THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2017-0115

APPEAL OF THE STATE EMPLOYEES' ASSOCIATION/SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1984,

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BRIEF FOR APPELLANT
STATE EMPLOYEES' ASSOCIATION/SERVICE EMPLOYEES, LOCAL 1984

State Employees' Association
Local 1984,
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I. QUESTIONS PRESENTED FOR REVIEW

1. Whether the PELRB acted unlawfully, unjustly or unreasonably in failing to apply the clear and unambiguous language of RSA 273-A:11, II which provides that a reasonable number of employees who act as representatives of the bargaining unit shall be given reasonable opportunity to meet with the employer or its representatives during working hours without loss of compensation or benefits? CR at 281, 285

2. Whether the PELRB acted unlawfully, unjustly or unreasonably in failing to determine that compensation paid to adjunct faculty for tutoring students by the public employer on assignments constituted wages and as such a mandatory subject of bargaining? CR at 284

3. Whether the PELRB acted unlawfully, unjustly or unreasonably in failing to apply the tri partite test articulated by this Honorable Court in Appeal of State, 138 N.H. 716 (1994) to determine whether tutoring is a mandatory, permissive or prohibited subject of bargaining in New Hampshire? CR at 284

4. Whether the PELRB acted unlawfully, unjustly, or unreasonably in determining that tutoring services provided at no additional cost to the students and performed by adjunct faculty are not an "integral" part of an adjunct's duties despite the evidence to the contrary? CR at 281-283

5. Whether the PELRB acted unlawfully, unjustly, or unreasonably in failing to apply the clear and unambiguous language of RSA 273-A:1, XI and RSA 273-A:3, which collectively requires that a public employer negotiate in good faith with an exclusive representative regarding wages, hours and other conditions of employment? CR at 262-263

6. Whether the PELRB acted unlawfully, unjustly, or unreasonably in relying upon the voluntary nature of tutoring for determining that tutoring is not "unit work and not subject to bargaining by the exclusive representative and the public employer? CR at 283

7. Whether the PELRB acted unlawfully, unjustly, or unreasonably in improperly distinguishing the controlling case of Appeal of Berlin Education Ass'n, NHEA/NEA, 125 N.H. 779, 784 (1984)? CR at 281

II. STATUTORY PROVISIONS

188-F:1 Community College System of New Hampshire Established. – The community college system of New Hampshire is hereby established and made a body politic and corporate, the main purpose of which shall be to provide a well-coordinated system of public community college education offering, as a primary mission, technical programs to prepare students for technical careers as well as general, professional, and transfer programs, and certificate and short term training programs which serve the needs of the state and the nation. The colleges of the community college system of New Hampshire are authorized to grant and confer in the name of

the colleges all such degrees, literary titles, honors, and distinctions as other community colleges may of right do. The community college system of New Hampshire shall include, but is not limited to, colleges in Berlin, Claremont, Concord, Laconia, Manchester, Nashua, and Portsmouth. The community college system may also include regional academic centers that make quality educational opportunities accessible to New Hampshire residents.

Source. 2007, 361:2, eff. July 17, 2007. 2010, 199:1, eff. Aug. 20, 2010. 2011, 35:1, eff. July 8, 2011.

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188-F:2 Governance. – The community college system of New Hampshire shall be governed by a single board of trustees which shall be its policy-making and operational authority. The board of trustees shall be responsible for ensuring that the colleges operate as a well coordinated system of public community college education.

Source. 2007, 361:2, eff. July 17, 2007.

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188-F:6 Authority of the Board of Trustees. – The trustees shall have the management and control of all the property and affairs of the community college system, all of its colleges, divisions, and departments. In addition to this authority, the trustees are authorized to:

I. Develop and adopt bylaws for the regulation of its affairs and the conduct of business and to adopt an official seal and alter it as necessary or convenient.

II. Oversee the administration of the community college system of New Hampshire and its colleges, divisions, departments, and regional academic centers, to determine the organizational structure and operational policies and procedures for the community college system, and to render the final decision on the closure of any college or regional academic center.

III. (a) Appoint and fix the compensation of a chancellor of the community college system of New Hampshire who shall serve as the chief executive officer of the community college system, as the community college system's primary liaison with the general court and other elements of state government, and as chief spokesperson for the community college system. The chancellor shall be qualified by education and experience and shall serve at the pleasure of the board.

(b) Approve the nomination by the chancellor, and fix the compensation of a vice-chancellor who shall be qualified by education and experience and who shall serve at the pleasure of the chancellor.

(c) Approve the nomination by the chancellor, and fix the compensation of a president of each community college system of New Hampshire college, who shall be the chief academic and administrative officer of his or her institution. The president, who shall report to the chancellor, shall be the chief executive officer of his or her college, and shall have the authority for and be responsible for the general administration and supervision of all operations of that college, and shall have such other duties as the board of trustees may determine. The president shall be qualified by education and experience and shall serve at the pleasure of the board.

(d) Appoint and fix the compensation and duties of such other community college system of New Hampshire administrators as are needed to provide a well-coordinated system of public higher education.

(e) Employ and prescribe the duties of personnel as may be necessary to carry out the purposes for which the community college system of New Hampshire has been created.

IV. Accept legacies and other gifts to or for the benefit of the community college system.

V. Accept any moneys accruing to the community college system and its colleges, or moneys appropriated by or received from the United States government or the state of New Hampshire, including federal financial aid, and any grant moneys from state or federal governmental agencies, public or private corporations, foundations or organizations for the benefit and support of the community college system.

VI. Prepare and adopt a biennial operating budget for presentation to the governor and the general court. Each college within the community college system of New Hampshire and the chancellor's office shall be considered a separate division and budgetary unit. The community college system of New Hampshire shall submit its budget in accordance with RSA 9:4-e and at the same time as state agencies. All claims to be presented for the issuance of warrants submitted by the colleges and the system office of the community college system of New Hampshire shall be pre-audited by the community college system of New Hampshire, and such certification shall be sufficient evidence for the director of the division of accounting services to fulfill such responsibilities relative to the debt incurred by the community college system of New Hampshire.

VII. Prepare and adopt a biennial capital improvements budget for presentation to the governor and the general court.

VIII. Receive, expend, allocate, and transfer funds within the community college system of New Hampshire as necessary to fulfill the purposes of the community college system. The trustees shall have no authority over any funds appropriated to the police standards and training council or to the McAuliffe-Shepard discovery center, which shall not be commingled with any funds of the community college system of New Hampshire.

IX. Invest any funds not needed for immediate use, including any funds held in reserve, in property and securities in which fiduciaries in the state may legally invest funds.

X. Establish and collect tuition, room and board, and fees, and to set policies related to these and other charges, including fees for the reasonable use of community college system of New Hampshire facilities.

XI. Enter into any contracts, leases, and any other instruments or arrangements that are necessary, incidental, or convenient to the performance of its duties and responsibilities.

XII. Acquire consumable supplies, materials, and services through cash purchases, sole-source purchase orders, bids, or contracts as necessary to fulfill the purposes of this chapter.

XIII. Acquire by purchase, gift, lease, or rent any property, lands, buildings, structures, facilities, or equipment necessary to fulfill the purposes of this chapter.

XIII-a. Enter into a contract for the sale of real property with the prior approval of the long range capital planning and utilization committee and governor and council, provided that the state shall retain the right of first refusal in any proposed sale of real property. This paragraph shall not apply to real property acquired by the community college system of New Hampshire after the effective date of this paragraph.

XIV. Grant or otherwise transfer utility easements.

XV. Authorize and enter any contracts, leases, and any other instruments or arrangements that are necessary, incidental, or related to the construction, maintenance, renovation, reconstruction, or other necessary improvements of community college system of New Hampshire buildings, structures, and facilities.

XVI. Develop and adopt personnel policies and procedures for the community colleges. The board of trustees shall determine the qualifications, duties, and compensation of its employees and shall allocate and transfer personnel within the community college system of New Hampshire as necessary to fulfill the purposes of this chapter.

XVII. Appoint or identify college or program advisory committees to advise the community colleges with respect to strategic directions, general, professional, career, and training policies and programs and their modification to meet the needs of the state's economy and the changing job market.

XVIII. Adopt principles of effective self-governance and to assess board processes, policies, and operations in light of such principles.

XIX. Delegate duties and responsibilities as necessary for the efficient operation of the community college system of New Hampshire and to do other acts or things necessary or convenient to carry out the powers and duties set forth in this chapter.

XX. By and with the consent of the governor and council, borrow on the credit of the community college system of New Hampshire in anticipation of income for the purpose of forwarding its building program, not exceeding $500,000 in any one fiscal year. All amounts so obtained in any fiscal year shall be repaid from the income of the next succeeding year.

XXI. Enter into program and service relationships with state departments, divisions, and other state entities through memoranda of understanding.

Source. 2007, 361:2, eff. July 17, 2007. 2009, 13:6, eff. April 17, 2009. 2010, 199:2, 4, 7, eff. Aug. 20, 2010. 2011, 35:2, eff. July 8, 2011; 199:3, eff. Aug. 19, 2011. 2016, 319:6, eff. July 1, 2016.

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188-F:7 Employment; Benefits; Retirement System Status. –

I. Any changes to the conditions of employment, compensation, and benefits of community college system of New Hampshire employees covered by collective bargaining agreements shall be negotiated through the collective bargaining process.

II. The community college system of New Hampshire shall, as of the effective date of this section, be considered an employer for the purposes of RSA 100-A:1, IV. Full-time employees of the community college system of New Hampshire as of the effective date of this section shall be considered employees for the purposes of RSA 100-A:1, V.

III. Service as an employee of the community college system of New Hampshire shall be creditable service for purposes of RSA 100-A, RSA 21-I:29, RSA 21-I:30, RSA 21-I:30-a, RSA 21-I:30-b, and RSA 21-I:30-c. Any community college system of New Hampshire employee who transfers, without a break in service, to a state classified, unclassified, or nonclassified service position shall retain and transfer all leave accruals and seniority and be entitled to all the rights and benefits of a permanent employee in the classified or unclassified service of the state based on the years of creditable state service. At the time of such a transfer, the employee shall immediately begin to accrue annual and sick leave as granted at the time of the transfer by the

receiving agency according to the employee's continuous years worked. Any state employee in a classified, unclassified, or nonclassified service position who transfers, without a break in service, to the community college system of New Hampshire shall retain and transfer all leave accruals and seniority and be entitled to all the rights and benefits of a permanent employee in the classified or unclassified service of the state based on the years of creditable state service. At the time of such a transfer, the employee shall immediately begin to accrue annual and sick leave as granted at the time of the transfer by the receiving agency according to the employee's continuous years worked.

