



State of New Hampshire
Public Employee Labor Relations Board

**Londonderry Administrative Employees Association,
Affiliated with AFSCME Council 93
(Public Safety Administrative Employees)**

v.

Town of Londonderry

**Case No. G-0022-8
Decision No. 2022-166**

Appearances: Justin Murphy, Esq. AFSCME Council 93, Boston, Massachusetts
for LAEA, Affiliated with AFSCME Council 93

Michael D. Ramsdell, Esq., Sheehan Phinney Bass & Green,
Manchester, New Hampshire for Londonderry

Background:

On January 11, 2022, the Town issued an amended Temporary Leave Policy (2022 TLP) which adopted new COVID-19 isolation and quarantine guidelines issued by the New Hampshire Department of Health and Human Services (DHHS). The Town also unilaterally created and included a new paid leave benefit in the 2022 TLP available only to vaccinated employees in the event they are unable to work remotely during a COVID-19 related isolation. This led the Association to file an unfair labor practice complaint under the Public Employee Labor Relations Act (PELRA) on April 18, 2022. The Association claims that the new paid leave benefit is a form of wages under RSA 273-A:1, XI and is therefore a mandatory subject of bargaining.¹ The

¹ The Association does not contest the Town's right to adopt the new COVID-19 isolation and quarantine guidelines issued by the New Hampshire Department of Health and Human Services (DHHS).

Association claims the Town's failure to negotiate the new paid leave benefit is a prohibited practice under 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) and (e)(to refuse to negotiate in good faith with the exclusive representative of a bargaining unit...)² As relief, the Association requests that the PELRB find that the Town has committed an unfair labor practice and order the Town to: 1) negotiate in good faith; 2) credit all accrued time employees were required to use as a result of this unilateral policy implementation; and 3) make the Association whole for all costs and expenses incurred to pursue this prohibited practice charge.

The Town denies the charges.³ The Town argues that the sole purpose of the COVID-19 related 2022 TLP is maintaining the health and safety of employees and the workplace. The Town maintains that the vaccine incentive was necessary to protect employees and promote a safe and healthy work environment. The Town also says the 2022 TLP did not disadvantage or negatively affect any employee but instead created an opportunity for employees to receive an additional benefit. The Town further argues the disputed conduct is not a prohibited practice based on the board's prior decisions in *State Employees' Association of NH, SEIU Local 1984 v. Coos County Board of Commissioners (Department of Corrections)*, PELRB Decision 2021-034 (March 9, 2021) and *International Chemical Workers Union Council/UFCW Local 1046C v. Hillsborough County Nursing Home*, PELRB Decision 2021-069 (April 30, 2021).

² The Association also included, but subsequently withdrew, a claim that the Town breached the parties' collective bargaining agreement in violation of subsection (h).

³ The Town also filed a motion to dismiss, raising a jurisdictional argument under *In re Silverstein*, 163 N.H. 192 (2012)(PELRB lacks jurisdiction over breach of collective bargaining agreement claim when last step of grievance procedure is final and binding). The motion is moot as the Association withdrew the sub-section (h) breach of collective bargaining agreement claim.

