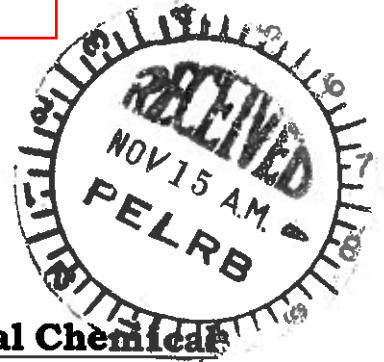


Appeal of PELRB Decision  
No. 2021-017 withdrawn.

**THE STATE OF NEW HAMPSHIRE**  
**SUPREME COURT**



**In Case No. 2021-0227, Appeal of International Chemical Workers Union Council/UFCW Local 1046C, the court on November 12, 2021, issued the following order:**

The petitioner's request to withdraw the appeal is granted.

Appeal withdrawn.

This order is entered by a single justice (Donovan, J.). See Rule 21(7).

**Timothy A. Gudas,**  
**Clerk**

Distribution:

√ New Hampshire Public Employee Labor Relations Board, G-0292-2  
H. Jon Meyer, Esq.  
Randall Vehar, Esq.  
Carolyn M. Kirby, Esq.  
Attorney General  
File



**State of New Hampshire**  
Public Employee Labor Relations Board

**International Chemical Workers Union Council/UFCW Local 1046C**

v.

**Hillsborough County Nursing Home**

**Case No. G-0292-2**  
**Decision No. 2021-069**

Order

On February 26, 2021 the Union filed a motion for rehearing<sup>1</sup> of PELRB Decision No. 2021-017 (January 28, 2021) and a request to take administrative notice of certain Board of Commissioner's meeting minutes, attached as Exhibits A through E to the request. The County filed its objection, which prompted the Union to file a motion to strike references to certain draft meeting minutes contained in the County's objection. We then issued an order suspending PELRB Decision No. 2021-017<sup>2</sup> and directing the parties to file supplemental briefs on the following specific issue:

Whether or not the County was (or was not) required to give prior notice and an opportunity to bargain before March 31, 2021 about the exemption of county nursing home bargaining unit employees from the Emergency Paid Sick Leave and Public Health Leave of the FFCRA.

We also took the Union's request to take administrative notice and motion to strike under advisement.

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<sup>1</sup> We review motions for rehearing under N.H. Admin. Rules, Pub 205.01.

<sup>2</sup> See PELRB Decision No. 2021-043 (March 24, 2021).

Both parties filed supplemental briefs by the April 2, 2021 deadline, and on April 5, 2021, the Union filed a motion to strike the sentence in the County's supplemental brief that "[t]he Union claims FFCRA was a permissive (not mandatory) subject of bargaining." The County agrees the cited sentence is error and should be stricken. The Union's April 5, 2021 motion to strike is therefore moot. The Union's pending request to take administrative notice of the Board of Commissioner meeting minutes attached as Exhibits A through E to the request, and which were not submitted into the record prior to the issuance of PELRB Decision No. 2021-017, is denied. In addition, the Union's motion to strike references in the County's objection to the motion for rehearing to documents (meeting minutes) that were not submitted into the record prior to the issuance of PELRB Decision No. 2021-017 is granted. See N.H. Admin. Rules, Pub 203.07 Reopening of the Record, sub-section (a).<sup>3</sup>

We have reviewed the issue we asked the parties to address in their supplemental briefs and upon further consideration, our decision that the County did not commit an unfair labor practice has not changed. The FFCRA establishes additional paid leave benefits while simultaneously giving employers of "health care providers" the right to exclude such employees from the 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

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<sup>3</sup> At any time prior to the issuance of the decision on the merits, the presiding officer, on the presiding officer's own motion or on the motion of any party, shall reopen the record to receive newly discovered, relevant, material and non-duplicative testimony or evidence not previously received and not previously available at the time of hearing if the presiding officer determines that such testimony and evidence are necessary to a full consideration of the issues which form the subject of the hearing. (Emphasis added)

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.

