STATE OF NEW HAMPSHIRE
SUPREME COURT

2017-0472

APPEAL OF NEW ENGLAND POLICE BENEVOLENT ASSOCIATION, INC.;
APPEAL OF STATE EMPLOYEES' ASSOCIATION OF NEW HAMPSHIRE, INC.,
SEIU, LOCAL 1984

ON APPEAL FROM THE PUBLIC EMPLOYEE LABOR RELATIONS BOARD

BRIEF OF THE APPELLANT NEW ENGLAND POLICE BENEVOLENT ASSOCIATION, INC. (NEPBA)

For Appellant
NEPBA:

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QUESTIONS PRESENTED FOR REVIEW

1. Whether RSA 273-A:9, I's Union "committee" reference extends to RSA 273-A:12's impasse resolution activities?

2. Whether the Public Employee Labor Relations Board ("PELRB" or "the Board") committed an error of law or acted unjustly and unreasonably when it concluded that the State of New Hampshire was entitled to insist that all five unions negotiating with it, on behalf of separately established bargaining units of State employees, act and continue to bargain as one committee in the event one or more of the unions declared impasse and sought to invoke impasse resolution procedures such as mediation and fact-finding?

3. Whether the PELRB committed an error of law or acted unjustly and unreasonably when it concluded that "[i]t is the obligation of the five unions to coordinate with each other and determine whether the Union Committee will engage with the State at the bargaining table or in impasse resolution proceedings" even where the statutory framework provides no mechanism for agreement or requirement that the unions continue to bargain in a committee format.

(PELRB Rec. at 94-100 and 140-146).[1]

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, OR REGULATIONS INVOLVED IN THE CASE

NH RSA 273-A:3

> 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

[1] References to the agency record submitted by the Public Employee Labor Relations Board are denoted "PELRB Rec. at ____."

shall not compel either party to agree to a proposal or to make a concession.

NH RSA 273-A:5, I

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.

NH RSA 273-A:9, I

All cost items and terms and conditions of employment affecting state employees in the classified system generally shall be negotiated by the state, represented by

the governor as chief executive, with a single employee bargaining committee comprised of exclusive representatives of all interested bargaining units. Negotiations regarding terms and conditions of employment unique to individual bargaining units shall be negotiated individually with the representatives of those units by the governor.

NH RSA 273-A:12

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.

STATEMENT OF THE CASE

Factual Background

The PELRB found the following facts which were largely stipulated by the parties:

1. The State is a "public employer" under RSA 273-A:1, X.

2. There are approximately fifty separate state executive branch bargaining units that are represented by five separate exclusive representatives, or unions.

3. The SEA is the exclusive representative and bargaining agent for approximately 42 bargaining units, and its representation of the majority of these dates to 1976. The collective bargaining agreements on file with the PELRB per RSA 273-A:16, I reflect that the SEA and the State negotiate a master agreement covering all SEA represented bargaining units, with a number of different sub-unit provisions and wage schedules. State collective bargaining agreements are available online at https://www.nh.gov/pelrb/collective/index.htm. The current collective bargaining agreement between the SEA and the State will remain in force and effect until June 30, 2017 or until such time as a new agreement is executed.

4. The [New England Police Benevolent Association, Inc. ("NEPBA")] represents and bargains for five separate bargaining units (two Fish and Game Department units since 2006, one Liquor Commission/Division of Enforcement and Licensing unit since 2009, and two Department of Corrections/Probation and Parole units since 2010). The five NEPBA collective bargaining agreements have a term and duration clause similar to the one in the SEA agreements.

5. The Teamsters Local 633 (Teamsters) has represented and bargained for a Department of Corrections bargaining unit (Corrections Officers and Correction Officers Corporals) since 2012 (PELRB Decision No. 2012-266). The current Teamsters collective bargaining agreement has a term and duration similar to the SEA contract.

6. The New Hampshire Troopers Association (NHTA) has represented and bargained for Department of Safety sworn personnel up to and including the rank of Sergeant since 1990 (see PELRB Certification of Representative and Order to Negotiate, Case No. P-0754, available online at https://www.nh.gov/pelrb/certifications/documents/state_troopers.pdf. The current NHTA collective bargaining agreement has a term and duration similar to the SEA contract.

