifications approved by the PELRB." Appeal of Londonderry School Dist., 142 N.H. at 680. "Our focus, therefore, is upon the language of the recognition clause, which we review de novo." Id.

The applicable Certification of Representative and Order to Negotiate issued by the PELRB certifies that the Union was "designated and selected by a

majority of the employees of the [Town], in the unit described below, as their representative for the purpose of" collective bargaining and settling grievances:

UNIT: Full time firefighters, EMT personnel and lieutenants.
EXCLUDED: Full time Deputy Chief.

The PELRB concluded that the term "EMT personnel" includes EMT-paramedics, reasoning that the applicable administrative rules designate "three levels of EMT certification[,] . . . EMT-basic, EMT-Intermediate, and EMT-paramedic," and, therefore, the "EMT-paramedic is . . . an EMT with the third, or highest, level of training and certification."

The Town challenges that reasoning, arguing that "[a] paramedic is not simply a more advanced EMT designation; it is a designation within and part of a discrete and specific program." The Town concludes that "[p]aramedic certification is not an extension or another level of EMT certification: it is a discrete certification." The Town cites no legal support for these assertions, and we have found none. Rather, as noted previously, New Hampshire Administrative Rule, Saf-C 5901.50 defines "[e]mergency medical technician (EMT)" to mean, in pertinent part, "an emergency medical care provider, specifically trained at the EMT-basic, EMT-intermediate or EMT-paramedic level of certification." N.H. Admin. Rules, Saf-C 5901.50 (emphasis added). Interpreting the language of the bargaining unit certification de novo, Appeal of Londonderry School Dist., 142 N.H. at 680, we conclude that the term "EMT personnel" includes EMT-paramedics.

Our conclusion that EMT-paramedics are already in the bargaining unit disposes of the Town's next issue; namely, that it "has no obligation to bargain over the creation or the initial wages, hours, and working conditions of new positions such as those in the Paramedic Program" until the Town agrees to, and the PELRB orders, inclusion of the new positions in a bargaining unit. Moreover, we note that the record casts significant doubt upon the Town's appellate attempts to characterize the paramedic-certified firefighter as a new position. In his letter to Union counsel following adoption of the paramedic program, Town counsel stated that the Town selectboard "made the determination not to create a new position distinct from that of FireFighter, but to create [a] new category of Firefighter identified as a Firefighter/Paramedic." This is consistent with the CBA pay scales, in which "[m]ovement through [the] steps is dependent on achieving certain professional certifications," including EMT certifications. Thus, in addition to falling within the EMT classification in the bargaining unit, participants in the paramedic program apparently would fall within the firefighter classification as well.

Finally, the Town argues that "[t]here was NO evidence submitted to the PELRB that the creation of the Paramedic Program was based upon direct

dealing or anti-union animus." The PELRB, however, made no finding of direct dealing with respect to the paramedic program, but, rather, found such with respect to the original insurance-related unfair labor practice charge that was pending when the Union added the charge related to the paramedic program. The Town did not appeal the PELRB's ruling with respect to the insurance-related charge.

In any event, a finding of anti-union animus was not necessary to the PELRB's finding that the Town committed an unfair labor practice by unilaterally setting the wage and other conditions of employment for a firefighter/paramedic. "A unilateral change in a condition of employment is equivalent to a refusal to negotiate that term and destroys the level playing field necessary for productive and fair labor negotiations." Appeal of Alton School Dist., 140 N.H. at 308 (emphasis added).

The Town has failed to demonstrate that the PELRB made an erroneous ruling of law or to demonstrate, by a clear preponderance of the evidence, that its order is unjust or unreasonable. Appeal of Town of Hampton, 154 N.H. at 134; see RSA 541:13. Accordingly, we will not set aside the PELRB's decision. Given our rulings above, we need not address the parties' remaining contentions.

Affirmed.

DALIANIS, C.J., and CONBOY, LYNN and BASSETT, JJ., concurred.

NH Supreme Court affirmed this decision on 5-7-2014, Slip Op. No. 2012-798
(NH Supreme Court Case No. 2012-798)

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

North Hampton Professional Fire Fighters, Local 3211, IAFF

v.

