Appeal to NH Supreme Court withdrawn on 8-26-2013 (NH Supreme Court Case No. 2013-0097)

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Concord Fire Fighters Association, IAFF Local 1045

v.

City of Concord

Case No. G-0164-3
Decision No. 2012-252

Appearances: John S. Krupski, Esq., Molan, Milner & Krupski, PLLC Concord, New Hampshire for the Complainant

Danielle L. Pacik, Esq., Assistant City Solicitor, Concord, New Hampshire, for the Respondent

Background:

The Union filed an unfair labor practice charge on November 23, 2011 complaining about the City's alleged unilateral implementation of a mandatory requirement that firefighter paramedics obtain and maintain a Rapid Sequence Intubation (RSI) certification. The Union asserts that the RSI requirement is a mandatory subject of bargaining; that the City's actions constitute a unilateral change in terms and conditions of employment; and that the City has improperly refused to bargain the change and/or its impact. According to the Union, the City should have negotiated the RSI requirement and its impact with the Union but refused to do so all in 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); (e)(to refuse to negotiate in good faith with the exclusive representative of a bargaining unit, including the failure to submit to the legislative body any cost item agreed upon in negotiations; (g)(to fail to comply with this chapter or any rule adopted under this chapter); and (i)(to make any law or regulation, or to adopt any

rule relative to the terms and conditions of employment that would invalidate any portion of an agreement entered into by the public employer making or adopting such law, regulation or rule) and RSA 273-A:3 (obligation to bargain). The Union requests that the PELRB find that the City committed an unfair labor practice and order the City to negotiate the RSI requirement and/or require the City to bargain the impact of mandatory RSI certification.

The City denies the charges and claims that the City has required firefighters to have and maintain RSI certification for a number of years prior to 2011 and that the City's actions represent a legitimate exercise of management rights. The City requests dismissal of the complaint.

After a delay in the conduct of the hearing at the parties' request, a hearing was held on the complaint on August 15, 2012 at the offices of the PELRB in Concord. Both parties have submitted post-hearing briefs, and the decision in this case is as follows.

Findings of Fact

1. The Union is the certified exclusive representative of certain employees of the Concord Fire Department, including full time firefighters/paramedics.

2. The City of Concord (City) is a public employer as that term is defined by RSA 273-A:1 (IX).

3. The parties' current collective bargaining agreement was executed on March 30, 2012 and covers the July 1, 2011 to June 30, 2014 (2011-14 CBA).

4. The parties' Joint Stipulations include the following:

> The New Hampshire Department of Safety, Bureau of Emergency Medical Services has issued protocols for paramedics to obtain additional, non required qualifications, to conduct Rapid Sequence Intubation (RSI). This skill set is not required to maintain a paramedic licensure and requires additional training, and periodic refresher for the individual paramedic. Joint Exhibit 5 (State of NH-Student packet) and Joint 6 (State of NH-Protocols for Rapid Sequence Induction).

5. RSI is an airway management technique involving the use of paralytics to suspend a patient's ability to breathe independently prior to intubation. It has gained recognition and acceptance in different parts of the country over the last 15 years and in New Hampshire over the last 10 years. Concord is one of the few communities with paramedics who have been trained to perform RSI.

6. Neither the 2011-14 CBA nor the prior CBA mandate or require that fire department paramedics obtain and maintain RSI certification.

7. The training and qualification process paramedics must complete to become certified and qualified to perform the RSI procedure is described and discussed in the Administrative Packet and Student Manual for Rapid Sequence Intubation contained in City Exhibit S. The introduction to the Student Manual (pages 10-11 of City Exhibit S) states as follows:

> Securing and maintaining an airway is a paramedic's highest priority when caring for critically ill or injured patients. When required, advanced airway interventions must be performed quickly and efficiently by an experienced individual with the goal of establishing a definitive airway while minimizing any possible complications. The State of New Hampshire, Division of Fire Standards and Training and Emergency Medical Services (FST&EMS) had established a Rapid Sequence Intubation (RSI) program which offers an advanced technique using mediations to facilitate intubation. In order to be performed successfully, it requires an experienced provider with a thorough understanding of the indications, contraindications and pharmacology of RSI medicines.
>
> This class will discuss the recognition of airway compromise and management as well as the proper use of RSI medications and clinical skills with the goal of developing a paramedic confidence and competence to successfully and safely perform RSI in the pre-hospital setting.