7. The New Hampshire State Police Command Staff, New Hampshire Troopers Association (Command Staff) has represented and bargained for the Department of Safety Command Staff unit comprised of the positions of Major, Captain, and Lieutenant since 2016 (PELRB Decision No. 2016-040). The current Command Staff

collective bargaining agreement has a term and duration similar to the SEA contract.

8. As chronicled in the parties' stipulations, bargaining on successor contracts began in December, 2016. The first session was an organizational meeting, where introductions were made, spokespersons were identified for each group, bargaining schedules were discussed, and ground rules were reviewed, revised, and signed. The order in which each of the five unions would make proposal presentations was also discussed and agreed upon. There were fourteen subsequent bargaining sessions between December 15, 2016 and March 7, 2017.

9. At the February 21, 2017 bargaining session, the State finally announced and informed all five unions that it was rejecting all union wage proposals. The State explained that the Governor was not offering any wage increases during this bargaining cycle given anticipated increases in prescription drug costs in the healthcare market.

10. On March 7, 2017, the State's teams and the Union Master teams met (SEA, NHTA, Command Staff, Teamsters, and NEPBA).

11. The SEA withdrew proposals, submitted amended proposals, discussed the remaining proposals on the table, and challenged the State's position on wages.

12. The Teamsters requested the State's final and best offer on wages. In response, the State offered no wage increase. The Teamsters then discussed pay and working conditions at the different state prisons and in particular the discrepancies that exist between pay rates for State Department of Corrections officers

and pay rates for correction officers employed at county correctional facilities and New Hampshire federal correctional facilities. The State's position remained unchanged and the Teamsters declared a bargaining impasse.

13. The State responded "no" to pending NHTA proposals and the NHTA also declared impasse.

14. The State then took the position that all five unions would have to proceed to impasse mediation since the Teamsters and the NHTA had declared impasse and the five unions needed to decide upon a mediator. The SEA claimed the State's position was contrary to RSA 273-A and asked how the State could justify its position when the State did not try and force the other unions into impasse mediation when the SEA had declared impasse in prior bargaining cycles, including during the 2014-2015 cycle. The State said it could not answer this question and represented that it was willing to meet with SEA sub-unit teams but would only meet with the SEA Master Team if they followed the other unions into mediation or if the Teamsters and the NHTA (Troopers and Sergeants) withdrew their impasse declaration and returned to the bargaining table.

15. On March 16, 2017, the State's team and the SEA, Command Staff, and NEPBA met to discuss the declarations of impasse made by the Teamsters and NHTA (Troopers and Sergeants) on March 7, 2017. The State reiterated its position that because two of the unions (NHTA and Teamsters) had declared impasse all units must go to impasse mediation or all units must return to the bargaining table. At one point, the SEA cited the procedural difficulties with the State's position

by pointing out that the SEA was not responsible for coordinating the actions of the other unions.

16. On April 27, 2017, the State advised all five unions that it would select a mediator and that the impasse mediation sessions were not limited to the Teamsters and NHTA contracts because the issues to be resolved affected all bargaining units. A mediator has been selected and all five unions have been invited to participate.

17. The SEA declined to participate but agreed to attend as an observer.

18. The NEPBA continues to object to the State's actions and has reserved all of its rights.

19. On May 1, 2017, State offered to meet with the SEA and NEPBA outside of impasse mediation on all non-cost items unique to their respective bargaining units.

(PELRB Rec. at 129-132).

Procedural Background

Both the NEPBA and the SEA filed Unfair Labor Practice Charges alleging that the State had violated RSA 273-A:5 by refusing to continue negotiations with NEPBA and SEA at the bargaining table after other unions had declared impasse and moved on to impasse resolution procedures. (PELRB Rec. at 1-9; 56-59). The NEPBA filed its petition on behalf of the five bargaining units it represents: NEPBA Local 40 (Fish and Game),

NEPBA Local 45 (Fish and Game Supervisors), NEPBA Local 260 (Liquor Commission), NEPBA Local 270 (Probation and Parole Chiefs) and NEPBA Local 265 (Probation and Parole). (PELRB Rec. at 129). Following submission of written briefs on the stipulated issues, the PELRB determined that the State could lawfully insist that all bargaining must be conducted by the Unions together through one committee and that "[i]t is the obligation of the five unions to coordinate with each other and determine whether the Union Committee will engage with the State at the bargaining table or in impasse resolution proceedings." (PELRB Rec. at 133). After timely motions for rehearing were denied, this appeal followed. (PELRB Rec. at 159).