IV. Membership in the retirement system shall be optional for positions within the community college system of New Hampshire for which participation was optional as of June 30, 2007, and for such other positions within the community college system of New Hampshire as may be designated by the board of trustees.

V. The community college system of New Hampshire shall remit to the state on a monthly basis the cost of retiree health care benefits for employees who have retired on or after July 1, 2011. The amount due shall be based on current enrollment for that month and the working rate for the calendar year. Invoices from the department of administrative services shall contain retiree enrollment detail in regards to the amount due. The department shall provide the community college system an anticipated budget each biennium as part of the retiree health budget process.

Source. 2007, 361:2, eff. July 17, 2007. 2010, 199:5, eff. Aug. 20, 2010. 2015, 276:24, eff. July 1, 2015.

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273-A:1 Definitions. – In this chapter:

I. "Board" means the public employee labor relations board created by RSA 273-A:2.

II. "Board of the public employer" means the executive body of the public employer, such as the city council, board of selectmen, the school board or the county commissioners.

(a) For purposes of this chapter:

(1) The board of the public employer for executive branch state employees means the governor and council.

(2) The board of the public employer for the judiciary means the chief justice of the supreme court with the advice and consent of the judicial branch administrative council appointed pursuant to supreme court rule 54.

(b) In certain political subdivisions of the state the board of the public employer may also be the legislative body.

III. "Budget submission date" means the date by which, under law or practice, the public employer's proposed budget is to be submitted to the legislative or other similar body of the government, or to the city council in the case of a city, for final action. In the case of a town, school district or supervisory union it means February 1 of each year, except in the case of a city school district or city school administrative unit which has a separate budget submission date applied to it by the city.

IV. "Cost item" means any benefit acquired through collective bargaining whose implementation requires an appropriation by the legislative body of the public employer with which negotiations are being conducted.

V. "Grievance" means an alleged violation, misinterpretation or misapplication with respect to

one or more public employees, of any provision of an agreement reached under this chapter.
VI. "Impasse" means the failure of the 2 parties, having exhausted all their arguments, to achieve agreement in the course of good faith bargaining, resulting in a deadlock in negotiations.
VII. "Legislative body" means that governmental body having the power to appropriate public money. The legislative body of the state community college system and university system shall be the board of trustees.
VIII. "Professional employee" means any employee engaged in work predominantly intellectual and varied in character, involving the consistent exercise of discretion and judgment, and requiring knowledge in a discipline customarily acquired in a formal program of advanced study.
IX. "Public employee" means any person employed by a public employer except:
(a) Persons elected by popular vote;
(b) Persons appointed to office by the chief executive or legislative body of the public employer;
(c) Persons whose duties imply a confidential relationship to the public employer; or
(d) Persons in a probationary or temporary status, or employed seasonally, irregularly or on call. For the purposes of this chapter, however, no employee shall be determined to be in a probationary status who shall have been employed for more than 12 months or who has an individual contract with his employer, nor shall any employee be determined to be in a temporary status solely by reason of the source of funding of the position in which he is employed.
X. "Public employer" means the state and any political subdivision thereof, the judicial branch of the state, any quasi-public corporation, council, commission, agency or authority, the state community college system, and the state university system.
XI. "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.
XII. [Repealed.]

Source. 1975, 490:2. 1977, 437:1. 1983, 270:1. 2001, 170:1, 2. 2007, 107:1, eff. June 11, 2007; 368:1, eff. Sept. 15, 2007. 2011, 159:1, I, eff. Aug. 8, 2011. 2014, 13:1, 2, eff. July 13, 2014.

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273-A:3 Obligation to Bargain. –
I. It is the obligation of the public employer and the employee organization certified by the board as the exclusive representative of the bargaining unit to negotiate in good faith. "Good faith" negotiation involves meeting at reasonable times and places in an effort to reach agreement on the terms of employment, and to cooperate in mediation and fact-finding required by this chapter, but the obligation to negotiate in good faith shall not compel either party to agree to a proposal or to make a concession.

II. (a) Any party desiring to bargain shall serve written notice of its intention on the other party at least 120 days before the budget submission date; provided, however, that bargaining with state employees shall commence not later than 120 days before the deadline for submission of the governor's proposed operating budget.

(b) Only cost items shall be submitted to the legislative body of the public employer for approval at the next annual meeting of the legislative body, unless there is an emergency as defined in RSA 31:5 or RSA 197:3. If the legislative body rejects the submission, or while accepting the submission takes any action which would result in a modification of the terms of the cost item submitted to it, either party may reopen negotiations on the entire agreement. No cost item agreed to by the public employer and the employee organization shall be modified by the legislative body of such public employer.

(c) If the public employer is a local political subdivision with a city or town council form of government cost items shall be submitted within 30 days to the city council or aldermen or to the town council for approval. Within 30 days of the receipt of the submission, the city council, aldermen, or the town council shall vote to accept or reject the cost items. If the city council or aldermen or the town council rejects any part of the submission, or while accepting the submission takes any action which would result in a modification of the terms of the cost item submitted to it, either party may reopen negotiations on all or part of the entire agreement.

III. Matters regarding the policies and practice of any merit system established by statute, charter or ordinance relating to recruitment, examination, appointment and advancement under conditions of political neutrality and based upon principles of merit and competence shall not be subjects of bargaining under the provisions of this chapter. Nothing herein shall be construed to diminish the authority of the state personnel commission or any board or agency established by statute, charter or ordinance to conduct and grade merit examinations from which appointments or promotions may be made.

IV. Each public employer shall record its budget submission date with the board.

Source. 1975, 490:2. 1977, 437:2. 1979, 374:3. 1985, 39:1. 1998, 205:1, eff. Aug. 17, 1998. 2013, 244:1, eff. Sept. 22, 2013.

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273-A:5 Unfair Labor Practices Prohibited. –

I. It shall be a prohibited practice for any public employer:

(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;

(c) To discriminate in the hiring or tenure, or the terms and conditions of employment of its employees for the purpose of encouraging or discouraging membership in any employee organization;

(d) To discharge or otherwise discriminate against any employee because he has filed a complaint, affidavit or petition, or given information or testimony under 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;

(f) To invoke a lockout;

(g) To fail to comply with this chapter or any rule adopted under this chapter;
(h) To breach a collective bargaining agreement;
(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.

II. It shall be a prohibited practice for the exclusive representative of any public employee:
(a) To restrain, coerce or otherwise interfere with public employees in the exercise of their rights under this chapter;
(b) To restrain, coerce or otherwise interfere with public employers in their selection of agents to represent them in collective bargaining negotiations or the settlement of grievances;
(c) To cause or attempt to cause a public employer to discriminate against an employee in violation of RSA 273-A:5, I(c), or to discriminate against any public employee whose membership in an employee organization has been denied or terminated for reasons other than failure to pay membership dues;
(d) To refuse to negotiate in good faith with the public employer;
(e) To engage in a strike or other form of job action;
(f) To breach a collective bargaining agreement.
(g) To fail to comply with this chapter or any rule adopted hereunder.

Source. 1975, 490:2. 1979, 374:4, eff. Aug. 22, 1979.

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273-A:8 Determining Bargaining Unit. –

I. The board or its designee shall determine the appropriate bargaining unit and shall certify the exclusive representative thereof when petitioned to do so under RSA 273-A:10. In making its determination the board should take into consideration the principle of community of interest. The community of interest may be exhibited by one or more of the following criteria, although it is not limited to such:
(a) Employees with the same conditions of employment;
(b) Employees with a history of workable and acceptable collective negotiations;
(c) Employees in the same historic craft or profession;
(d) Employees functioning within the same organizational unit.

In no case shall the board certify a bargaining unit of fewer than 10 employees with the same community of interest. For purposes of this section, probationary employees shall be counted to satisfy the employee minimum number requirement. In no case shall such probationary employees vote in any election conducted under the provisions of this chapter to certify an employee organization as the exclusive representative of a bargaining unit.

II. The board may certify a bargaining unit composed of professional and non-professional employees only if both the professional and non-professional employees, voting separately, vote to join the proposed bargaining unit. Persons exercising supervisory authority involving the significant exercise of discretion may not belong to the same bargaining unit as the employees they supervise.

III. In the event the bargaining unit is determined by the board's designee, the decision may be appealed to the board for final determination.

Source. 1975, 490:2. 1983, 270:2. 2008, 137:1, eff. Aug. 5, 2008. 2011, 45:1, eff. July 8, 2011.

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273-A:11 Rights Accompanying Certification. –

I. Public employers shall extend the following rights to the exclusive representative of a bargaining unit certified under RSA 273-A:8:

(a) The right to represent employees in collective bargaining negotiations and in the settlement of grievances. An individual employee may present an oral grievance to his employer without the intervention of the exclusive representative. Until the grievance is reduced to writing, the exclusive representative shall be excluded from a hearing if the employee so requests; but any resolution of the grievance shall not be inconsistent with the terms of an existing agreement between the parties.

(b) The right to represent the bargaining unit exclusively and without challenge during the term of the collective bargaining agreement. Notwithstanding the foregoing, an election may be held not more than 180 nor less than 120 days prior to the budget submission date in the year such collective bargaining agreement shall expire.

II. A reasonable number of employees who act as representatives of the bargaining unit shall be given a reasonable opportunity to meet with the employer or his representatives during working hours without loss of compensation or benefits.

Source. 1975, 490:2, eff. Aug. 23, 1975.

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273-A:12 Resolution of Disputes. –

I. (a) Whenever the parties request the board's assistance or have bargained to impasse, or if the parties have not reached agreement on a contract within 60 days, or in the case of state employees 90 days, prior to the budget submission date, and if not otherwise governed by ground rules:

(1) The chief negotiator for the bargaining unit may request to make a presentation directly to the board of the public employer. If this request is approved by the board of the public employer, the chief negotiator for the board of the public employer shall in turn have the right to make a presentation directly to the bargaining unit. The cost of the respective presentations shall be borne by the party making the presentation.