8. The FST&EMS RSI program includes the following description of the credentialing process:

> In order to ensure the RSI program operates at a safe and efficient level, FST&EMS has stringent requirements for paramedics who wish to complete the credentialing process. The first step in the process is to decide whether you, as a paramedic, are ready to take on the added responsibility associated with performing RSI. Are you completely comfortable with your basic airway and intubation skills or do you need more time to develop them? Are you intimately familiar with the backup airways and medications? If not, then RSI is not for you. Basic airway management is not a part of this program. Rather is it (sic)

expected that anyone wishing to obtain RSI privileges be able to demonstrate mastery of basic airway assessment and management, as well as endotracheal intubation.

Once ready, you will need to complete some competencies and meet other minimum requirements:

- Been a paramedic for a minimum of 2 years
- Documented a minimum of 5 successful field intubations. This is beyond any intubations performed as a student
- Completion of the Airway Assessment Module
- Completion of the Backup Airway Module
- Completion of the Pharmacology Module
- Completion of the Malignant Hyperthermia Competency
- Completion of the Rapid Sequence Intubation Module (aka Putting it all Together)
- Successfully complete the RSI in-service. This involves the RSI class, a final written exam, practical exams on the backup devices and completing RSI SimLab with Medical Director.

Once the requirements are met the EMS Medical Director and Unit Leader will review your packet and, if satisfied, give you final approval. Once you have protocol, they must be renewed every 2 years. The renewal process will require:

≥ 10 successful prehospital RSIs (no further recertification required)
< 10 successful prehospital RSIs (two options)
1 – Challenge SimLab final practical and exam with approval from program Medical Director.
2 – Complete NH RSI training modules/SimLab

9. As reflected by the Administrative Packet and Student Manual, RSI is not a basic procedure which all paramedics are expected to easily master. Even if a paramedic has completed relevant competencies and met the specified minimum requirements the EMS Medical Director and Unit Leader may withhold final approval. A paramedic who obtains approval is thereafter subject to a biennial renewal process. A paramedic attempting to obtain RSI certification clearly faces a challenging process which includes a final decision by the EMS Medical Director and Unit Leader who have discretion to deny RSI credentials to an applicant who has otherwise completed the competencies and met the minimum requirements.

10. The administration of RSI during the a paramedic's delivery of emergency medical services is somewhat daunting on account of the use of paralytics, which removes the patient's existing respiratory efforts and thereby eliminates any patient ability to breathe independently.

11. Derek Martel is a bargaining unit employee and an EMT basic. He is not a paramedic, but he has worked with paramedics during emergency service calls. He has not observed a paramedic perform RSI during the past 12 years. He understood and believed that until 2011 paramedic attainment of RSI credentials was voluntary, not mandatory.

12. Ian Butman is the current Union president and has worked in the City fire department since 1986, and has been a Firefighter-Paramedic since 1989. According to Mr. Butman, RSI is a high risk/low frequency procedure, and he notes that currently paramedics are required to perform to the maximum level of their certification before contacting a physician. These circumstances may combine to adversely affect the confidence of paramedics in their ability to successfully complete the RSI procedure. Like Derek Martell he does not believe that obtaining RSI certification has been mandatory all along as claimed by the City.

13. The City fire department hired Aaron McIntire as a paramedic in 1998. He has since held a number of positions. In 2003 he was promoted to Paramedic/Lieutenant, and his duties included supervising, educating, training, and overseeing paramedic activities on a daily basis. In 2006 he was promoted to Captain, and in that capacity was second in command of shift level training and also was in charge of the central station. In 2008 Mr. McIntire was promoted to Battalion Chief. In that position he had daily oversight of the 22-24 department members who were on duty at any given time for 4 stations, including all daily operational functions within that shift such as EMS and fire related activities. In 2011 he became the Bureau Chief for Emergency Medical Services and Professional Standards. He has currently has four key areas of oversight: 1. Emergency medical services; 2. Emergency medical training; 3. Safety; and 4. Professional development.

14. Bureau Chief McIntire's testimony supports the Union's contention that RSI credentials were not mandatory prior to mid-2011:

Question (by Attorney Pacik, Assistant City Solicitor): You've heard that, it was I believe, Derek Martell testified, and also Ian Butman, that they never believed that RSI was mandatory. Could you respond to that?

Answer: Ah, I think from an organizational (inaudible) it was something we had started very early on that we had all wanted to do it was the right thing to do for the patient...to do what is in the patient's best interests. This was a skill that we'd been providing and trained on since 2001.

15. Bureau Chief McIntire also described how the City or City fire department is credentialed as an RSI agency and it is "our goal" to train all paramedics to be competent in RSI and to have paramedics perform it where it is medically appropriate.

16. Neither the December 2006 nor the February 2008 Firefighter/Paramedic job description (City Exhibits H and I) list RSI under "Minimum Qualifications Required...Licenses and Certifications."