SUMMARY OF ARGUMENT

The PELRB misconstrued the plain requirements of RSA 273-A by requiring all unions representing state employees to proceed to mediation and fact-finding if any individual union exercised its right to do so. The PELRB decision is contrary to the plain language of the relevant statutory provisions, forces the unions into an unworkable position without any mechanism to resolve disputes and undermines the unions' ability to discharge its duty to its membership. The stipulated record establishes a prima facia unfair labor practice and the NEPBA's complaint

should be sustained. The matter should be remanded to the PELRB solely to enforce a remedy for the State's statutory infraction.

ARGUMENT

I. STANDARD OF REVIEW

RSA chapter 541 governs this Court's review of PELRB decisions. *See* RSA 273A:14 (2010); RSA 541:2 (2007). The Court will "not set aside the PELRB's order except for errors of law, unless we are satisfied, by a clear preponderance of the evidence, that it is unjust or unreasonable." App. of Strafford County Sheriff's Off., 105 A.3d 1061, 1065 (N.H. 2014) citing RSA 541:13 (2007). The Court reviews the PELRB's rulings on issues of law de novo. Id.; See Appeal of Portsmouth Regional Hosp., 148 N.H. 55, 57, 802 A.2d 1175 (2002).

II. THE BOARD MISAPPLIED THE PLAIN LANGUAGE OF THE RELEVANT STATUTORY PROVISIONS

As this Court has explained:

> We are the final arbiter of the legislature's intent regarding the meaning of a statute considered as a whole, and our review of the trial court's statutory interpretation is de novo. Ouellette v. Town of Kingston, 157 N.H. 604, 609, 956 A.2d 286 (2008). We first examine the language of the statute, and, where possible, we ascribe the plain and ordinary meanings to the words used. Id. When a statute's language is plain and unambiguous, we need not look beyond it for further indication of legislative intent, and we refuse to consider what the legislature might have said or add language that the legislature did not see

> fit to incorporate in the statute. Id. Finally, we interpret a statute in the context of the overall statutory scheme and not in isolation. State v. Etienne, 163 N.H. 57, 72, 35 A.3d 523 (2011).

State v. Guay, 62 A.3d 831, 833-34 (N.H. 2013)

The decision of the Board misconstrues the plain language of the relevant portions of RSA 273-A:9 and RSA-A:12 and improperly reads a committee mediation and fact-finding requirement into Section 12. As noted above, only section 273-A:9 references or requires union committee negotiation. If no agreement is reached pursuant to section 9, RSA 273-A:12 provides procedures by which each individual union "bargaining unit" may make a presentation to the "board of the public employer." The chief negotiator for the board of the public employer may also make a presentation "directly to the bargaining unit." If the direct presentations do not resolve the impasse, Section 12 provides mediation and fact-finding procedures to attempt to resolve the dispute. Id.

There is no language in Section 12 which even suggests, much less mandates, that the Section 12 process be conducted by a union committee. Indeed, the language of Section 12 refers expressly to individual "bargaining unit[s]" and not a union committee. The Board's decision improperly reads a committee

bargaining requirement into RSA 273-A:12 that does not exist.[2] For this reason, the Board's conclusion cannot stand.

The Board's stated reasons for its holding are without merit. The Board's claim that Committee bargaining at mediation and fact-finding is necessary to prevent "strain upon the State's bargaining resources" is already properly addressed by the Board at the time it certifies bargaining units containing state employees. See generally, Pub 302.02(c). The bargaining units that have been certified to date have established, often through arduous litigation, that they have a sufficient and unique community of interest to warrant separate bargaining representation. By its decision, the Board has effectively abdicated its responsibility to those employees in bargaining units who have obtained separation through the Board's certification process from other differently situated state employees.