(2) The chief negotiator for the board of the public employer may request to make a presentation directly to the bargaining unit. If this request is approved by the bargaining unit, the chief negotiator for the bargaining unit shall in turn have the right to make a presentation directly to the board of the public employer. The cost of the respective presentations shall be borne by the party making the presentation.

(b) If the impasse is not resolved, a neutral party chosen by the parties, or failing agreement, appointed by the board, shall undertake to mediate the issues remaining in dispute. If the parties so choose, or if mediation does not result in agreement within 45 days, or in the case of state employees 75 days, prior to the budget submission date, a neutral party chosen by the parties, or failing agreement, appointed by the board, shall make and report findings of fact together with recommendations for resolving each of the issues remaining in dispute, which findings and

recommendations shall not be made public until the negotiating teams shall have considered them for 10 days.

II. If either negotiating team rejects the neutral party's recommendations, his findings and recommendations shall be submitted to the full membership of the employee organization and to the board of the public employer, which shall vote to accept or reject so much of his recommendations as is otherwise permitted by law.

III. (a) If either the full membership of the employee organization or the board of the public employer rejects the neutral party's recommendations, the findings and recommendations shall be submitted to the legislative body of the public employer at the next annual meeting of the legislative body, unless there is an emergency as defined in RSA 31:5 or RSA 197:3, which shall vote to accept or reject so much of the recommendations as otherwise is permitted by law.

(b) If the public employer is a local political subdivision with a city or town council form of government and if either the full membership of the employee organization or the board of the public employer rejects the neutral party's recommendations, the findings and recommendations shall be submitted within 30 days to the city council or aldermen or town council for approval. Within 30 days of the receipt of the submission, the city council or aldermen or town council shall vote to accept or reject the recommendations as otherwise is permitted by law.

IV. If the impasse is not resolved following the action of the legislative body, negotiations shall be reopened. Mediation may be requested by either party and may, at the mediator's option, involve the board of the public employer. In cases where the board of the public employer also serves as the legislative body of a municipality, the mediator may request no more than one less than a quorum of the legislative body to participate in the mediation.

V. Nothing in this chapter shall be construed to prohibit the parties from providing for such lawful procedures for resolving impasses as the parties may agree upon; providing that no such procedures shall bind the legislative body on matters regarding cost items. The parties shall share equally all fees and costs of such procedures.

VI. The parties shall share equally all fees and costs of mediation and fact-finding required by this chapter.

VII. [Repealed.]

Source. 1975, 490:2. 1979, 374:9. 1998, 205:2; 341:1. 2008, 388:1, eff. July 15, 2008. 2011, 3:1, eff. Mar. 1, 2011. 2012, 161:1, eff. Jan. 1, 2013.

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541:13 Burden of Proof. – Upon the hearing the burden of proof shall be upon the party seeking to set aside any order or decision of the commission to show that the same is clearly unreasonable or unlawful, and all findings of the commission upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable.

Source. 1913, 145:18. PL 239:11. 1937, 107:24; 133:85. RL 414:13.

III. STATEMENT OF THE CASE/STATEMENT OF FACTS

On August 18, 2016, the State Employees Association of New Hampshire, SEIU Local 1894 (hereinafter "SEA") filed an unfair labor practice against the Community College System of New Hampshire (hereinafter "CCSNH" or "public emplpyer"), asserting that it failed to bargain in good faith when the CCSNH failed to negotiate over compensation for tutoring work and failed to allow a unit member to engage in the impasse resolution process without loss of pay or benefits[1] (Certified Record "CR" at 1-7). An adjudicatory hearing was held on October 3, 2016 before the Public Employee Labor Relations Board (hereinafter "PELRB") (CR at 34, 272).

These issues arose during the parties' last round of negotiations over a successor collective bargaining agreement and the post impasse dispute resolution mechanism provided by statute under RSA 273-A:12. The parties' relationship is governed primarily by a collective bargaining agreement between the SEA and the public employer. The most recent collective bargaining agreement expired on June 30, 2016 (CR at 27; Joint Stipulated Facts "SF" 4). This was the first collective bargaining agreement between the parties. The parties commenced negotiations on a successor collective bargaining agreement on February 22, 2016 (CR at 27; SF 5.). The parties reached impasse on May 23, 2016 and agreed to the services of mediator Gary Altman for mediation (CR at 26; SF 6). The mediation was conducted on Monday, July 18, 2016 (Id.).

The parties did not include compensation for tutoring in their first collective agreement (CR at 273). On March 7, 2016, the SEA proffered their first proposal, including a variety of requests, one of which adjuncts would be compensated based upon a prorated share of the compensation provided in the compensation article of the collective bargaining agreement for

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[1] The parties resolved all other complaints raised in the initial Unfair Labor Practice Complaint prior to submission of this case for decision (CR at 272).

duties exigent to classroom lecture requested or required by the employer, this would include tutoring (CR at 162; CR at 80; Transcript at 49, lines 1-4). On March 28, 2016, the public employer responded that they would not address or discuss the issue of tutoring, as it was, in their opinion, a prohibited subject of bargaining within the management prerogative to unilaterally determine the compensation for tutoring (CR at 85; Transcript at 54, lines 10-20; CR at 86; Transcript at 55, lines 4-11). In an attempt the facilitate discussions, the SEA reduced their demand for compensation to be paid for tutoring to $65.00 per hour (CR at 207).

The public employer refused to provide a counter and impasse was declared on May 23, 2016 (CR at 28). The public employer refused, and continues to refuse to negotiate compensation for tutoring work performed by adjuncts.

One of the members of the SEA's bargaining team, Professor RW (hereinafter "RW") is a member of the bargaining unit and has been an English Adjunct since 1990s. RW is also a member of the SEA's bargaining team and tutors for the public employer (CR at 274). Tutoring is a service provided exclusively to students of the public employer privately for assistance in their classroom activities (CR at 274; Findings of Fact "FOF" #6 see also CR at 105: Transcript at 74, lines 20-23[2] ; CR 57; Transcript at 26, lines 19-22). The public employer provides these services to the students at no extra charge (CR 105; Transcript at 74, lines 16-19). In other words, the tutoring is a service that is part of the tuition paid by the students.

Rebecca Dean is in charge of the tutoring at the Academic Center for Excellence, which includes the writing center at the CCSNH campus in Concord, NH. Rebecca Dean testified that **99.9%** of the work performed at the writing center related to the students' work assignments and is content driven as provided by professors, such as RW (CR at 94; Transcript at 63, lines 14-19;

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[2] Counsel identifies that there is a mistake in the transcript, and the words "whole two" should read "solely to".

CR at 105, Transcript at 74, lines 5-7). Ms. Dean reports to Pam Langley, the Vice President of Student Affairs (CR at 93; Transcript at 62, lines 1-8). The determination of whether the adjuncts would be paid for attending mediation was not made by Ms. Dean, but within the CCSNH through the Human Resources Department. See, CR at 107; Transcript at 76, lines 6-19; see also CR at 232. It is interesting to note that Director of Human Resources, Sarah Sawyer (CR at 242) was also a part of the CCSNH bargaining team for the first contract. See, CR at 152.

The CCSNH was established and made a body politic and corporate, the main purpose of which shall be to provide a well-coordinated system of public community college education offering, as a primary mission, technical programs to prepare students for technical careers as well as general, professional, and transfer programs, and certificate and short term training programs which serve the needs of the state and the nation. See, RSA 188-F:1 (CR at 211). The CCSNH is governed by a single Board of Trustees with whom vests all policy making and operational authority. See, RSA 188-F:2 (CR at 211). The Trustees' powers include, but are not limited to, overseeing the administration of the community college system of New Hampshire and its colleges, divisions, departments, and regional academic centers, to determine the organizational structure and operational policies and procedures for the community college system, and to render the final decision on the closure of any college or regional academic center; to appoint and fix the compensation and duties of such other community college system of New Hampshire administrators as are needed to provide a well-coordinated system of public higher education; and to employ and prescribe the duties of personnel as may be necessary to carry out the purposes for which the community college system of New Hampshire has been created. See, RSA 188-F:6; CR at 214-215. Further, the Board of Trustees are specifically empowered to negotiate any changes to the conditions of employment, compensation and

benefits of any employee covered by a collective bargaining agreement through the collective bargaining process. See, RSA 188-F:7 (CR at 216). It is undisputed that ACE is under the control and direction of CCSNH and that CCSNH is a public employer in this matter. See, CR at 27; SF 2.

On July 6, 2016, after the scheduling for mediation for July 18, 2016, a bargaining team member requested that he be able to attend mediation without loss of pay or benefits. The writing center's tutoring schedule had been approved on April 29, 2016 (CR at 233). On July 8, 2016, the bargaining unit member was provided the following response from the public employer's Human Resource Department, "Please be advised that RW is not eligible to be paid for tutoring hours that he has elected not to perform due to his participation in adjunct faculty negotiations. RW participates in adjunct faculty negotiations on a voluntary basis, as such he is not eligible to receive payment for work not performed due to participation. Therefore, RW request is denied." (CR at 275; FOF #10; CR at 28; SF 13).

On or about July 13, 2016, RW objected to not being paid for his scheduled tutoring (CR at 231). Thereafter, the writing center was closed for the day (CR at 235; CR 66; Transcript at 35, lines 10-17). The bargaining unit member was the only individual scheduled to work on Monday, July 18, 2016. See, CR at 234. In other instances, the adjuncts would substitute for one another so they would not lose compensation (CR at 66, Transcript at 35, lines 2-5; CR at 100; Transcript at 69, lines 12-17; CR at 125-126). However, RW was not provided this opportunity, based upon his status as a member of the bargaining team. The public employer's position was that because he volunteered for participation in a negotiating team, he forfeited his right to pay and benefits (CR at 232, CR at 28; SF 13).

The PELRB held an adjudicatory hearing on this matter on October 3, 2016 (CR at 34; Transcript at 3, line 2). The parties examined and cross examined witnesses, submitted stipulations and exhibits. The parties filed post hearing briefs by the November 4, 2016 deadline (CR at 272).