Town of North Hampton

Case No. G-0176-1
Decision No. 2012-209

Appearances: John S. Krupski, Esq. for the North Hampton Professional Fire Fighters, Local 3211, IAFF

J. Joseph McKittrick, Esq. for the Town of North Hampton

Background:

The Union filed an unfair labor practice complaint on July 28, 2011 claiming that the Town engaged in direct dealing and bad faith bargaining in violation of RSA 273-A:5, I (a), (b), (g), and (h) when it allegedly sent a health insurance proposal directly to bargaining unit employees and when it unilaterally established compensation and other terms and conditions for Firefighters who obtain or hold a State paramedic certification.

The Town denies the charges that it has violated any provisions of RSA 273-A (the Act) and asserts that is has acted in a manner consistent with its obligations to recognize the Union as the exclusive representative of bargaining unit employees and its obligations to bargain the terms and conditions of employment for bargaining unit employees with the Union.

Following a hearing and the submission of the parties' post-hearing briefs the board's decision is as follows:

Findings of Fact

1. The Union is the exclusive representative of full time Firefighters, EMT personnel and lieutenants of the North Hampton Fire Department by virtue of the Association's certification by the Public Employee Labor Relations Board. *See* Union Exhibit 1.

2. The Town is a public employer pursuant to RSA 273-A:1, IX.

3. The parties' most recent collective bargaining agreement covered the time period from July 1, 2010 to June 30, 2011 (2010-11 CBA) *See* Joint Exhibit 1. Section 3.01 of the 2010-11 CBA provides as follows:

> The Town recognizes the Union as the exclusive representative and exclusive bargaining agent, for the purpose of collective bargaining, for the employees in the job classification for all full time Firefighters, and Lieutenants of the North Hampton Fire & Rescue.

4. Under the 2010-11 CBA the Town provides a Blue Cross/Blue Shield plan which the Union describes as the Local Government Center's Blue Cross/Blue Shield 3 Tier $5.00 co-pay health insurance with a pharmaceutical rider of $3 generic/$15 non-generic and a $1.00 mail order 90 day supply (the BC/BS LGC plan).

5. Bargaining topics and proposals in negotiations for a successor CBA included several alternatives to the BC/BS LGC plan. One of the Town's health insurance proposals was a "cafeteria" plan under which employees would receive a specific amount of money that could be used to select and purchase coverage from a number of health care options. The Union rejected this proposal.

6. Another one of the Town's health insurance proposals was a change in insurance carriers from BC/BS LGC to a Matthew Thornton HMO. The Town Matthew Thornton HMO included a proposal for the Town to pay 100% of the cost in year 1, 95% in year 2, and 90% in year 3. The Union's response was a 3 year collective bargaining agreement with salary increases of 4%, 1%, and 1% with a co-pay increase on the existing BC/BS LGC from 10% to 11%. The Union also

left open the possibility of having a Matthew Thornton option but on different terms than proposed by the Town.

7. The parties were ultimately unable to come to agreement on a switch to a Matthew Thornton plan or any other change to the existing BC/BS LGC plan and contract negotiations ended in March, 2011 without a successor agreement (see Joint Exhibit 4, Town's March 9, 2011 declaration of impasse).

8. As reflected in Joint Exhibit 3, on July 14, 2011, the Town Administrator sent an email to all employees, including bargaining unit employees, describing and offering a Matthew Thornton Blue HMO health care plan. The Town Administrator's email included the following content:

> We are all aware of the rising cost of health care not only to the Town, but also to all of us personally. With that in mind, the Select Board has approved an additional health care plan for ***all employees*** (emphasis in original). Effective August 1, 2011, employees will be able to enroll in a Matthew Thornton Blue HMO with a $10 co pay, with a $250 deductible per person up to $750. The Town will cover 90% of the HMO coverage, with the employees covering 10%. In addition, the Town in the first year will place 100% of your deductible in a Health Reimbursement Account. This amount will be reduced by 25% each year over the next four years.
>
> The Town will continue to offer employees the current plans that are in place with no changes. Also, employees will still be in their current dental plans at their current contribution rates (87.5% or 90%.) Pharmaceutical plans would change if you are not currently in the Caremark program.
>
> What does this mean for you? If you switch to the Matthew Thornton Blue, a family currently in the Blue Cross Blue Shield 2 Tier plan would save an estimated $800 a year in health care costs. A two-person plan would save an estimated $593, and a single person plan would save an estimated $296. This does not include your out of pocket savings associated with co pays for doctor visits.
>
> Those currently with a Blue Cross Blue Shield 3 tier program could save an estimated $500 for each family plan, $370 for a two person and $185 for a single plan.
>
> In addition, the Town will now offer a buyout option for all employees. [T]he buyout will be a stipend of twenty-five (25%) percent of the Town's share of the premium for the plan under which he/she had previously been covered as of July 1. Regardless of the plan or coverage, the stipend shall not exceed $5,000.00. This stipend will be paid on the first pay period of December.