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[2] Section 9 simply codifies both the state's and the unions' abilities to pattern bargain. See Lehigh Portland Cement Co., 286 NLRB 1366, 1370 (N.L.R.B. 1987)(("'pattern bargaining' [is] a shorthand term used to describe a process in which an employer may negotiate with many separate unions while insisting that they all accept nearly identical deals"). By sanctioning pattern bargaining, Section 9 may ultimately diminish the bargaining power of the individual unions because as a practical matter it allows the State to attempt to attempt to leverage a deal with one union participant onto other members of the coalition. See generally, Miller & Anderson, Inc. and Tradesmen International 2016 WL 3667748 at 13.

III. The Board's Decision is Unreasonable and Unworkable

This Court has cautioned against picking and choosing portions of a statute and has refused to interpret a statutory provision in a manner that leads to an "absurd result." State v. Duran, 960 A.2d 697, 705 (N.H. 2008) citing Great Traditions Home Builders v. O'Connor, 157 N.H. 387, 388, 949 A.2d 724 (2008). The Board's decision leads to an unworkable and wildly illogical result. The independent unions representing various bargaining units have been ordered to "coordinate with each other to determine the forum in which negotiations will go forward and thereafter utilize the Union Committee format accordingly." (PELRB Rec. 137). The Board has essentially ordered the unions to agree while there is no legal mechanism available to resolve disputes such as the decision on whether to declare impasse and proceed to mediation and fact-finding.

The Board's decision thus subverts one of the fundamental underpinnings of RSA 273-A which allows a group of employees with a community of interest to form their own Union and achieve self-governance over negotiation regarding the terms and conditions of their employment. See generally, In re State Employees' Ass'n of New Hampshire, 939 A.2d 209, 213 (N.H. 2007)("The interests of justice also call for recognition of the

expressed will of Fish and Game's conservation officers."). Once representation is certified, Unions owe the membership a duty of fair representation. See generally In re Johnson, 62 A.3d 779, 780 (N.H. 2013). Because the decision contains not even a whisper as to how the unions are to arrive at a common course of action in a manner that (1) protects the individualized interests that led to separate certification in the first place; (2) is consistent with the duty of fair representation; and (3) somehow maintains an effective bargaining posture, the decision must be vacated.

As the Board's dissent noted:

> The forced maintenance of the Union Committee structure given the split between impasse and non-impasse unions is also unworkable. Union action through a unified Union Committee is impossible at this juncture. Can two of the five unions force the other three into impasse mediation or fact-finding? Can the three non-impasse unions force the other two impasse unions to remain at the bargaining table? How such issues are to be resolved is unclear.
> The PELRB has certified each of the five unions as the "exclusive" representative of the state bargaining units referenced in the findings of fact. Each represents employees working in different areas of state government, and each is working on finalizing their own collective bargaining agreement with the State. The fact that the five unions have not moved "in lock step" into impasse resolution is not surprising giving the divergent working conditions and responsibilities which characterize the different bargaining units. Contrast, for example, Teamsters represented corrections officers working at the Department of Corrections with SEA represented employees working at the Division of Administrative

> Services, the Insurance Department, and the Department of Education. Given such fundamental differences between the various bargaining units it is especially important to avoid infringing upon the right of individual unions (Teamsters and NHT A) to leave the bargaining table and pursue impasse resolution without prejudicing the right of non-impasse unions (SEA and NEPBA) to continue at the bargaining table. Continuation of the Union Committee format, however, interferes with, and improperly limits, these important statutory rights. It also gives the State an unfair advantage in the difficult task of settling common terms and conditions of employment because of the restrictions that are placed upon the unions' ability to fully utilize the tools and options available to them under the Act.

(PELRB Rec. at 138-139). This Court should not sanction the Board's unworkable resolution.

IV. The State's Refusal to Continue to Negotiate with the NEPBA is an Unfair Labor Practice

The sin qua non of public employee collective bargaining is set forth in NH RSA 273-A:3, which requires the "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 …." Id. Pursuant to RSA 273-A:5, I (e), it is an unfair labor practice for a public employer such as the State to "refuse to negotiate in good faith with the exclusive representative of a bargaining unit." The State has committed

an unfair labor practice by refusing to continue to negotiate with the NEPBA.