17. Both the December 2006 and the February 2008 job descriptions include "[p]harmaceutically inducing coma in a conscious patient undergoing a life-altering event" under the "Skill in" heading. There was no evidence from anyone involved in the preparation of these two job descriptions as to the meaning of this phrase. However, Dr. David Hirsch, who has been an emergency room physician at Concord Hospital since July, 2010 and the Emergency Medical Services Director since September, 2010, testified that the phrase refers to RSI given the "pharmaceutically inducing coma" language.

18. When the subject of Rapid Sequence Intubation is mentioned or described in other exhibits and testimony presented at hearing, the term "RSI," and not "[p]harmaceutically inducing coma in a conscious patient undergoing a life-altering event," is predominately, if not universally, used.

19. In an exchange of letters in July, 2011 counsel for the Union received assurances from the City Solicitor that RSI was not mandatory for fire department paramedics unless required by the current contract but the "fire department administration strongly encourages IAFF members

to be certified in certain life saving techniques and procedures, which may be above and beyond the baseline requirements." See Joint Exhibits 7-9.

20. By letter dated August 22, 2011 the Union submitted a bargaining proposal as part of ongoing negotiations seeking to preserve and confirm what the Union understood to be the voluntary nature of fire department paramedic participation in RSI training and certification, among other things. This letter discusses and requests negotiations concerning the RSI program. See Joint Exhibit 10. The City Solicitor responded by letter dated September 7, 2011 in which he disagreed with the Union's characterization of RSI as a voluntary program for paramedics based upon the "[p]harmaceutically inducing coma in a conscious patient undergoing a life-altering event" language in the job descriptions and which he equates with the RSI skill. See Joint Exhibit 11.

Decision and Order

Decision Summary:

Prior to August, 2011 the City strongly encouraged but did not require Firefighter/Paramedics to hold an RSI certification. In September 2011 the City notified the Union that holding an RSI certification was mandatory for paramedics. We find that the City's managerial rights include the right to mandate the RSI certification for Firefighter/Paramedics, and the City is not obligated to bargain this decision. However, this mandatory requirement impacts working conditions and the City is obligated to bargain with the Union over this impact.

Jurisdiction:

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

Discussion:

In general, pursuant to RSA 273-A:3, I, the City is obligated to negotiate in good faith the terms and conditions of employment with the Union. RSA 273-A:1, XI defines "terms and conditions of employment" 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.

The extent to which the City is obligated to bargain the Union's RSI proposal concerning Firefighter/EMT-Paramedics[1] (Joint Exhibit 10) requires the application of the court's three part test to determine if the subject matter[2] of the Union's proposal is a mandatory, permissive, or prohibited subject of bargaining. Public employers like the City must bargain mandatory subjects, may bargain permissive subjects, and may not bargain prohibited 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

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[1] RSA 153-A:11 and Saf-C 5902.07 govern the EMT certification process, inclusive of an EMT-paramedic level of certification. Saf-C rules/regulations 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.

[2] Specifically making RSI training and credentials mandatory.

> 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). *See also Appeal of City of Nashua Board of Education,* 141 N.H. 768, 772-73 (1997)(public employer may not make unilateral changes to terms and conditions of employment, like wages, which are mandatory subjects of bargaining; *Appeal of State,* 138 N.H. at 724 (union discipline proposal not subject to mandatory bargaining, but state may choose to bargain the proposal); and *Appeal of International Association of Firefighters,* 123 N.H. 404, 408 (1983)(fire department platoon size was a permissive subject of bargaining and city could have properly refused to bargain the union's proposal).

Whether Firefighter-EMT/Paramedics[3] should be required to have RSI credentials is not a matter which has been reserved to the City's exclusive managerial authority by the constitution, or by statute or statutorily adopted regulation. [4] The Union's proposal therefore satisfies the first step of the three part test and is not a prohibited subject of bargaining. However, it does not satisfy the second part of the test and therefore is a permissive subject of bargaining which the City. Requiring paramedics in the fire department to have RSI credentials involves public employer methods, technology, and direction of personnel consistent with public control of governmental functions within the meaning of RSA 273-A:1, XI. In other words, the nature and extent of the emergency medical services the City provides to its residents is a matter of broad managerial policy "within the exclusive prerogative" of the City.

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[3] In general, the different levels of emergency medical service providers are First Responder, EMT-Basic, EMT-Intermediate, and EMT-Paramedic. Licensing/qualification is through the State. See

[4] *See Appeal of Nashua Board of Education,* 141 N.H. 768,774 (1997)(the reference to "statutes" reserving particular subjects to the exclusive managerial authority of the public employer means statutory authority independent of the managerial policy exception expressed in RSA 273-A:1, XI.)