Moreover, even if application of the state's bargaining law is appropriate, the County's decision to use the exclusion option is, at most, a permissive subject of bargaining. This means the County could have, but was not required to, negotiate with the Union about whether health care providers should be excluded from eligibility for the FFCRA leave benefits. We base this conclusion on the court's three-step analysis set out in *Appeal of State*, 138 N.H. 716 (1994), which provides:

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 724.

As to the first step, constitutional, statutory or statutory regulation descriptions of managerial authority cited for the proposition that a particular topic is a prohibited subject of bargaining must provide that such authority is "reserved exclusively" for the public employer, is within the "sole prerogative" of the public employer, or contain language to similar effect. See, e.g. *Appeal of State*, 138 N.H. at 724; *Appeal of City of Nashua Board of Education*, 141 N.H. 768, 774 (1997); *Sugar River Education Association, NEA-NH v. Claremont School District*, PELRB

Decision No. 2016-176 (July 29, 2016). The FFCRA does not appear to include such language with respect to the health care provider exclusion option, and therefore the first step is, technically, satisfied.

The second step requires that we determine whether the County's exercise of the exclusion option "primarily affect(s) the terms and conditions of employment or matters of broad managerial policy." *Appeal of State*, 138 N.H. at 723. This part of the test "cannot be resolved through simple labels offered by management...or through conclusory descriptions urged by employees..." *Appeal of City of Nashua Board of Education*, 141 N.H. at 774. 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. The FFCRA temporary rule (County Exhibit B) states that:

The Department understands that the option to exclude health care providers and emergency responders serves to prevent disruptions to the health care system's capacity to respond to the COVID-19 public health emergency and other critical public health and safety needs that may result from health care providers and emergency responders being absent from work.

....

The FFCRA's optional exclusion from its leave entitlements has a different purpose: Ensuring that the health care system retains the capacity to respond to COVID-19 and other critical health care needs. Congress' optional exclusion of emergency responders in addition to health care providers demonstrates that Congress was intending to provide a safety valve to ensure that critical health and safety services would not be understaffed during the pandemic (citations omitted).

The Governor expressed similar concerns in his April 16, 2020 Emergency Order #31.<sup>4</sup> In evaluating the strength and focus of the competing interests in this case, we find that the County's strong interest in maintaining adequate staffing levels at the nursing home during the COVID-19

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<sup>4</sup> See County Exhibit F(emergency order recites that critical staffing levels are threatened at Medicaid providers of long term services in facility-based settings...Medicaid funded residential facilities are struggling to retain the needed workforce...)

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.

In conclusion, we have reviewed the Union's motion for rehearing and the County's objection as well as the parties' supplemental briefs filed on April 2, 2021. The motion for rehearing is denied.

So ordered.

April 30, 2021

/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 alternate Board Member Glenn Brackett.

Distribution: Eugene White, ICWU Representative  
August Randall Vehar, Esq.,  
Danielle L. Murphy, Esq.  
Carolyn M. Kirby, Esq.



**State of New Hampshire**  
Public Employee Labor Relations Board

**International Chemical Workers Union Council/UFCW**

v.

**Hillsborough County Nursing Home**

**Case No. G-0292-2**  
**Decision No. 2021-017**

**Appearances:** Randall Vehar, Esq. and Danielle L. Murphy, Esq. Akron, Ohio and Eugene White, Toms River, New Jersey for ICWUC/UFCW Local 1046C  
  
Carolyn M. Kirby, Esq., Goffstown, New Hampshire for Hillsborough County Nursing Home

**Background:**

On July 10, 2020, the International Chemical Workers Union Council/UFCW (Union) filed an unfair labor practice complaint, as amended on July 24, 2020 per PELRB Decision No. 2020-151, against the Hillsborough County Nursing Home (County). The Union claims that it did not have notice and an opportunity to bargain over the elimination of family leave benefits ("leave benefits") provided by the Families First Coronavirus Response Act (FFCRA). The Union charges that as a result the County has committed an unfair labor practice in violation of RSA 273-A:5, I (e)(refusal to negotiate in good faith). As relief, the Union requests that the PELRB order the County to: 1) to reverse its exemption decision; 2) reinstate the leave benefits; and 3) make affected employees whole by compensating employees who should have been paid and restoring used vacation and other paid leave.