CONCLUSION

For the foregoing reasons and those cited by the Board's Dissenting Opinion, the NEPBA respectfully requests that this Court reverse the decision of the PELRB and order that the PELRB enter an order sustaining the Unfair Labor Practice Complaint. The PELRB should hold further hearings regarding the proper remedy to be entered.

Pursuant to Rule 16(3)(i), undersigned counsel certifies that the the appealed decision is in writing and is appended to the brief at Addendum page 1.

Respectfully Submitted,
NEPBA,
By its lawyer,

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DATED: 1/29/18

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 the Brief of the Appellant NEPBA have been hand-delivered to the Clerk of the Supreme Court this 29th Day of January 2018.

In accordance with New Hampshire Supreme Court Rule 16(10), the undersigned hereby certifies that two copies of the Brief of the Appellant have been forwarded, via first class mail, postage prepaid to the Office of the New Hampshire Attorney General, also counsel for the SEA.

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 Peter J. Perroni be designated as the attorney to argue its merits on behalf of the Appellant. Counsel requests seven and one-half (7.5) minutes for argument with the remainder designated to the other appellant, SEA.

Dated: 1/29/18

Peter J. Perroni

ADDENDUM

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State of New Hampshire
Public Employee Labor Relations Board

SEA of NH, Inc., SEIU Local 1984 v. State of New Hampshire
Case No. G-0252-1

and

NEPBA, Inc. Local 40 (Fish & Game) et. al. v. State of New Hampshire
Case Nos. G-0254-1, G-0255-1, G-0110-2, G-0106-2, G-0107-2

Consolidated Cases
Decision No. 2017-094

Appearances:

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Background:

On March 24, 2017, the SEA filed an unfair labor practice complaint under the Public Employee Labor Relations Act (Act), complaining that the State has improperly refused to continue negotiations with the SEA at the bargaining table because other unions (exclusive representatives) have declared impasse and are pursuing mediation, an impasse resolution procedure available under RSA 273-A:12. The NEPBA filed a similar complaint[1] on April 10, 2017. According to the SEA and the NEPBA, the State's refusal to continue negotiations is an unfair labor practice in violation of RSA 273-A:5, I (a)(to restrain, coerce or otherwise interfere

[1] The above captioned matters were previously consolidated. See PELRB Decision No. 2017-071 (April 24, 2017).

with its employees in the exercise of the rights conferred by this chapter); (e)(to refuse to negotiate in good faith with the exclusive representative of a bargaining unit, including the failure to submit to the legislative body any cost item agreed upon in negotiations); and (g)(to fail to comply with this chapter or any rule adopted under this chapter)(RSA 273-A:3 and 11). The NEPBA also claims the State has violated sub-section (b)(to dominate or to interfere in the formation or administration of any employee organization).

The SEA and the NEPBA request that the PELRB: 1) find that the State's refusal to continue bargaining violates the cited sub-sections of RSA 273-A:5, I; 2) issue an order directing the State to return to the bargaining table; and 3) grant additional relief as appropriate.

The State denies the charges and contends that RSA 273-A:9, I imposes a union bargaining committee ("Union Committee") requirement as to common terms and conditions of employment ("common terms and conditions")[2] that the SEA and the NEPBA are refusing to follow. According to the State, the five unions are required to utilize the RSA 273-A:9, I Union Committee structure to address common terms and conditions at the bargaining table and during any RSA 273-A:12 impasse resolution, like mediation or fact-finding, until contractual provisions addressing common terms and conditions are settled. The State argues that none of the five unions can be excused from the Union Committee requirement even in the event that some, but not all, declare a bargaining impasse and invoke impasse resolution procedures under RSA 273-A:12. The State maintains that non-impasse unions, like the SEA and the NEPBA, may not continue negotiations at the bargaining table over common terms and conditions, either on their own or as a reduced Union Committee (i.e. without the participation of all five unions). Likewise, the State argues that impasse unions may not proceed to impasse resolution mediation

[2] The State describes these as cost items and terms and conditions of employment affecting employees in the classified system generally.