This leaves the issue of impact bargaining.[5] In its post-hearing brief the City argues that the Union did not raise or preserve the issue of impact bargaining. This argument is not persuasive for a number of reasons. The Union requested negotiations relating to the RSI program in August, 2011 (Joint Exhibit 10), and in its complaint the Union complained about the City's failure to participate in any direct or impact negotiations (Paragraph 9, Union's complaint). Finally, the pre-hearing order (PELRB Decision No. 2012-010)(issued after the pre-hearing conference during which the parties discuss and clarify claims and issues per Pub 202) also references a failure to impact bargain as part of the Union's complaint.

The City also argues that a mandatory RSI requirement for paramedics is not new, and it is too late for the Union to bargain the effect of the requirement. However we conclude that until mid-2011 paramedic participation in RSI training and certification was strongly encouraged but was not mandatory. This is supported by the testimony of Derek Martel, Ian Butman, and Bureau Chief McIntire. Bureau Chief McIntire's testimony was particularly helpful given his extensive involvement and oversight of department paramedics over the last decade. There is also the July 2011 written exchange between counsel, which is more consistent with the Union's position than the City's position on this question.

The inclusion of the "pharmaceutically inducing coma" language in the 2006 and 2008 job descriptions does not lead us to a different conclusion. The placement or location of the "pharmaceutically inducing coma" language in the job description is inconsistent with a finding that it is a "mandatory requirement." It is not one of the credentials and certifications listed under "Minimum Qualifications Required...Licenses and Certifications". Additionally, "Rapid

[5] The obligation of a public employer to impact bargain the effect of a decision "within [its] exclusive prerogative" can arise in a number of circumstances. See *Derry Police Patrolmen's Association, NEPBA Local 38 v. Town of Derry,* PELRB Decision No. 2011-278 (impact bargaining effect of installation of GPS devices in police cruisers); *Laconia Education Association/NEA-NH v. Laconia School District,* PELRB Decision No. 2008-204 (impact bargaining effect of schedule change); *Conway Administrator's Assoc/Teamsters Local 633 of NH v Conway School District,* PELRB Decision No. 93-33(impact bargaining effect of changes to administrative evaluations).

Sequence Intubation" or "RSI" (and not "pharmaceutically induced coma") appear to be, based upon the record in this case, the more universally used terminology when describing the emergency medical procedure involved. See, for example, City Exhibits J, K, L, M, N, O, P, S, and V. However, this common and predominant terminology was not used in the job descriptions. Finally, it is not clear that having "skill in" (the language in the job descriptions) using pharmaceuticals to induce a "coma in a conscious patient undergoing a life-altering event" is the equivalent of obtaining RSI certification via the process described in Findings of Fact 7-10.

Therefore, the City is obligated to bargain the effect of its decision on the terms and conditions of employment, like wages and hours and other conditions. We believe both parties are sophisticated enough to proceed with the bargaining process in an appropriate and meaningful way without overly specific directives from the PELRB. We expect, by way of example, and not limitation, that such negotiations will consider and take into account the mandatory training itself, which consists of challenging requirements and uncertain outcomes per the FST&EMS RSI. Topics for consideration may include where will training be held, when will it be held, how often will it be offered, what support will be provided to paramedics seeking to successfully complete the training, master the skill, and utilize the skill during the course of their employment, and how many opportunities will a paramedic have to obtain RSI credentials? Wages, compensation and other benefits are also affected, as paramedics are now being required to undergo training and certification to obtain a specialized skill related to the provision of emergency medical services beyond what is necessary for an EMT-Paramedic licensure under applicable State law and regulations.

Accordingly, the Union's Unfair Labor Practice complaint is upheld in part and denied in part. The City has committed an unfair labor practice in violation of RSA 273-A:3, I and 273-A:5, I (e) and (g). As discussed, the City's bargaining obligations include the obligation to bargain the effect of its decision, and the City's refusal to participate in such negotiations

constitutes an unfair labor practice in violation of RSA 273-A:3, I and 273-A:5, I (e) and (g). The City shall immediately proceed to bargain with the Union the impact of the mandatory RSI certification requirement. Further, pending the completion of such negotiations, the City shall refrain from making any change or taking any adverse action with respect to the employment of any Firefighter/Paramedic on account of the employee's RSI certification status.

The Union's charge that the City has violated RSA 273-A:5, I (a) and (g) is dismissed. The City is not obligated to negotiate whether fire department paramedics should be required to obtain and maintain RSI credentials.

The City shall post this decision in areas in the workplace where affected employees work for at least 30 days.

So ordered.

November 13, 2012.

Charles S. Temple, Esq., Chair

By unanimous vote of Chair Charles S. Temple, Board Member Kevin E. Cash and Board Member Carol M. Granfield.

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