If you have any questions or need a form please feel free to contact Jan Facella or your department head. We will need the forms by Monday at the latest.

9. None of the bargaining unit employees elected the Matthew Thornton option outlined in Joint Exhibit 3.

10. State laws and regulations (RSA 153-A:11 and Saf-C 5902.07) govern the EMT certification process, inclusive of an EMT-paramedic level of certification. For example, State emergency medical care provider requirements set for by regulation include the following:

> Saf-C 5902.07 Emergency Medical Care Provider Requirements.
>
> (a) All providers shall be licensed in accordance with Saf-C 5903.
>
> (b) The staffing level in each EMS land or water vehicle shall, at minimum, include 2 providers during patient transport, at least one of whom shall attend the patient.
>
> (c) The 2 providers on board a land or water vehicle shall be licensed at one of the following levels:
>
> (1) First responder;
> (2) EMT-basic;
> (3) EMT-intermediate; or
> (4) EMT-paramedic.
>
> (d) During transport of a patient(s) in a land or water vehicle, the provider who is responsible for the patient care shall be licensed at one of the following levels:
>
> (1) EMT-basic;
> (2) EMT-intermediate; or
> (3) EMT-paramedic.

11. Firefighters with an EMT-paramedic level of medical licensure/certification have previously worked in the department but without any distinction in pay. This is a likely cause of the Town's inability to retain Firefighters with a paramedic level EMTs, and both the Town and the Union are interested in resuming a paramedic level of service in town on a more permanent basis. During bargaining for the 2010-11 CBA the Union submitted a wage proposal set forth in Union Exhibit 5 which provided as follows:

> Stipend for paramedic level EMT will be 5% over actual step (base pay) whether hired as or a current employee has received the certification.
>
> If the Town of North Hampton pays for tuition for paramedic level and certification is attained, the individual will committee (sic) 3 years to the Town of North Hampton Fire Department and provide ems services as a paramedic. If the individual leaves then the individual shall pay back the expense set forth according to a 3 year sliding scale.

12. The Town rejected the Union's proposal set forth in Union Exhibit 5 and the parties set aside paramedic related proposals so that they could otherwise finalize a one year agreement.

13. The Town's interest in the implementation of a paramedic program continued, and the Union was ready and willing to resume discussions on a paramedic program in an effort to reach a memorandum of understanding or side bar agreement and so informed the Town in June, 2011, all as reflected in Union Exhibit 6.

14. After informing the Union in June, 2011 that discussions concerning a paramedic program would be delayed because of a vacancy on the Select Board, the Town proceeded in August, 2011 to adopt a "paramedic program" which sets a wage schedule for and other conditions of employment for a Firefighter who obtains or holds a paramedic certification. See Union Exhibit 6, 7 and 9; Town Exhibit A and B.

15. The terms and condition of employment for a Firefighter Paramedic adopted by the Town are similar to those proposed by the Union, as per Union Exhibit 5, but are not the product or result of a bargained agreement with the Union.

16. According to the Fire Chief, the Town was not attempting to bypass the collective bargaining process and he understood the Town would negotiate with the Union over the paramedic level certification once the program was established. However, the Town did not want to delay the provision of the service to residents through the department and also wanted to take advantage of certain funding available for use in connection with a paramedic level certification/training. The record does not reflect that the Town faced the imminent loss of these

alternative funding sources for a paramedic level EMT service in the event the Town failed to act in August, 2011 to adopt the paramedic program.

Decision and Order

Decision Summary:

The Town violated its bargaining obligations, engaged in improper direct dealing with bargaining unit employees, and interfered with unit employees in the exercise of rights provided by the Act, all unfair labor practices in violation of RSA 273-A:5, I (a), (b), (g), and (h). The Town is ordered to cease and desist from such activity, all unilateral changes to terms and conditions of employment for a Firefighter with an EMT-Paramedic are suspended, and the Town is further directed to utilize the statutory collective bargaining process to establish terms and conditions for a Firefighter EMT-Paramedic and make changes to the current BC/BS LGC plan.