The County denies the charges. According to the County, it was entitled to exclude

nursing home health care providers under relevant provisions of the FFCRA. The County also states that the parties were in contract negotiations when the FFCRA became law and when the County exempted bargaining unit employees from FFCRA coverage. The County emphasizes that although the FFCRA was discussed during bargaining, the Union did not attempt to bargain the County's FFCRA exemption decision until after negotiations were complete and a successor collective bargaining agreement ratified and signed. The County has also filed a separate motion to dismiss, claiming there is no legal basis for the complaint because the County's action was within its authority under the FFCRA and because the subject matter of the disputed decision is a prohibited subject of bargaining under *Appeal of State of New Hampshire*, 138 N.H. 716, 722 (1994).

This case was originally scheduled for hearing on September 8, 2021 but the parties agreed to submit the case for decision on stipulated facts, exhibits and briefs.<sup>1</sup> All filings have been submitted, and our decision is as follows.

### **Findings of Fact**

1. The County is a public employer within the meaning of RSA 273-A:1, X.
2. The Union is the certified exclusive bargaining representative for certain County nursing home employees.
3. The FFCRA passed on March 18, 2020 with an April 1, 2020 effective date.
4. The Emergency Family Medical Leave Expansion Act ("EFMLEA") provision of the FFCRA expands the Family Medical Leave Act of 1993 ("FMLA") and requires employers like the County to provide up to twelve weeks of emergency leave for employees unable to work or tele-work due to child care responsibilities attributable to Covid-19. The final ten weeks of this

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<sup>1</sup> See PELRB Decision No. 2020-179 (August 19, 2020)(pre-hearing order) and PELRB Decision No. 2020-247 (November 3, 2020)(order stating this not a "summary judgment" proceeding).



leave is paid at rates specified in the law.

5. The EFMLEA provides that employers of “health care providers” may exclude such health care provider employees from coverage. County nursing home employees are health care providers within the meaning of the EFMLEA.

6. The Emergency Paid Sick Leave Act (“EPSLA”) is another section of the FFCRA and it requires employers like the County to provide up to 80 hours of paid sick leave for specified Covid-19 reasons. The EPSLA also states that employers of health care providers may exclude such employees from coverage.

7. On March 26, 2020 the county nursing home administrator posted the United States Department of Labor FFCRA poster on the nursing home staff bulletin board. See County Exhibit C. The poster contains a brief overview of FFCRA leave benefits. It includes a number to call for additional information as well as a Department of Labor website address.

8. Prior to March 31, 2020 the County posted a “Special Meeting Notice of the Hillsborough County Board of Commissioners for March 31, 2020.” The notice states that the “Hillsborough County Board of Commissioners will be meeting Tuesday March 31 at 1:30 p.m. at the Bouchard Building to discuss COVID-19 Update and Logistics for the County.” See Joint Exhibit 3.

9. During the March 31, 2020 meeting the county administrator discussed the FFCRA, which he stated was scheduled to take effect on April 1, 2020. He explained the leave benefits certain employers must provide to employees under the EFMLEA and the EPSLA as well as the employer’s option to exclude healthcare provider employees from coverage, which he said “will require a decision from the Board today.” After discussion, the Board of Commissioners passed a motion to “exempt all employees of the Hillsborough County Nursing Home, Hillsborough County

Department of Corrections and Hillsborough County Sheriff's Office from the Emergency Paid Sick Leave and Public Health Leave of the Act subject to current and future federal regulation and laws." See Joint Exhibit 4. The Board of Commissioners' exemption decision extended to bargaining unit employees and was made before the provisions of the FFCRA took effect.

10. The record does not address whether and when the official (Joint Exhibit 4) or unofficial minutes of the March 31 meeting were posted or published. The official minutes of the March 31 meeting include the parenthetical statement that they are "Not Official until Approved by the Board and signed by the Clerk." They were signed by the Clerk (Commissioner Paul G. Bergeron) and dated June 4, 2020.