Findings of Fact

1. The Town is a public employer within the meaning of RSA 273-A:1, X.
2. The Association is the certified exclusive bargaining representative for certain police and fire department employees as set forth in Joint Ex.1, PELRB Decision 2021-147 (August 26, 2021).
3. The parties' collective bargaining agreement (CBA) includes provisions on compensation in Article 14 as well as numerous Articles addressing paid and unpaid leave: Article 15 (12 paid holidays); Article 16 (paid vacation accrual); Article 17 (paid sick leave); Article 18 (paid personal day); Article 19 (bereavement leave); Article 20 (paid military leave); and Article 21 (paid leave for jury duty). Almost half of the CBA is devoted to these various provisions.
4. The 2022 TLP was preceded by one the Town adopted on March 17, 2020 (as amended on March 30, 2020 to incorporate provisions of the Family First Coronavirus Response Act (FFCRA)). The 2020 TLP included additional paid leave for employees with COVID-19, or who are required to quarantine, or who are serving as a caregiver for an individual with COVID-19 or who is in quarantine, as provided by the FFCRA. The Town extended the 2020 TLP through May 31, 2021, following the expiration of the FFCRA. See Town Exhibit 1 and Joint Exhibit 3.
5. The 2022 TLP reflects new COVID-19 isolation and quarantine guidelines issued by the New Hampshire Department of Health and Human Services (DHHS), which in turn were based on recently issued Federal Center for Disease Control (CDC) guidelines. Neither the DHHS nor CDC guidelines were submitted into the record. There is no evidence that the guidelines included the new paid leave benefit at issue in this case.

6. The 2022 TLP states the "isolation period for a COVID positive employee is now a minimum of five (instead of 10) calendar days." It also provides vaccinated employees who are in isolation but unable to work remotely with an additional five days paid leave to use during the first five days of the isolation period. Unvaccinated employees are not eligible for this additional paid leave benefit.

7. The Town ended the 2022 TLP on March 22, 2022.

8. There was no evidence submitted showing that any employee actually used, or was denied access to, the 2022 TLP paid leave benefit based on their vaccination status.

9. Joint Exhibit 6 documents one employee's use of paid sick leave at the end of 2021, apparently for COVID-19 related reasons, prior to the establishment of the 2022 TLP. Neither the stipulated facts nor other exhibits provide more detail about Joint Exhibit 6.

Decision and Order

Decision Summary:

The new paid leave benefit is a mandatory subject of bargaining that the Town was required to negotiate with the Association. The Town's failure to do so is a prohibited practice in violation of RSA 273-A:5, I (a) and (e).

Jurisdiction:

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

Discussion:

Under PELRA, the Town is obligated to negotiate in good faith the "terms and conditions of employment" with the Association. Terms and conditions of employment are:

[W]ages, 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. See also RSA 273-A:3, I. Ordinarily, the compensation the Town pays to employees, whether for hours worked or not-worked (e.g. paid leave such as paid holidays, paid sick leave), qualifies as "wages" within the meaning of RSA 273-A:1, XI and therefore must be bargained. The question in this case is whether a new paid leave benefit conditioned upon an employee's vaccination status should be treated differently, and categorized as "managerial policy within the exclusive prerogative of the public employer" because it is COVID-19 related and provided to promote a healthy and safe workplace.

The Town's obligation to negotiate is resolved by the three-step bargaining test described in *Appeal of State*, 138 N.H. 716 (1994):

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 the first part of the test is a prohibited subject of bargaining. A proposal that satisfies the first part of the test, but fails parts two or three, is a permissible topic of negotiations, and a proposal that satisfies all three parts is a mandatory subject of bargaining.

Id. at 721-723.

This case is about the application of the second step⁴ - whether providing the new paid leave benefit primarily affects the terms and conditions of employment or matters of broad managerial policy. This "cannot be resolved through simple labels offered by management...or through

⁴ The first and third steps are not at issue.

conclusory descriptions urged by employees..." *Appeal of City of Nashua Board of Education*, 141 N.H. 768, 774 (1997). Often, both parties will have significant interests affected by the disputed action, and "determining the primary effect of the action requires an evaluation of the strength and focus of the competing interests." *Appeal of State*, 138 N.H. at 722. See also *Appeal of New Hampshire Department of Transportation*, 174 N.H. 610, 618-621 (2021)(finding impact of new commercial driver's license (CDL) medical card requirement falls primarily on the protected rights of employees rather than on managerial matters despite State's "general concerns about roadway safety and employee health").