Jurisdiction:

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, *see* RSA 273-A:6.

Discussion:

The Union charges and the Board finds that the Town's conduct constitute a violation of RSA 273-A:5, I (a)(to restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter); (b)(to dominate or to interfere in the formation or administration of any employee organization); (g)(to fail to comply with this chapter or any rule adopted under this chapter); and (h)(to breach a collective bargaining agreement).

The Town's first unfair labor practice stems from the Town Administrator's insurance proposal submitted to "all employees," including bargaining unit employees, by email of July 14, 2011. The existing BC/BS LGC plan, like wages, represents a financial benefit and is a form of

compensation to employees for work and services provided. Like wages, employee health insurance qualifies as a condition of employment that is a mandatory subject of bargaining. The Town is obligated to bargain the subject and any changes to the existing BC/BS LGC plan with the Union, just like the Town has to bargain any change in wage rates with the Union.[1] That the parties are fully conversant with and understand these particular principles of collective bargaining is reflected by their own recent bargaining history, where a fair amount of the negotiations were dedicated to proposals to move to different health insurance plans and arrangements. Four months after the Town's March 9, 2011 declaration of impasse, the Town presented a Matthew Thornton Insurance proposal to "all employees," including bargaining unit employees. *See* Joint Exhibit 3.

By dealing directly with employees in this manner the Town bypassed and breached its statutory duty and contractual obligation to bargain the terms and conditions of employment with the Union and also violated the corresponding prohibition on bargaining terms and conditions of employment with unit employees. The Board reaches this conclusion after taking into account the fact that the communication was written, its purpose was unambiguous (the Town Administrator was plainly offering an alternative health insurance plan to bargaining unit employees), it was intentionally sent to "all employees," and the content of the communication includes clear attempts to persuade employees[2] to switch to a Matthew Thornton plan. The Town's decision to submit the proposal directly to unit employees, and in substance bargain the subject without the involvement of the Union, also undermines the role and function of the Union as exclusive representative and impairs the right of unit employees to have such Union

[1] Following the expiration of the 2010-11 CBA the BC/BS LGC plan continues under the status quo doctrine. *See Appeal of City of Nashua,* 141 N.H. 768, 772 (1997); *Appeal of Alton School District,* 140 N.H. 303, 315 (1995)(health insurance benefits provided under CBA are conditions of employment which employer must continue during any status quo period).

[2] The fact that the Town's insurance proposal was made to "all employees," including bargaining unit and non bargaining unit employees, does not excuse or justify the Town's actions under the Act.

representation in the bargaining process. This is an interference in the administration of Union affairs, including how the Union bargaining process is conducted and how specific bargaining proposals are made, received, evaluated, discussed, and accepted or rejected.

In summary, the Town acted in derogation of the Union's statutory right, responsibility, and prerogative to conduct all bargaining concerning unit employees collectively, and to manage such bargaining with due regard for the interests of the bargaining unit and also for the interrelationship of various contract provisions, bargaining proposals and subjects. *See, e.g.,* RSA 273-A:1, XI (terms and conditions means wages, hours and other conditions of employment other than managerial policy…); RSA 273-A:3, I (the Town is obligated to bargain in good faith the terms of employment with the Union); and RSA 273-A:11, I (a)(the Union is the exclusive representative of the bargaining unit and has the right to represent bargaining unit employees in negotiations).

The Board also finds that the Town committed an unfair labor practice on account of its unilateral adoption and establishment of a wage schedule and other conditions of employment for a firefighter EMT with a paramedic licensure level. Per N.H. Admin. Rule Saf-C 5902.07 Emergency Medical Care Provider Requirements (*see* Finding of Fact 10), the three levels of EMT certification are EMT-basic, EMT-intermediate, and EMT-paramedic. As reflected by the bargaining unit certification, the bargaining unit at issue in this case includes firefighters, lieutenants, and EMTs. EMT-paramedic is not a new position but is an EMT with the third, or highest, level of training and certification. The Town has previously employed firefighters with an EMT-paramedic level of certification, although without any additional compensation, benefits, or other conditions of employment.