11. The parties' most recent collective bargaining agreement was signed by Eugene White, the International Representative of the Chemical Workers Union, on June 27, 2020, by Local 1046C of the International Chemical Workers Union Council/UFCW on June 29, 2020, and by the County Commissioners on June 30, 2020. The term of this agreement is July 1, 2020 to June 30, 2022 ("2020-22 CBA"). The term of the preceding agreement was July 1, 2019 to June 30, 2020 ("2019-20 CBA"). See Joint Exhibits 1 and 2.

12. The parties negotiated the 2020-22 CBA from February 3 to May 29, 2020. The parties held seven bargaining sessions and exchanged proposals at six of those sessions. Eugene White, who is a Union representative, not a County employee, attended all of the bargaining sessions. Jeanine Bleau is a physical therapist at the county nursing home who serves as a shop steward and was on the Union's negotiating committee. Eric Duquette is an occupational therapist at the county nursing home and was also on the Union's negotiating committee. David Ross is the administrator of the county nursing home and was a member of the County negotiation team. Attorney Elizabeth A. Bailey served as chief negotiator for the County.

13. The FFCRA and the healthcare employee exemption were discussed at the April 24 and April 28 bargaining sessions according to affidavits filed by the County (Ross and Bailey).

14. The Bleau affidavit states that sometime between March 17, 2020 and the April 24, 2020 bargaining session, Bleau asked nursing home administrator Ross about the FFCRA during a hallway encounter and was told it didn't apply to nursing homes. Bleau was told the same thing during the April 24 bargaining session. The Bleau affidavit also states that "I became aware that the Hillsborough County Board of Commissioners exempted the Hillsborough County Nursing Home from the Families First Corona (sic) Response Act on or after the successor negotiations were complete in June 2020."

15. The Duquette affidavit states that the nursing home administrator raised the FFCRA at the April 24 bargaining session and the county representatives made it clear that the paid sick time benefit did not apply to nursing home employees. The Duquette affidavit also states that "I became aware that the Hillsborough County Board of Commissioners exempted the Hillsborough County Nursing Home from the Families First Corona (sic) Response Act on or after negotiations were complete."

16. During the negotiations that resulted in the 2020-22 CBA, the Union never took the position that the County was required to negotiate any decision to utilize the FFCRA health care worker exemption, never submitted a bargaining proposal concerning the FFCRA, and never otherwise attempted to bargain the health care worker exemption in any respect.

17. Near the end of June, 2020, after the 2020-22 CBA had been negotiated and ratified, the Union notified the County that the County's March 31 decision to utilize the health care worker exemption violated the County's bargaining obligations and demanded that the County negotiate that decision. The County responded by informing the Union that the FFCRA was not a mandatory

subject of bargaining and that the County was legally entitled to elect the health care worker exemption.

### **Decision and Order**

#### **Decision Summary:**

The record reflects that the Union had both adequate notice and an opportunity to pursue negotiation over FFCRA leave benefits and the health care worker exemption during the course of bargaining over the 2020-22 CBA. The complaint is dismissed on this basis.

#### **Jurisdiction:**

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

#### **Discussion:**

In general, the County is obligated to negotiate in good faith over the "terms and conditions of employment" with the Union. See RSA 273-A:3, I. The "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.

See RSA 273-A:1, XI and 273-A:3, I. The court has adopted a three part test to define a union and public employer's respective bargaining rights and obligations as to various subjects:

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.*

*Appeal of State*, 138 N.H. 716, 724 (1994)(emphasis added). As to the first part of the test, the “by statute” reference contained in the RSA 273-A:1, XI phrase “managerial policy...confided exclusively to the public employer *by statute*” means a statute other than RSA 273-A:1, XI (emphasis added). See *Appeal of Nashua Board of Education*, 141 N.H. 768, 774 (1997).

In this case, the Union argues that it was deprived of notice and an opportunity to bargain over FFCRA leave benefits and the County’s exemption decision. The threshold question is therefore whether the Union was denied notice and an opportunity to bargain. If so, the next question is whether the County was obligated to bargain and failed to do so in violation of RSA 273-A:5, I (e), which would require the application of the court’s three step test. Conversely, if the Union had notice and an opportunity bargain there is no need to evaluate the County’s bargaining obligations under *Appeal of State*.

