NH Supreme Court affirmed this decision on May 7, 2014. (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:
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