During the most recent bargaining session the Union made a proposal concerning compensation and other conditions for the paramedic level of certification. The Town did not

accept the Union's proposal, and the subject was set aside in the interests of finalizing an agreement. Subsequently, in June 2011, the Union and the Chief anticipated further discussions and negotiations on the topic, but such discussions were "delayed" on account of a vacancy in the Select Board. Thereafter the Town unilaterally adopted a wage adjustment and other conditions for an EMT-paramedic level of certification without any further discussion or bargaining with the Union.

At hearing the Town did express concern about taking advantage of funding to defray the expense to the Town of a paramedic program and also expressed an intent to commence bargaining with the Union on the terms and conditions for EMT-paramedic level certification now that the Town has established the initial terms. However, these circumstance did not excuse the Town from fulfilling its bargaining obligations as the Union has demanded. During the relevant time period the Union was ready, willing and able to meet with the Town (*see* Union Exhibit 6) but was never provided with the opportunity to do so. An EMT in the Town Fire Department is already a bargaining unit position that is represented by the Union, and allowing the Town to unilaterally establish terms and conditions for an EMT with a paramedic level of licensure provides the Town with an unfair preliminary advantage in the bargaining process. It is also noted that there was insufficient evidence that the Town's unilateral adoption of the terms and conditions for an EMT with a paramedic level of certification on August 22, 2011 was necessary in order to preserve the coveted source of funds.

In conclusion, it is within the Town's managerial prerogative to determine that it wants to promote the provision of EMT services at the paramedic level. However, the Town is obligated to bargain with the Union the compensation and other conditions of employment for an EMT who holds a paramedic license. The Town's unilateral establishment of wages and other conditions for an EMT-paramedic constitutes a breach of its obligation to bargain a mandatory

subject of bargaining with the Union. This is a violation of RSA 273-A:5, I (a)(one of the rights of employees conferred by the Act is the right to have the terms and condition of employment established through the collective bargaining process and not through the unilateral action of the employer). It is also a violation of RSA 273-A:5, I (g)(to fail to comply with this chapter or any rule adopted under this chapter). RSA 273-A:3, I requires the Town to bargain the terms of employment with the Union, and RSA 273-A:11, I (a) mandates that the Town extend the right to the Union to represent employees in collective bargaining negotiations.

Based upon the foregoing, the Town is ordered to cease and desist from engaging in conduct which the Board has identified as unfair labor practices in this decision. The unilateral terms and conditions of employment for a paramedic level EMT established by the Town and referenced in Finding of Fact 14 are suspended. The Town is directed to utilize the statutory collective bargaining process to establish terms and conditions for a paramedic level EMT and to make any changes to the current BC/BS LGC plan. The Town is also ordered to post this decision in the workplace in a location(s) where bargaining unit employees work for thirty days.

So ordered.

September 17, 2012.

Charles S. Temple, Esq., Chair

By unanimous vote of Chair Charles S. Temple, Esq. and Board Members Richard J. Laughton, Jr. and Carol M. Granfield.

Distribution:
John S. Krupski, Esq.
J. Joseph McKittrick, Esq.

NH Supreme Court affirmed this decision on 5-7-2014, Slip Op. No. 2012-798 (NH Supreme Court Case No. 2012-798)

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

North Hampton Professional Fire Fighters, Local 3211, IAFF

v.

Town of North Hampton

Case No. G-0176-1
Decision No. 2012-230

Order on Motion for Rehearing

On September 25, 2012 the Town filed a motion for rehearing of PELRB Decision No. 2012-209. Motions for rehearing are governed by RSA 541:3 and Pub 205.02, which provides in part as follows:

> **Pub 205.02 Motion for Rehearing.**
>
> (a) Any party to a proceeding before the board may move for rehearing with respect to any matter determined in that proceeding or included in that decision and order within 30 days after the board has rendered its decision and order by filing a motion for rehearing under RSA 541:3. The motion for rehearing shall set out a clear and concise statement of the grounds for the motion. Any other party to the proceeding may file a response or objection to the motion for rehearing provided that within 10 days of the date the motion was filed, the board shall grant or deny a motion for rehearing, or suspend the order or decision complained of pending further consideration, in accordance with RSA 541:5.

Upon review the Town's Motion for Rehearing is denied.

So ordered.

October 10, 2012.

Charles S. Temple, Esq., Chair

By unanimous vote of Chair Charles S. Temple, Esq. and Board Members Richard J. Laughton, Jr. and Carol M. Granfield.

Distribution:
John S. Krupski, Esq.
J. Joseph McKittrick, Esq.