We find that while negotiations were pending the Union had received adequate notice of both the provisions of the FFCRA and the fact that bargaining unit employees would not receive any FFCRA leave benefits. The FFCRA Department of Labor poster was displayed on the nursing home staff bulletin board beginning on March 26, and by the April 24 bargaining session the County had informed the Union that FFCRA leave benefits would not be provided to bargaining unit employees and referenced the health care worker exemption because the Act did not apply to the County as discussed and reviewed in the Ross and Bailey affidavits. Although the record does not clearly establish when the Union actually learned of the Board of Commissioner’s March 31 vote, it does indicate that by the April 24 bargaining session, at the latest, the Union had notice about the provisions of the FFCRA, including the health care worker exemption, and the County’s

position that bargaining unit employees were not eligible for FFCRA benefits. At this point there was still time and opportunity for the Union to submit a proposal and request bargaining over the FFCRA leave benefits as the parties continued to bargain over the 2020-22 CBA after the April 24 bargaining session. However, the Union did not do so, and instead the Union's first request to bargain with respect to the FFCRA leave benefits was made after negotiations over the 2020-22 CBA had concluded.

There is a suggestion in the Union's filings that the Union's failure to pursue FFCRA bargaining during the negotiations should somehow be excused because the Union was not aware of the Board of Commissioners' March 31 decision until after a tentative agreement had been reached and ratified. See the Bleau and Duquette affidavits. It is true that clear written communications from the County to the Union documenting the Board of Commissioners' likely consideration of a FFCRA exemption for health care workers at the March 31 meeting, together with a related communication documenting the Board of Commissioners' decision, would have been ideal and consistent with the promotion of harmonious labor relations. However, we cannot find that the absence of such communications means the County violated its good faith bargaining obligations or that the Union did not have sufficient notice or was denied an opportunity to bargain as charged. To do so would require us to overlook the fact that the Union has an independent duty to prepare itself for negotiations which, in the spring of 2020, should have included familiarizing itself with the structure of, and leave benefits available through, the FFCRA so that it could raise and attempt to address FFCRA issues when the parties were at the bargaining table as it deemed necessary. However, this didn't happen, and instead the Union only attempted to bargain FFCRA leave benefit issues after negotiations over the 2020-22 CBA were complete without, in our

judgment, adequate justification. In the circumstances, the Union's attempt to blame the County for the delay in its request to bargain is misplaced.

In evaluating the Union's claim that it did not have notice or an opportunity to bargain we have scrutinized the parties' bargaining history in order to understand what was actually negotiated when the parties were at the bargaining table as well as what potential bargaining proposals were not made or were not pursued at the table. This approach to our evaluation of the Union's duty to bargain claim is similar to our analysis in a prior case where we dismissed a union complaint that the employer was obligated to negotiate any change to an established past practice to provide salary enhancements to new hires. See *Appeal of State Employees' Association of New Hampshire, Inc., SEIU Local 1984*, 171 N.H. 391 (2018)(union abandonment of bargaining proposal to continue the disputed past practice was central to dismissal of union's duty to bargain complaint). During the course of negotiations the Union either learned and knew the County had exempted its health care workers from FFCRA leave benefits or, in the exercise of due diligence, could and should have discovered that the County had done so, all with sufficient opportunity to raise any FFCRA leave benefit issues at the bargaining table. We therefore reject the premise of the Union's claim, namely that it was improperly deprived of notice and an opportunity to bargain over FFCRA leave benefit issues, and we therefore dismiss the complaint. Our conclusion should not, however, be construed as an endorsement of the County's communications with the Union about FFCRA leave benefits. We believe the County could have been more forthcoming in its communication and its decision to elect the exemption in the FFCRA, and a greater effort on the County's part to clearly document in writing for the Union's benefit the status of FFCRA leave benefits would have ensured that the Union was fully informed on the subject and perhaps it could have avoided some of the strain in nursing home labor relations that is evident in this case.

So ordered.

January 28, 2021

/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 alternate Board Member Glenn Brackett.

Distribution: Eugene White, ICWU Representative  
August Randall Vehar, Esq.,  
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