In the present case, the interests of bargaining unit employees in a new paid leave benefit are obvious. The new paid leave benefit directly relates to wages, as it expands the availability of wages the Town will pay for time not worked. The importance and value of paid leave to employees is also reflected by the numerous CBA Articles addressing the subject. The Town's interests, and its justification for unilateral action, are that the new paid leave benefit is COVID-19 related and necessary to maintain the health and safety of employees and the workplace. However, beyond general statements to this effect, the evidentiary record⁵ is somewhat lacking. It does not, for example, address existing vaccination levels in the bargaining unit as of January, 2022 or detail the Town's resulting concerns and the urgency for immediate action to address the situation. There is also nothing in the record to explain why the Town believed the unilateral establishment of a new paid leave benefit was necessary to achieve higher vaccination rates among bargaining unit employees at that time.

The Town has cited the recent *Coos County*⁶ and *Hillsborough County*⁷ board decisions

⁵ The evidentiary record consists of the stipulated facts and exhibits.

⁶ *State Employees' Association of NH, SEIU Local 1984 v. Coos County Board of Commissioners* (Department of Corrections), PELRB Decision 2021-034 (March 9, 2021)

to support the argument that the new paid leave benefit primarily affects matters of broad managerial policy. It is true that these cases involved union bargaining claims raised during COVID-19 that resolved in the employer's favor under the second of the three-step test. However, both cases are distinguishable and therefore have limited application to the present dispute. For example, in *Coos County*, the County imposed a "Temporary Travel and Use of Leave Policy" effective March 18, 2020 "until further notice." The policy established a 14-day quarantine requirement following certain out-of-state travel. The policy also required the exhaustion of accrued personal and sick time, followed by unpaid leave. A County Administrator grievance decision cited by the board stated:

On January 31, 2020, the US Department of Health and Human Services declared a public health emergency related to the COVID-19 outbreak. On March 13, 2020 Governor Sununu issued the first of a series of Executive Orders (2020-04) declaring a state of emergency due to COVID-19. That initial order highlighted the risk of facility based transmission of COVID-19 to residents of long term care facilities and directed those facilities to take measures to protect those who live and work in those facilities. The same Order suspended all out of State business travel for State and municipal employees. Despite the measures described in Order 2020-004 and subsequent Orders, the COVID-19 virus has continued to spread and is present in every New Hampshire County. Data available from the NH Division of Public Health makes clear that residential facilities have been disproportionately affected by the virus.

The NH Division of Public Health Services issued guidance to employers...recommending that employers not permit any out of state domestic business travel and personal international travel. The guidance recommended that employers "[d]iscourage personal domestic travel outside of NH, ME and VT", as well as all travel by public conveyances. The guidance recommended that persons who travel internationally, on public conveyances outside of NH, VT or ME, or on a cruise ship, should quarantine for 14 days after return.

The County Commissioners have a legal, ethical and moral obligation to protect the health and safety of County employees and the persons who reside in County facilities, including the correctional facility and nursing homes. Consistent with those obligations and the guidance issued by federal and state health authorities, the Commissioners adopted and disseminated to all County employees, including CO Dube, a "Temporary Travel and Use of Leave Policy"...

⁷ International Chemical Workers Union Council/UFCW Local 1046C v. Hillsborough County Nursing Home, PELRB Decision 2021-069 (April 30, 2021)

Id. The board concluded that under *Appeal of State*, the 14-day quarantine policy was within the County's managerial prerogative and was not a mandatory subject of bargaining.⁸

Coos County involved a different issue, a 14-day quarantine requirement following certain out-of-state travel. It was decided in different circumstances, as at the time the disputed action took place, the US Department of Health and Human Services had declared a public health emergency related to the COVID-19 outbreak. Only five days prior to the issuance of the County's self-quarantine policy, the governor issued the first of a series of Executive Orders (2020-04) declaring a state of emergency due to COVID-19. The 14-day quarantine requirement itself was the New Hampshire Division of Public Health Services' specific recommendation. The record in this case does not reveal that these circumstances still prevailed as of January 11, 2022, when the Town announced the new paid leave benefit. There is no evidence that the new paid leave benefit was a tool promoted or recommended by state or federal authorities.