On or about December 15, 2016, the PELRB issued a decision, in contravention of the clear and unambiguous language of the Public Employee Labor Relations Act, that dismissed the SEA's charge of an unfair labor practice against the public employer for failure to bargain over tutoring. Further, the Board added as tutoring was not bargaining unit work, the public employer did not have to abide by RSA 273-A and allow a bargaining unit team to participate in mediation without loss of compensation or benefits. See, CR at 278-279 In reaching this holding, the PELRB unlawfully and unreasonable held that tutoring was not bargaining unit work. Ironically, the PELRB acknowledged that it is axiomatic that public employers are required to bargain with an exclusive representative under the Public Employee Labor Relations Act and that wages are mandatory subjects of bargaining (CR at 276). The PELRB, without authority and in contravention of the law, concluded that the public employer did not have to negotiate over tutoring, as it was not bargaining unit work. The PELRB unreasonably held that it was not bargaining unit work because tutoring was not an integral part of an adjunct's duties and was voluntary. See, CR at 277-278. The PELRB carved out, for the first time, an exception to the statutory requirement that public employers negotiate in good faith with an exclusive representative.

The SEA filed a timely Motion for Rehearing pursuant to Pub 205.02 (CR at 281-286) and the Motion for Rehearing was summarily denied without an opinion by a split vote of the PELRB on January 31, 2017 (CR at 293). On March 21, 2017, CCSNH moved for Summary disposition

of this matter prior to acceptance of the instant appeal. The Motion for Summary Disposition was denied by order of this Honorable Court on April 20, 2017. This appeal follows.

IV. SUMMARY OF ARGUMENT

The PELRB erred as, a matter of law, when it divested a member of the SEA bargaining team of the right to participate in mediation without loss of compensation or benefits by disregarding the clear, plain and unambiguous provisions of the law. The relevant statute provides that, "a reasonable number of employees who act as representatives of the bargaining unit shall be given a reasonable opportunity to meet with the employer or his representatives during working hours without loss of compensation or benefits." See, RSA 273-A:11, II. The clear an unambiguous language of RSA 273-A:11, II requires that RW be able to participate in negotiations without fear of reprisal and without loss of compensation or benefits.

The PELRB erroneously found that wages for tutoring, as a matter of law, did not constitute a subject of bargaining, in contravention of the well established law under the Public Employee Labor Relations Act and the decisional law interpreting mandatory subjects of bargaining. The PELRB, for the first time, without legal authority or support, deviates from the dictates of the PELRA by announcing exceptions to the command that public employers negotiate wages by creating a "non-bargaining unit work" exception. The PELRB issues this unlawful exception without any guidance or standard for the parties to follow. This decision allows a public employer to avoid the obligations under the statutory and regulatory framework set forth by the legislature by allowing an employer to avoid their obligations simply by declaring that a topic is not unit work.

In reaching this erroneous conclusion, the PELRB, while recognizing the public employer's duties to negotiate wages as "axiomatic" carves out an exception for tutoring and improperly distinguishes the controlling precedent of Appeal of Berlin Education Ass'n, 125 N.H. 779 (1991). The PELRB erroneously concludes that tutoring is not an integral part of the education system and that the voluntary nature of tutoring precludes it from being a mandatory subject of bargaining.

However, the decisional and statutory law provides that the voluntary nature of tutoring is irrelevant to the mandatory requirement to negotiate wages. Further, the great weight of the evidence demonstrated that tutoring is an integral part of the education process, and within the scope of the duties of an educator to assist students in completing mandatory assignments. The CCSNH concedes that **99.9%** of the time the work performed at the tutoring center related to student's work assignments.

The PELRB also erred, as a matter of law, in that it appears that the PELRB implicitly adopts the position that the certification of representation defines "unit work". However, the PELRB is incorrect as the certification defines the composition of the bargaining unit as to positions, not the work performed by the positions.

Finally, the PELRB failed to follow this Honorable Court's guidance in applying the appropriate analysis for the determination of whether subject matter between a public employer, CCSNH, and an exclusive representative is a mandatory, permissive or prohibited subject of bargaining, utilizing the tri partite test articulated in Appeal of State, 138 N.H. 716 (1994).

V. ARGUMENT

A. The PELRB divested members of their right to participate in mediation without a loss of pay or benefits.

On January 15, 2017, the PELRB ruled,

> CCSNH's argument that he is somehow disqualified from receiving any compensation because he voluntarily chose to serve on the SEA bargaining team is without merit and is rejected. However, a majority of the Board (A. Ellis and J. O'Mara) find that CCSNH did not violated this provision when it refused to compensated RW as demanded. This is because in the contacts of the PERLA, which involves collective bargaining or bargaining unit work, we understand the reference to "without loss of pay or benefit" to mean without loss of any pay or benefit derived from bargaining unit work.

Resolution of this petition requires statutory interpretation, which is a question of law that the Court reviews *de novo*. Hudson v. Director, N.H. Div. of Motor Vehicles, 155 N.H. 197, 198 (2007) "We are the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole." McDonald v. Town of Effingham Zoning Bd. Of Adjustment, 152 N.H. 171, 174, (2005) (quotation omitted). "When examining the language of a statute, we ascribe the plain and ordinary meaning to the words used." Bennett v. Town of Hampstead, 157 N.H. 477, 483, (2008) "We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. We interpret a statute in the context of the overall statutory scheme and not in isolation." *Id.* (citation omitted) When a statute's language is plain an unambiguous, we need not look beyond it for further indications of legislative intent. Appeal of Garrison Place, 159 N.H. at 542 (2009).

The relevant statute reads, "A reasonable number of employees who act as representatives of the bargaining unit shall be given a reasonable opportunity to meet with the employer or his representatives during working hours without loss of compensation or benefits."

See, RSA 273-A:11, II. The clear and unambiguous language of RSA 273-A:11, II requires that RW be able to participate in negotiations without fear of reprisal and without loss of compensation or benefits. See, RSA 273-A:11, II and RSA 273-A:5, I(g)(f).

The Board appropriately rejected the CCSNH's argument that RW was disqualified from receiving compensation because he voluntarily chose to serve on the SEA bargaining team. See, Decision at CR at 278. However, the Board found that CCSNH did not violate RSA 273-A:11, II when it refused to compensate RW as, "we understand the reference to "without loss of pay or benefits" to mean without loss of any pay or benefit derived from bargaining unit work." See, Decision (CR at 279). However, the clear and unambiguous language of RSA 271-A:11, II does not limit loss of pay to "unit work".

It is undisputed that CCSNH is the only public employer in this matter (CR at 27; SF 2). RW is a member of the bargaining team for the Union (CR at 274). Impasse was reached on or about May 23rd. The parties agreed upon Mediator Altman (Id.). On July 6, 2016, after the scheduling the mediation for July 18, 2016, bargaining team member RW requested that he be able to attend the mediation session without loss of pay or benefits. See, CR at 232. The writing center's tutoring schedule had been approved on April 29, 2016. See, CR at 233-234. On July 8, 2016, RW was informed,

> Please be advised that Mr. Watrous is not eligible to be paid for tutoring hours that he has elected not to perform due to his participation in adjunct faculty negotiations. Mr. Watrous participates in adjunct faculty negotiations on a voluntary basis, as such, he is not eligible to receive payment for work not performed due to such participation. Therefore, Mr. Watrous' request is denied (emphasis in original). See, CR at 28; CR at 232.

On or about July 13, 2016, RW objected to not being paid for the scheduled tutoring. See, CR at 231. Thereafter, the writing center

was closed for the day. See, CR at 235. It is interesting to note that RW was the only

individual scheduled to work on Monday, July 18, 2016. See, CR at 234. This divested RW of approximately $88.00 in pay. Testimony RW. In other instances, the adjuncts would substitute for one another so they would not lose compensation. See, CR at 125, 126. CR at 66; Transcript at 35; CR at 100; Transcript at 69, lines 12-17; CR at 125-126. However, RW was not provided any notice that the public employer intended to completely close the ACE writing center, and as such, effectively precluded him from an exchange with another tutor (CR at 66; Transcript at 35, lines 6-23; CR at 77; Transcript at 46, lines 10-15).

RW was not provided this opportunity based upon his status as a member of the negotiating team. It appears that CCSNH's position is that if an individual volunteers for participation in a negotiating team, they forfeit their right to pay and benefits because they are volunteers. The closing of ACE on July 18, in this matter, could constitute a prohibited lockout. Lockouts by a public employer are prohibited by law. See, RSA 273-A:5(i)(f). The dissenting opinion also properly noticed that the decision of the PELRB, if upheld, could create a chilling effect on employee participation in negotiations.

The clear and unambiguous language of RSA 273-A:11, II requires that RW be able to participate in negotiations without fear of reprisal and without loss of pay or benefits. See, RSA 273-A:11, II and RSA 273-A:5, I(g) and (f). The dissenting member aptly described the actions of CCSNH in this matter,

> In summary, the law is very clear, and employees should understand that we recognize their right, subject to the "reasonable number of employees" limitation, to participate in negotiations during working hours without losing any pay or benefits, including pay derived from non-bargaining unit work. CCSNH's actions were petty and in bad faith with respect to its treatment of RW and should not be condoned, and that CCSNH has, in fact, committed an unfair labor practice for the reasons stated. CR at 280.

The PERLB reached their conclusion that RW was not entitled to attend mediation

without loss of pay or benefits by inserting the words "bargaining unit work" at the end of RSA 273-A:11 (II). As described above, the PELRB is prohibited from adding words that the legislature didn't seem fit to include. Bennett v. Town of Hampstead, 157 N.H. 477, 483 (2008).

However, assuming arguendo, that the PERLB is empowered to add language to the statutory framework created by the legislature, their analysis is incorrect as compensation for tutoring is a mandatory subject of bargaining. As described in greater detail below, since the inception of the Public Employee Labor Relations Act, RSA 273-A:1 *et seq.* and codified in RSA 273-A:1, XI ("terms and conditions of employment" means wages, hours, and other terms of condition of employment other than managerial policy within the exclusive prerogative of the public employer, confided exclusively to the public employer by statute or regulation adopted pursuant to statute…") and affirmed by the Appeal of Berlin wages and compensation are required to be bargained by a public employer. Although the PELRB gave recognition to this legal fiat, it nonetheless, for the first time, without legal authority or citation to any provision of the law, deviates from the dictates of the PELRA by announcing exception to the command that public employers negotiate wages by creating a "non bargaining unit" work exception. The PELRB issues this unlawful exception without any guidance or standard for the parties to follow. This decision allows a public employer to avoid the obligations under the statutory and regulatory framework set forth by the legislature by allowing an employer to avoid their obligations by simply declaring that the topic is not "unit work".

The PELRB is in error in this analysis as is described below, and must follow the requirements of the Public Employee Labor Relations Act and the controlling precedent of Appeal of Berlin.

