



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 rehearing¹ 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. 2021-017² 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.

¹ We review motions for rehearing under N.H. Admin. Rules, Pub 205.01.

² 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).³

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

³ 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 #31.⁴ 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

⁴ 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.

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