Like the *Coos County* case, *Hillsborough County* dates to March of 2020. The issues in *Hillsborough County* are also different; the case involves the County's exercise of rights provided by a new federal law. At a March 31, 2020 meeting, the County Commissioners voted, without prior notice to the union or negotiation, to exempt nursing home employees from the Emergency Paid Sick Leave and Public Health Leave provided by the FFCRA.⁹ The union complained that by this vote the County had violated its obligation to negotiate a mandatory subject of bargaining. The board was not convinced that the federal law at issue was subject to the state's collective bargaining law. The board stated:

The FFCRA establishes additional paid leave benefits while simultaneously giving employers of "health care providers" the right to exclude such employees from the

⁸ The board also noted that issues concerning the use of accrued personal or sick leave before taking unpaid leave were resolved through the grievance process.

⁹ See PELRB Decision 2021-017 (January 28, 2021) for a detailed time line of events in *Hillsborough County*.

application of FFCRA paid sick leave and paid family leave requirements to help ensure adequate staffing levels at facilities like the County nursing home. See Joint Exhibit 7 (FFCRA) and County Exhibit B (Paid Leave Under the FFCRA, U.S. Dept. of Labor Temporary Rule, 29 CFR 826). The Union has not cited any provision in the FFCRA, or a decision from any jurisdiction, stating or ruling in substance that the County's FFCRA health care provider exclusion option is subject to state public sector bargaining laws like RSA 273-A:1 *et. seq.* The disputed leave benefit and health care provider exclusion option were created by the same federal law and are inextricably intertwined. We are not convinced that the FFCRA health care provider exclusion option, included in a federal law intended to address a national pandemic, can be limited by, or subject to, state public sector bargaining laws.

Assuming state law applied, the board also found that the FFCRA health care exclusion option primarily affected matters of broad managerial policy under *Appeal of State*. The board cited the FFCRA temporary rule and the Governor's April 16, 2020 Emergency Order #31, and determined "that the County's strong interest in maintaining adequate staffing levels at the nursing home during the COVID-19 pandemic means the FFCRA health care provider exclusion option primarily affects matters of broad managerial policy. Therefore, the FFCRA health care provider exclusion option is, at most, a permissive subject of bargaining under the court's three-step test." *Id.* We cannot equate the FFCRA health care provider exclusion, as discussed and analyzed in *Hillsborough County*, with the new paid leave benefit included in the 2022 TLP.

The Town also defends against the charges in this case by citing the duration of the new paid leave benefit and the fact that, at least from the Town's perspective, it is a positive change in working conditions. However, neither one of these factors alters our assessment of the Town's obligation to bargain. The Town's obligation to negotiate a new paid leave benefit does not depend on its duration or whether it will improve working conditions, just as the Town's obligation to negotiate wages does not depend on whether the Town seeks to increase or decrease existing wages, whether indefinitely, or for a limited period of time.

In accordance with the foregoing, and after due consideration of the parties' respective interests, we find that the primary effect of the new paid leave benefit is on the terms and conditions of employment, and not matters of broad managerial policy. The Town unilaterally established a new term and condition of employment that it should have negotiated with the bargaining unit's exclusive representative. The Town also interfered with the right of employees to have such negotiations take place. Therefore, the Town has committed a prohibited practice in violation of RSA 273-A:5, I (a) and (e). However, since the Town ended the new paid leave benefit in March of 2022, and because there is no evidence as to how the Town actually administered the new paid leave benefit, and no information as to whether any employee was adversely impacted, we find it unnecessary to order any additional relief.

So ordered.

October 19, 2022

/s/ Peter G. Callaghan

Peter G. Callaghan, Esq.
Chair/Presiding Officer

By unanimous vote of Alternate Chair Peter G. Callaghan, Esq., Board Member Carol M. Granfield, and Board Member Richard J. Laughton, Jr.

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