B. The PELRB improperly distinguished Appeal of Berlin

The Board found that,

> ... the present case is factually distinguishable from *Appeal of Berlin* in a number of significant respects, and we conclude that under the applicable law CCSNH is not obligated to bargain with the SEA over tutoring. Tutoring provided through ACE is clearly not an extracurricular activity like a sport or other student activity at issue in *Appeal of Berlin.* Instead, it is merely a service CCSNH offers to students who would like help completing class assignments. Unlike a sport or other student activity referenced in *Appeal of Berlin,* tutoring cannot fairly be classified as "an integral part" of an adjunct's duties. Based upon the record, we find that adjuncts, who are part-time faculty, are responsible for teaching a particular course, inclusive of the limited consultation referenced in our findings of fact, but not the "training of a child for citizenship or leadership" as was the situation in *Appeal of Berlin.* There is no requirement (or expectation) that adjuncts provide tutoring services through ACE. We recognize there is some overlap between the skills adjuncts rely upon as instructors and those they may use when providing tutoring services through ACE. However, when RW is providing services through ACE, he is working as a tutor, and not as an adjunct. CR at 277-278.

The PELRB, while recognizing the public employer's duty to negotiate wages as "axiomatic" (CR at 276) carves out an exception for tutoring and improperly distinguishes the controlling precedent of Appeal of Berlin. The PELRB erroneously concludes that "tutoring" is not an integral part of the education system and that voluntary nature of tutoring precludes it from being a mandatory subject of bargaining. The PELRB is incorrect as is explained below.

(i) The voluntary nature of tutoring is irrelevant to the mandatory requirement to negotiate wages

It is interesting to note that the PELRB rejected the notion that the voluntary nature of participation by a member in the collective the bargaining process does not preclude an individual from protections of the Public Employee Labor Relations Act (CR at 278) however, provides that the voluntary nature of tutoring somehow divests an exclusive representative from

being able to negotiate the compensation for said services (CR at 278).

First, there is no requirement provided under the statutory or regulatory framework of RSA 273-A or the Appeal of Berlin that supports the notion that the voluntary nature of certain work precludes it from being negotiated with an exclusive representative. In fact, the law is quite the opposite. The law requires that all terms and conditions of employment including wages, hours and other conditions of employment must be negotiated in good faith between the public employer and the exclusive representative. See, RSA 273-A:1, IX; RSA 273-A:3, I; and RSA 273-A:5, I(e). Further, in the Appeal of Berlin, this Honorable Court held that "Courts have consistently held that such items such as overtime pay, extra duty pay, vacation and holiday pay, bonus or merit pay, severance pay, shift differentials and pensions are mandatory subjects of bargaining encompassed in the terms "wages"." Appeal of Berlin, 125 N.H. 783-784 (1984). Many of these items are not mandatory for participation by the individual unit member, and in fact, in the Appeal of Berlin, it was not mandatory that the teachers participate in extra curricular activities and supervising student activities. In addition, the extra curricular activates were not required to be performed exclusively by unit members. Id at 781.

The voluntary nature of tutoring is irrelevant to the analysis of whether the public employer is required to negotiate these matters with the exclusive representative.

The Board incorrectly seems to rely upon the voluntary nature of tutoring for adjunct professors. This is incorrect as a public employer's greater power to create or eliminate positions or programs does not necessarily include the lessor power to unilaterally determine wages or hours for the positional program. Appeal of City of Nashua Board of Education, 141 N.H. 768, 775 (1997); see Appeal of Town of North Hampton, 166 N.H. 227 (2013). As in the Appeal of North Hampton, the fact that individuals were not required to be paramedics but could

do so at their own choosing, still required the Town to negotiate the wages and other terms and conditions of employment of a paramedic. This is the same concept. Although tutoring is not required, it is a function performed by a public employer, i.e. CCSNH, by a public employee, i.e. RW, and must be negotiated with the exclusive representative.

As a practical matter, the Board opens the door for a nefarious public employer to simply avoid their obligation to bargain in good faith be referring to a duty requested or required to be "non bargaining unit work" and therefore exempt from negotiations. The voluntary nature of tutoring does not distinguish "tutoring" from the controlling precedent of Appeal of Berlin and the requirement of the PELRA.

(ii) Tutoring is an "integral" part of the education process

"When reviewing a decision of the PELRB, we defer to its findings of fact, and, absent an erroneous ruling of law, we will not set aside its decision unless the appealing party demonstrates by a clear preponderance of the evidence that the order is unjust or unreasonable." Appeal of Nashua Police Comm'n., 149 N.H. 688, 689 (2003); see also RSA 541:13 (1997). Though the Board's findings of fact are presumptively lawful and reasonable, we require that the record support the Board's determinations. Appeal of the City of Laconia, 150 N.H. 91, 93 (2003). The Board's holding is not supported by the record or common sense.

The Board's findings are not, will all due respect, based upon any findings of fact and contravenes the testimony of RW and Rebecca Dean. RW testified that it is clear that the tutoring center allows an adjunct professor to help students become adept at their classroom assignments and the skills utilized in tutoring and lecturing are virtually the same (CR at 58; Transcript at 27, lines 5-10). In the event that the student cannot master their classroom assignments, they will not pass the class and ultimately may not graduate. There is nothing more

integral to an education than mastering the material. In fact, the findings of fact by the Board seem to contradict their conclusion. The Board found that, "under Article 9 of the 2013-16 CBA, adjuncts are responsible for teaching a specific assigned course and making themselves available to students for "consultation before or after class, or by appointment." See, CR at 273.

In fact, Rebecca Dean testified as to the importance of tutoring and completing assignments in the following colloquy,

> QUESTION: Okay, when people come in for a tutor, do they have an assignment in particular from a course that they want help with, or can it be more amorphous, help they are looking for?
>
> ANSWER: I would say 99.9% of the time it is within assignment.
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> (CR at 94; Transcript at 63, lines 14-19)
>
> This was verified on cross examination,
>
> QUESTION: ...I think as you said, its content driven, and to help them with their assignments, correct?
>
> ANSWER: Correct.
>
> QUESTION: Alright, and I believe you used number 99.9%; correct?
>
> ANSWER: Correct.
>
> (CR at 105; Transcript at 75, lines 1-7)

In addition, the primary mission of education, of any educational institution, is to educate the students. See, RSA 188-F:1; CR at 211. An adjunct's primary role is to educate students. Lecturing is merely a methodology utilized by adjuncts to educate the students. It is a tool or methodology. The goal is not lecturing in and of itself. Tutoring is also another tool utilized to help assist students in mastering their materials. It is part of the educational process and not much else could be more integral to the role of an educator. This is not exclusive to adjuncts.

Further, the evidence provided at the hearing presented the following facts: (1) that RW was hired as a tutor at the recommendation of his Department Head (CR at 90; Transcript at 59, lines 19-23; CR 54; Transcript at 23, lines 11-17); (2) that many of the tutors were chosen because they taught English 101 (a foundation course) (CR 57; Transcript at 26, lines 13-18); (3) that tutors are paid in the same paycheck for tutoring services and adjunct services (CR at 60; Transcript at 29, lines 2-11); (4) that the skills utilized for tutoring and lecturing are virtually the same (CR 58; Transcript at 27, lines 5-10); (5) that the ability to lecture is curtailed by a limitation imposed by the public employer in the event an adjunct voluntarily tutors (i.e. cap of hours used counts both against lecture time and tutoring) (CR at 59; Transcript at 28, lines 8-23; CR at 60; Transcript at 29, lines 14-23; (6) that the public employer is the same in all instances (CCSNH) (CR at 27; SF 2); and (7) that Rebecca Dean, the individual in charge of the tutoring center, testified that **99.9%** of the work performed at the tutoring center related to students' work assignments provided by professors such as RW (CR at 94; Transcript at 63, line 14-19; CR at 105, Transcript at 74, lines 5-7).

Terms and conditions of employment means wages, hours, and other conditions of employment other than the managerial policy within the exclusive prerogative of the public employer, or confided exclusively to public employer by statute or regulation adopted pursuant to statute. RSA 273-A:1, XI. This is despite the undisputed evidence that the vast majority of the tutoring concerns assignments provided by professors in an attempt to master the lessons provided during the lecturing. Tutoring is merely an extension of their duties as recognized by the parties, as adjuncts must make themselves available for consultation with students in regards to class assignments. This is so-called "extra duty" or overtime, is required to be negotiated as a mandatory subject of bargaining.

Other jurisdictions have also held that extracurricular activities are an integral part of education, as was recognized in Appeal of Berlin. See, Board of Education of the City of Asbury Park v. Asbury Park Education Ass'n, 145 N.J.Super. 495 (N.J., 1976). That court provided, "...the court holds that extracurricular activities are an integral part of a child's education and are incorporated into the duty to properly teach." Further, the court properly expounds on those duties expected of a teacher when it stated, "Any teaching duty within the scope of the license held by a teacher may properly be imposed. The day in which the concept was held that teaching duty was limited to the classroom instruction has long since passed. See, Id. at 502. Applying such logic to the case at bar clearly illustrates that tutoring falls well within the parameters of those issues that are part of a student's education. In fact, tutoring is even more so integral to a student's educational success than those skills acquired through traditional extracurricular activities.

In West Hartford Education Ass'n v. Dayson DeCourvy, et al, 162 Conn. 566 (Conn., 1972) the Supreme Court of Connecticut defines extracurricular activities, as, "...activities generally outside of regular hours of a pupil attendance at which a teacher's attendance is either required or voluntary and which may or may not involve additional pay. See, Id. at 537 Applying that definition to the case at bar again clearly displays that tutoring should fall within those duties that must be bargained whether it is voluntary or required. Thus, when applying simple logic to the issue at hand as well as the correct legal precedent there can be no argument that tutoring is an extension of an adjuncts duties and must be bargained by the parties.

The adoption of the disregard of Appeal of Berlin to the case a bar would mean an employer could simply state that it is not negotiating an item because it believes such an item falls outside of the parameters of those duties associated with a particular bargaining unit. To

allow such logic would be subversive to the intent underlying collective bargaining laws. In fact, when a new unit is formed it can be theoretically argued that all duties and assignments are for the first time being negotiated between the parties. Thus, to allow an employer to simply take the position that a particular duty has not been traditional negotiated and therefore not negotiable would undermine the whole negotiation process. Professions are continuously changing to conform to those needs of the particular point of time. A profession and those duties or obligations associated with such a profession cannot remain stagnant or else it becomes antiquated and superseded by another profession. The tutoring duties at bar are clearly an example of a profession progressing with the times. That progression and the duties associated with it must fall within the parameters of negotiations. To allow otherwise would simply allow an employer to categorize a duty as something outside the parameters of traditional bargaining. To allow such a dangerous precedent would not only allow an employer to circumvent the negations process it would thereby allow an employer to ignore collective bargaining in general by simply stating that the work in question is not negotiable. In fact, the legislature presumed changes to the terms and conditions of employment with CCSNH. See, RSA 188-F:6; CR at 26.

Tutoring is not a so-called second job or profession but rather an extension or so called "Extra work", as described in Appeal of Berlin, for their primary responsibility of educating students. Lecturing is the methodology utilized in educating students on a particular discipline not an end in itself. Taken to its logical conclusion, the Board's ruling could lead to an absurd result. It seems that it is unreasonable for the public employer not to have to negotiate the payment for extra help with students completing mandatory assignments, but require the same public employer to negotiate the participation of an adjunct to be a soccer coach or a social club leader. See, State of New Hampshire v. Robert Breest, 167 N.H. 210 (2014).

(iii) PELRB improperly and implicitly adopts the position that the Certification defines "Unit work"

Although the PELRB did not define what exactly constitutes unit work, the Board seems to adopt the definition provided by the CCSNH,

> The description for bargaining unit work, as set forth in the Board's MA 2011 certification of the unit, focuses exclusively on the *course teaching work* that adjunct faculty perform, in that bargaining unit members are determined by the number of semesters they have taught at CCSNH. (Union Ex. 2). In fact, the certification makes no reference whatsoever to any additional work adjunct faculty may perform outside of their teaching duties. *Id.* Accordingly, it stands to reason that nay supplemental work an adjunct chooses to perform, such as tutoring, is not considered bargaining unit work. To find otherwise would allow SEA to circumvent the clear and unambiguous language of the Board's determination as to the appropriate bargaining unit.
>
> Community College System of New Hampshire's Post Hearing Brief; CR at 252)

The parties' certification describes the unit as follows,

UNIT: All adjunct faculty who are employed by the CCSNH and who have taught at least five semesters in the last five years or who have currently begun their fifth semester of teaching and have taught four semesters within the last five years.

EXCLUDED: Any CCSNH employee who 1) already holds a full or part-time appointment as a faculty member with the CCSNH, and who is currently covered by the existing collective bargaining agreement between the SEA/SEID Local 1984 and the CCSNH; 2) already holds a full-time or part-time appointment as a professional, administrative, technical, or operating staff member with the CCSNH, and who is currently covered by the existing collective bargaining agreement between the SEA/SEID Local 1984 and the CCSNH; or
3) already holds a full-time CCSNH position and who is managerial and/or confidential and thus excluded from the existing collective bargaining agreement between the SEA/S ID Local 1984 and the CCSNH.

> Note: The summer semester is excluded from the calculation of the appropriate bargaining unit.

The PELRB is incorrect as the certification defines the composition of the bargaining unit as to positions, not the work performed by the positions. The composition of a bargaining is limited to positions sharing a sufficient community of interest to negotiate jointly with a public employer. The principal consideration in determining the appropriateness of a bargaining unit is "whether there exists a community of interest 'in working conditions such that it is reasonable for the employees to negotiate jointly." Appeal of the University System of N.H., 120 N.H. at 855 (1980) (quoting University System v. State, supra at 99-100, 369 A.2d at 1140).

A legal Certification defines the composition of bargaining unit not scope of work and duties are not static. "Any changes to the conditions of employment, compensation, and benefits of community college system of New Hampshire employees covered by collective bargaining agreements shall be negotiated through the collective bargaining process." See, RSA 188-F:7(I).

Nonetheless, in acting under RSA 273-A:8, I, the PELRB is required to take into account the principle of community of interest as evidenced by such criteria as similarity in conditions of employment and profession, a history of workable and acceptable collective negotiations, and identity of organizational units. The PELRB itself has further refined these factors in PELRB Rule 302.02 under which it may consider as evidence of community of interest "the geographic location of the proposed unit, the presence or absence of common work rules and personnel practices, common salary and fringe benefit structures, the self-felt community of interest among employees, and the potential for a division of loyalties between the public employer and the employee's exclusive representative." Appeal of the Bow School District,134 N.H. 64, 71-72 (1991). The duty of the PELRB is to determine practical, appropriate and effective

bargaining units. The community of interest which employees in the same bargaining unit must share is a common interest in their labor relations.

The rights accompanying certification are provided by statute. See, RSA 273-A:11. One of the rights is to provide exclusive representation to the bargaining unit and collective bargaining. The collective bargaining process is not static, but rather, dynamic. The terms and conditions of employment change over time, as is fully discussed above. The PERLB ruling would not allow a collective bargaining agreement to address changing terms and conditions of employments or to encompass new terms and conditions of employment and therefore render said process meaningless. The process would become static and the parties would not be required to address issues in an ever changing world concerning policies, procedures and technology.

However, the law is just the opposite. As the collective bargaining process is dynamic, public employers are required to negotiate the terms and conditions of employment with the exclusive representative pursuant to the Public Employee Labor Relations Act. See, RSA 273-A:1, IX; RSA 273-A:3 (1); and RSA 273-A:5, I(e). In particular, in this instant case, the legislature recognized that not only is changes to term and conditions require to be negotiated under the PELRA, but also under the governing statute for CCSNH. The relevant statute provides, "Any changes to the conditions of employment, compensation, and benefits of community college system of New Hampshire employees covered by collective bargaining agreements shall be negotiated through the collective bargaining process." See, RSA 188-F:7(I).

The Appellant asserts that the appropriate standard to be applied is already provided under the controlling case of Appeal of Berlin. For tutoring to be excluded from the collective bargaining process, the tutoring must be dissimilar, distinct, and outside the community of interest of the adjuncts for the subject matter to be considered outside of the collective

bargaining process. See, Appeal of Berlin at 1040.

The Board itself recognized that there was an overlap between the skills of adjuncts rely upon as instructors and those they may use when providing tutoring services at ACE (CR at 278). Further, it is undisputed that the tutoring at ACE comprises of classroom assignments 99.9% of the time. As such, the evidence does not support that tutoring is outside of the scope of duties required by adjuncts.

As a practical matter, the idea that terms and conditions are static is a novel concept in regards to collective bargaining for public employees in the State of New Hampshire that is unsupported by law or practice. The concept that the collective bargaining process is static and that the parties are limited to the footprint created by the first collective bargaining agreement between the parties is incorrect. The collective bargaining process in New Hampshire is dynamic and based upon the internal and external forces existing at the time of the negotiations that effect demands and concessions requested by the respected parties. This dynamic allows the parties relationship to develop and mature while satisfying the needs of their respective constituents. This fosters the lofty goal of harmonious relationships as set forth in the spirit of the PELRA.

(iv) The PELRB failed to apply the appropriate analysis

This Honorable Court has consistently held, since 1994, that the PELRB is required to apply a tri partite test to determine whether a subject matter between a public employer and an exclusive representative is required to be negotiated, permitted to be negotiated, or prohibited from the negotiation process.

In determining whether a subject matter between a public employer, CCSNH and an exclusive representative is mandatory, permissive, or prohibited, is guided by the often cited tri partite test articulated 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 constitution, 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 processes may interfere with public control of governmental functions contrary to the provisions of RSA 2713-A:1, XI. Id. at 718.

There are only two exceptions to a public employer's obligations to bargain wages, hours and other conditions of employment. State Employees Association v. New Hampshire PELRB, 118 N.H. 885, 886 (1978). First, there is the managerial exception contained in RSA 273-A:1, XI, which is inapplicable to the case at bar. The second is the merit system exception found in RSA 273-A:3, III, which is not at issue here either. The PELRB does not cite to either of these exceptions. The analysis of whether tutoring is a mandatory subject of bargaining is conducted in the section below.

C. Tutoring is a mandatory subject of bargaining

The CCSNH is required, as a matter of law, to recognize that the SEA is the exclusive representative of the covered adjunct faculty (CR at 153; RSA 273-A:11, I) and to negotiate in good faith the terms and conditions of employment with the SEA. See, RSA 273-A:3, I and RSA 273-A:5, I(e). It is axiomatic that wages are "terms and conditions of employment" by definition. "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." RSA 273-A:1, XI. The compensation paid for tutoring is clearly wages or

compensation paid by the public employer, CCSNH. The New Hampshire Supreme Court has already determined that, tutoring constitutes wages and a mandatory subject of bargaining. See, Appeal of Berlin Education Association, 125 N.H. 779 (1984).

Since the issuance of Appeal of Berlin, the Supreme Court has clarified the interpretation of the managerial policy exception. They adopted a three step analysis to determine when an employer must negotiate mandatory subjects of bargaining. The test is as follows:

> To clarify our interpretation of the managerial policy exception, we adopt a three-step analysis suggested by the applicable statutes [138 N.H. 722] and our prior decisions. We expect the new standard to assist public employers and employees in settling between them which proposals are subject to mandatory bargaining, which ones may be negotiated, and which, if any, proposals are prohibited subjects for negotiation. In addition, we intend the new standard to facilitate the PELRB in implementing "its broad powers to assist in resolving disputes between government and its employees." Laws 1975, 490:1, III.
>
> 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. RSA 273-A:1, XI; see also Town of Pelham, 124 N.H. at 137, 469 A.2d at 1298. For instance, the mere existence of personnel rules does not require that the subject matter of the rules be excluded from negotiation, under the prohibition of step one, unless the subject matter is otherwise reserved to the sole prerogative of the public employer by statute. SEA v. PELRB, 118 N.H. at 889-90, 397 A.2d at 1038.
>
> Second, the proposal must primarily affect the terms and conditions of employment, rather than matters of broad managerial policy. Matters of managerial policy include, at least, "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." RSA 273-A:1, XI. Often, both the public employer and the employees will have significant interests affected by a proposal. See State Employees' Ass'n, 120 N.H. at 694, 422 A.2d at 1304. Determining the primary effect of the proposal requires an evaluation of the strength and focus of the competing interests. For example, although a school district's decision about whether or not to offer extracurricular programs is part of broad managerial policy, staff wages, hours, and other specifics of staff obligations and remuneration primarily affect the terms and conditions of employment. See, e.g., Berlin Educ. Ass'n, 125 N.H. at 783-84, 485 A.2d at 1041-42.

> 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. Without public control over budgetary matters through the legislature, city councils, town or school meetings, as authorized by statute, proposals relating to wages and other cost items would not pass step three. RSA chapter 273-A, however, provides for public control [138 N.H. 723] where cost items are involved by requiring approval by the legislative body of the public employer. RSA 273-A:3, II(b) (1987); see also, e.g., Appeal of City of Franklin, 137 N.H. 723, 634 A.2d 1000 (1993).
>
> In general, although not always, proposals that provide procedures for implementing the public employer's policy will satisfy steps two and three, while those that propose to establish policy, standards or criteria for decision-making will not pass either step. A public employer is prohibited from bargaining a proposal that does not meet the first step. A public employer has authority to bargain a proposed contract provision that passes the first step, as in Town of Pelham, 124 N.H. 131, 469 A.2d 1295, but the employer is not obligated to bargain unless the proposal satisfies all three steps. See RSA 273-A:3 (1987). See, Appeal of State, 138 NH 716 (1994).

In this case, the first prong is easily satisfied as tutoring and compensation for tutoring are not reserved by constitution, statute or statutorily adopted regulation. Second, the discussion of wages and compensation primarily effect terms and conditions of employment rather than matters of broad managerial policy. This is simply the amount to be paid to the Adjunct, not whether the services are offered. Finally, the incorporation of wages or compensation for tutoring would not interfere with the public control of governmental functions. As such, the CCSNH is required to bargain the proposal in regards to compensation for tutoring as it has satisfied all three steps.

The CCSNH can gain no solace in attempting to find refuge in the managerial exception contained in RSA 273-A:1, XI. The Court has been clear that "a public employer's "greater power to create or eliminate a position or program does not necessarily include the less power" to unilaterally determine wage or hours for the position or program. Appeal of City of Nashua

Board of Education, 141 N.H. 768, 775 (1997) See, Appeal of Town of North Hampton, 166 N.H. 227 (2013).

The Supreme Court has also recognized that proposals that primarily effect wages and hours are mandatory subjects of bargaining. For example, even though a school board has the authority to decide whether to offer extra curricular programs, the wages and hours for staff involved in the extra curricular activity constitute a mandatory subject of bargaining. See, Appeal of City of Nashua Board of Education, 141 N.H. 768, 775 (1997) and Appeal of Berlin Education Association, 125 N.H. 779, 783-84 (1984). As discussed above, the CCSNH's unwillingness to negotiate tutoring compensation is a violation of RSA 273-A:3, RSA 273-A:11, I and RSA 273-A:5, I(a)(e)(g).

VI. CONCLUSION

For the reasons set forth above, the Appellant requests this Honorable Court to reverse the decision of the Public Employee Labor Relations Board.

VII. CERTIFICATE OF COMPLIANCE

In accordance with New Hampshire Supreme Court Rule 16(7), the undersigned hereby certifies that an original and eight (8) copies of Brief of Plaintiff/Appellant have been hand-delivered to the Clerk of the Supreme Court on this 15th day of August, 2017.

In accordance with New Hampshire Supreme Court Rule 16(10), the undersigned hereby certifies that two (2) copies of Brief of Appellant have been forwarded, via first class mail, postage prepaid, to Jeffrey S. Siegel, Esq. and Joseph P. McConnell, Esq., and one (1) copy the Public Employee Labor Relations Board and the Attorney General's Office.

In accordance with New Hampshire Supreme Court Rule 16(10), the undersigned hereby requests that this matter be heard on oral argument and, further, that John S. Krupski, Esquire be designated as the attorney to argue its merits on behalf of the State Employees' Association of New Hampshire, SEIU Local 1984. Counsel respectfully requests fifteen (15) minutes for argument.

Dated: August 15, 2017

John S. Krupski, Esq.

STATE OF NEW HAMPSHIRE

Public Employee Labor Relations Board

SEA/SEIU Local 1984

v.

Community College System of New Hampshire (Adjunct Faculty)

Case No. G-0154-3
Decision No. 2016-293

Appearances:

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

Joseph P. McConnell, Esq.,
Morgan, Brown & Joy, LLP
Boston, Massachusetts for the Respondent

Background:

On August 18, 2016, the SEA/SEIU Local 1984 (SEA) filed an unfair labor practice complaint alleging that the Community College System of New Hampshire (CCSNH) violated RSA 273-A:3, RSA 273-A:5, I (a), (e), (f), and (g), and RSA 273-A:11, II. The SEA claims CCSNH has improperly refused to bargain with the SEA over tutoring services some adjuncts provide through the Academic Center for Excellence (ACE). The SEA also claims that CCSNH improperly failed to compensate Rick Watrous (RW) for tutoring work he missed in order to

participate in impasse mediation on July 18, 2016 as part of the SEA bargaining team.[1] The SEA requests that the PELRB order CCSNH to cease and desist from refusing to negotiate in good faith; order CCSNH to negotiate with the Union over terms and conditions of employment for tutoring work performed by adjuncts at ACE; and order CCSNH to compensate RW for tutoring work he missed in order to attend impasse mediation.

CCSNH denies the charges. According to CCSNH, any work tutoring adjuncts may perform through ACE is outside the scope of bargaining unit work covered by the adjunct certification and therefore CCSNH has no obligation to bargain tutoring work proposals. CCSNH also contends that the SEA claim based upon CCSNH's refusal to compensate RW for lost compensation attributable to the scheduling of the impasse mediation should be denied because RW volunteered to serve on the SEA bargaining team and because ACE tutoring is not bargaining unit work. In its post-hearing brief CCSNH also raised, for the first time, the six month limitation period set forth in RSA 273-A:6, VII as a bar to the SEA's complaint. CCSNH requests that the PELRB deny all SEA requests for relief and dismiss the complaint.

The undersigned board held a hearing on the SEA complaint on October 3, 2016. Both parties presented evidence at the hearing, and both parties filed post-hearing briefs by the November 4, 2016 deadline.

Findings of Fact

1. CCSNH is a public employer within the meaning of RSA 273-A.

2. The SEA is the exclusive representative of and bargaining agent for certain employees of CCSNH. The bargaining unit description is set forth in PELRB Decision No. 2011-074 (March 14, 2011), which provides as follows:

[1] The parties resolved all other complaints raised in the SEA's unfair labor practice complaint prior to the submission of this case for decision.

Unit: All adjunct faculty who are employed by CCSNH and who have taught at least five semesters in the last five years or who have currently begun their fifth semester of teaching and have taught four semesters within the last five years.

Excluded: Any CCSNH employee who: 1) already holds a full or part-time appointment as a faculty member with CCSNH, and who is currently covered by the existing collective bargaining agreement between the SEA/SEIU Local 1984 and CCSNH; 2) already holds a full-time or part-time appointment as a professional, administrative, technical, or operating staff member with CCSNH, and who is currently covered by the existing collective bargaining agreement between the SEA/SEIU Local 1984 and CCSNH; or 3) already holds a full-time CCSNH position and who is managerial and/or confidential and thus excluded from the existing collective bargaining agreement between the SEA/SEIU Local 1984 and CCSNH.

Note: The summer semester is excluded from the calculation of the appropriate bargaining unit.

3. The parties' first collective bargaining agreement covered the September 25, 2013 to June 30, 2016 time period (2013-16 CBA). It does not specifically address the subject of tutoring or the subject of compensation for tutoring services that an adjunct may be hired to provide through ACE.

4. Under Article 9 of the 2013-16 CBA, adjuncts are responsible for teaching a specific assigned course and making themselves available to students "for consultation before or after class, or by appointment." They are clearly identified as "part-time faculty" who "teach a variable number of credits in an academic year and serve in a non-benefitted instructional position." Nothing in the 2013-16 CBA provides that adjuncts, as part of their job duties and responsibilities, are responsible for, or required to participate in, tutoring services CCSNH offers to students through ACE.

5. Rebecca Dean is the Director of ACE. For the most part, Director Dean operates independently of specific academic departments at CCSNH. She is responsible for hiring tutors, which includes interviewing applicants, consulting with Department Heads as necessary and

issuing appointment letters. She also schedules and coordinates all tutoring on her own, with the exception of Biology Department related tutoring.

6. Tutoring is currently offered at Concord's Community College (NHTI) during the fall, winter, and summer semesters. Tutors are usually adjuncts or full time teachers, but students are also occasionally hired as "peer" tutors, typically following a faculty recommendation and an interview. Tutors generally help students who are having difficulty with specific assignments.

7. During negotiations over the 2013-16 CBA, CCSNH refused to bargain with the SEA over proposals concerning tutoring work performed by adjuncts prior to the 2013-16 CBA because, according to CCSNH, tutoring is not bargaining unit work. CCSNH continues to take the same position. In October of 2015, CCSNH obtained an arbitration award rejecting an SEA grievance based upon a CCSNH unilateral reduction in the hourly rate paid to NHTI adjuncts providing tutoring services. The award was based upon a finding that the 2013-16 CBA did not address the disputed tutoring work.

8. RW has worked at Concord's Community College (NHTI) as an Adjunct in the English Department since the 1990's. He was hired and has worked as a tutor since 2010. He is also a member of the SEA bargaining team and has been actively involved in unit negotiations on a successor contract to the 2013-16 CBA. By May 23, 2016, the parties had reached impasse and by early July they had agreed to proceed to impasse mediation on July 18, 2016.

9. The impasse mediation was scheduled during a time when RW was scheduled to tutor at ACE. On July 6, 2016, RW emailed Director Dean as follows:

> CCSNH Administration and the Adjunct Bargaining Team have reached impasse and have scheduled a contract mediation session on Monday, July 18, at 10:00 at Manchester Community College.
>
> As you may know, I am a member of the Adjunct Bargaining Team. Since I will be engaged in system business I am requesting that I be able to participate in this session

without losing the pay I would otheRwise earn as a writing tutor working 10-2 that Monday.

10. The Director of CCSNH Human Resources informed Director Dean by way of response as follows:

> Please be advised that (RW) is not eligible to be paid for tutoring hours that he has elected not to perform due to his participation in adjunct faculty negotiations. (RW) participates in the adjunct faculty negotiations on a voluntary basis. As such, he is not eligible to receive payment for work not performed due to such participation. Therefore, (RW's) request is denied. (Emphasis in original).

11. Ultimately Director Dean closed ACE on July 18, 2016 due to lack of coverage given RW's planned absence.

Decision and Order

Decision Summary:

CCSNH's request for dismissal based upon the six month limitation period is denied. The Board finds that tutoring services provided by adjuncts like RW through ACE is not bargaining unit work. Therefore, the SEA claim that CCSNH committed an unfair labor practice because it refused to bargain over tutoring services adjuncts may provide through ACE is dismissed. Additionally, by a 2-1 vote (board members Andrew Eills and James M. O'Mara, Jr. in the majority, and board member Senator Mark Hounsell in the minority), a majority of the Board finds that under RSA 273-A:11, II, RW is not entitled to compensation for lost tutoring income when he attended the July 18, 2016 impasse mediation because he did not lose any bargaining unit income. Therefore, that claim is dismissed as well.

Board member Hounsell disagrees with the dismissal of the RW compensation claim because he finds the statute, as written, makes no distinction between bargaining and non-bargaining unit work, and CCSNH committed an unfair labor practice because it failed to compensate RW for his lost tutoring pay.

Jurisdiction:

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

Discussion:

The first issue is CCSNH's argument that the complaint is time barred under RSA 273-A:6, VII. However, we deny this dismissal request because CCSNH did not raise the six month limitation period until its post-hearing brief. As a result, CCSNH failed to give sufficient notice to the SEA that it was contesting the timeliness of the complaint, and therefore the SEA was not provided with an adequate opportunity to address this argument with evidence at hearing or in its post-hearing brief.

The next issue is whether CCSNH is obligated to bargain over tutoring services adjuncts may be hired to provide through ACE. Under RSA 273-A:3, I, CCSNH is obligated to bargain with the Union over the terms and conditions of employment:

> It is the obligation of the public employer and the employee organization certified by the board as the exclusive representative of the bargaining unit to negotiate in good faith. "Good faith" negotiation involves meeting at reasonable times and places in an effort to reach agreement on the terms of employment, and to cooperate in mediation and fact-finding required by this chapter, but the obligation to negotiate in good faith shall not compel either party to agree to a proposal or to make a concession.

This includes bargaining over wages ("[t]erms and conditions of employment" means wages...). See RSA 273-A:1, XI. It is axiomatic that wages are a mandatory subject of bargaining. *Appeal of State*, 138 N.H. 716, 721 (1994); *Appeal of Berlin Education Association, NHEA/NEA*, 125 N.H. 779, 784 (1984). Under RSA 273-A:5, I (e), it is an unfair labor practice for an employer to refuse to bargain over wages and/or to make a unilateral change in a mandatory subject of bargaining like wages. However, this rule is limited by the principle that public employers like CCSNH are only obligated to bargain over wages paid for the performance of bargaining unit

work. In other words, the term "employment" in RSA 273-A:1, XI refers to bargaining unit work.

In *Appeal of Berlin*, the court considered a situation that is similar to the one under consideration in this case. In that case the Berlin Board of Education refused to negotiate a wage scale with the teachers' union for extracurricular positions like coaching and supervising student activities. The court decided the Berlin Board of Education was obligated to bargain as demanded by the union:

> ....There is general agreement that extracurricular activities are a fundamental part of a child's education, making the supervision of such activities an integral part of a teacher's duty toward his or her students.
>
> Teaching is not limited to classroom instruction, but also involves the complete training of a child for citizenship and leadership. Extracurricular activities can be a significant part of that training. To hold that extracurricular activities are dissimilar, distinct and outside the community of interest of teachers would be to limit a teacher's role in a child's education merely to classroom instruction. Consequently, we conclude that extracurricular activities are within the scope of a teacher's duties.
>
> [C]ourts have rather consistently held that such items as overtime pay, extra duty pay, vacation and holiday pay, bonus or merit pay, severance pay, shift differentials, and pensions are mandatory subjects of bargaining encompassed within the term 'wages.' Likewise, compensation for extracurricular activities, *which is remuneration for services constituting an integral part of a teacher's duties*, is within the term "wages" and is therefore a mandatory subject of bargaining.

Appeal of Berlin, 125 N.H. at 783-784 (quotations and citations omitted)(emphasis added).

However, the present case is factually distinguishable from *Appeal of Berlin* in a number of significant respects, and we conclude that under the applicable law CCSNH is not obligated to bargain with the SEA over tutoring. Tutoring provided through ACE is clearly not an extracurricular activity like a sport or other student activity at issue in *Appeal of Berlin*. Instead, it is merely a service CCSNH offers to students who would like help completing class assignments. Unlike a sport or other student activity referenced in *Appeal of Berlin*, tutoring cannot fairly be classified as "an integral part" of an adjunct's duties. Based upon the record,

we find that adjuncts, who are part-time faculty, are responsible for teaching a particular course, inclusive of the limited consultation referenced in our findings of fact, but not the "training of a child for citizenship or leadership" as was the situation in *Appeal of Berlin*. There is no requirement (or expectation) that adjuncts provide tutoring services through ACE. We recognize there is some overlap between the skills adjuncts rely upon as instructors and those they may use when providing tutoring services through ACE. However, when RW is providing services through ACE, he is working as a tutor, and not as an adjunct.

The last issue is whether CCSNH improperly refused to compensate RW for pay he would have earned working as a tutor on July 18, 2016. The SEA says RW is entitled to compensation because he missed bargaining unit work (tutoring) in order to attend mediation. CCSNH argues that this claim should be denied because RW volunteered to serve on the SEA bargaining team and because tutoring is not bargaining unit work.

The PELRA addresses this topic as follows:

273-A:11 Rights Accompanying Certification.

....

> II. A reasonable number of employees who act as representatives of the bargaining unit shall be given a reasonable opportunity to meet with the employer or his representatives during working hours without loss of compensation or benefits.

Under this provision, a limited number of bargaining unit employees have the right to participate in contract negotiations during working hours without suffering a loss of pay. The record indicates that RW has been a member of the SEA bargaining team for some time, and he attended the July 18, 2016 impasse mediation in that capacity. CCSNH's argument that he is somehow disqualified from receiving any compensation because he voluntarily chose to serve on the SEA bargaining team is without merit and is rejected. However, a majority of the board (A.

Eills and J. O'Mara, Jr.) find that CCSNH did not violate this provision when it refused to compensate RW as demanded. This is because in the context of the PELRA, which involves collective bargaining over bargaining unit work, we understand the reference to "without loss of pay or benefit" to mean without loss of any pay or benefit derived from bargaining unit work. We have already decided that tutoring is not bargaining unit work, and therefore we dismiss this claim on that basis.

In accordance with the foregoing, the SEA's complaint is dismissed.

So ordered.

December 15, 2016

/s/ Andrew Eills
Andrew Eills, Esq., Chair

Chair Andrew Eills, Esq. and Board Member James M. O'Mara, Jr. vote to dismiss all claims. Board member Senator Mark Hounsell votes to dismiss all claims except for the RW tutoring compensation claim, as explained in his dissenting decision below.

Dissenting Opinion:

I disagree with the majority's conclusion that RSA 273-A:11, II only covers a claim for pay or benefits derived from bargaining unit work, and therefore I believe we should find that CCSNH committed an unfair labor practice in violation of RSA 273-A:5, (g)(to fail to comply with this chapter or any rule adopted under this chapter) because of its failure to compensate RW for lost tutoring pay. In my view, limiting the application of RSA 273-A:11, II to bargaining unit work unreasonably and improperly restricts the scope of the statute. We are required to apply the statute as it is written. Nowhere has the legislature stated that "without loss of pay or benefit" means, or only refers to, bargaining unit work. Further, if we consider the purpose of this provision, which is to ensure that an employee like RW does not suffer any loss of pay when participating in a statutorily protected, and fundamental, activity like contract negotiations, then

any question about the application of the statute must be resolved in favor of the SEA and RW. In other words, we should interpret the law in a manner that is consistent with facilitating employee participation in the bargaining process, especially where the statutory language is very general and broad enough to include the "pay or benefits" RW would have earned as a tutor had he not attended the impasse mediation. I fear that the majority ruling could have a chilling effect on employee participation in negotiations, which is a crucial component of the collective bargaining framework.

In summary, the law is very clear, and employees should understand that we recognize their right, subject to the "reasonable number of employees" limitation, to participate in negotiations during working hours without losing any pay or benefits, including pay derived from non-bargaining unit work. CCSNH's actions were petty and in bad faith with respect to its treatment of RW and should not be condoned, and that CCSNH has, in fact, committed an unfair labor practice for the reasons stated.

December 15, 2016

/s/ *Mark Hounsell*
Senator Mark Hounsell, Board Member

Distribution: John S. Krupski, Esq.
Joseph P. McConnell, Esq.

STATE OF NEW HAMPSHIRE
Public Employee Labor Relations Board

SEA/SEIU Local 1984

v.

Community College System of New Hampshire (Adjunct Faculty)

Case No. G-0154-3
Decision No. 2017-017

Order on Motion for Rehearing

The Association filed a motion for rehearing of PELRB Decision No. 2016-293 (December 15, 2016) on January 17, 2017 and the CCSNH has objected. Motions for rehearing are governed by RSA 541:3 and Pub 205.02, which provides in part as follows:

Pub 205.02 Motion for Rehearing.

(a) Any party to a proceeding before the board may move for rehearing with respect to any matter determined in that proceeding or included in that decision and order within 30 days after the board has rendered its decision and order by filing a motion for rehearing under RSA 541:3. The motion for rehearing shall set out a clear and concise statement of the grounds for the motion. Any other party to the proceeding may file a response or objection to the motion for rehearing provided that within 10 days of the date the motion was filed, the board shall grant or deny a motion for rehearing, or suspend the order or decision complained of pending further consideration, in accordance with RSA 541:5.

Upon review, the Association's Motion for Rehearing is denied.

So ordered.

January 31, 2017

/s/ Andrew Eills
Andrew Eills, Esq., Chair

The Board's decision to deny the motion for rehearing is 2-1, with Chair Andrew Eills, Esq. and Board Member James M. O'Mara, Jr. voting to deny the motion, and Board Member Senator Mark Hounsell voting to grant the motion.

Distribution: John S. Krupski, Esq.
Joseph P. McConnell, Esq.