(or fact-finding), over common terms and conditions, as a reduced Union Committee (i.e. without the participation of the non-impasse unions). The State is ready to address common terms and conditions of employment with the Union Committee on this basis, and requests that the PELRB deny all requests for relief and dismiss the complaints.

At the parties' request, the scheduled hearing was cancelled, and the parties have submitted these consolidated cases for decision on stipulations and briefs, all of which have been duly filed.The stipulations are reflected in the Findings of Fact, set forth below.

Findings of Fact

1. The State is a "public employer" under RSA 273-A:1, X.

2. There are approximately fifty separate state executive branch bargaining units that are represented by five separate exclusive representatives, or unions.

3. The SEA is the exclusive representative and bargaining agent for approximately 42 bargaining units, and its representation of the majority of these dates to 1976. The collective bargaining agreements on file with the PELRB per RSA 273-A:16, I reflect that the SEA and the State negotiate a master agreement covering all SEA represented bargaining units, with a number of different sub-unit provisions and wage schedules. State collective bargaining agreements are available online at https://www.nh.gov/pelrb/collective/index.htm. The current collective bargaining agreement between the SEA and the State will remain in force and effect until June 30, 2017 or until such time as a new agreement is executed.

4. The NEPBA represents and bargains for five separate bargaining units (two Fish and Game Department units since 2006, one Liquor Commission/Division of Enforcement and Licensing unit since 2009, and two Department of Corrections/ Probation and Parole units since

during impasse resolution proceedings until such time as the common terms and condition of employment are settled. The SEA and NEPBA complaints charging the State with violations of various sub-sections of RSA 273-A:5, I are therefore dismissed.

For the reasons stated in his dissent, Board Member Hounsell voted to find that the State has committed an unfair labor practice as charged.

Jurisdiction:

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

Discussion

The basic issue is whether the RSA 273-A:9, I Union Committee format requirement, which the parties agree applies to bargaining table activity over common terms and conditions, extends to RSA 273-A:12 impasse resolution activity dealing with the same subject matter. We conclude that bargaining table activity, impasse mediation, and impasse fact-finding are all a version of negotiation within the meaning of RSA 273-A:9, I. In other words, they are each different phases of the overall negotiation process. Therefore, to the extent of negotiations over common terms and conditions, the State is entitled to insist that the five unions continue to adhere to the Union Committee format in the event one or more of the unions declares a bargaining impasse as has happened in this case. It is the obligation of the five unions to coordinate with each other and determine whether the Union Committee will engage with the State at the bargaining table or in impasse resolution proceedings.

We base our decision on several different provisions of the Act. First, there is RSA 273-A:9, I, applicable to Executive Branch state employee bargaining units. This establishes the Union Committee format:

All cost items and terms and conditions of employment affecting state employees in the classified system generally shall be negotiated by the state, represented by the governor as chief executive, *with a single employee bargaining committee comprised of exclusive representatives of all interested bargaining units.* Negotiations regarding terms and conditions of employment unique to individual bargaining units shall be negotiated individually with the representatives of those units by the governor.

(Emphasis added).

The statutory impasse process, set forth in RSA 273-A:12, is also relevant. Unlike RSA 273-A:9, I, it is applicable to all bargaining units[4] in the state, regardless of whether they involve municipal, county, or state employees, and provides, in part, as follows:

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

[4] There are approximately 600 PELRB certified bargaining units in the state. They are indexed online at https://www.nh.gov/pelrb/certifications/index.htm.

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.

A third provision expressly provides that cooperation during impasse resolution proceedings is part of good faith negotiation under the Act:

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.

See RSA 273-A:3, I (emphasis added).

Based upon these statutory provisions it is clear that impasse mediation, impasse fact-finding, and bargaining table activity each occupy different points on the collective bargaining spectrum. Indeed, the overlap between impasse resolution and negotiation is reflected in the first two sentences of sub-section IV of RSA 273-A:12, where mediation is identified as a negotiation option if the fact finding process does not settle the contract: "[i]f the impasse is not resolved

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which negotiations will go forward and thereafter utilize the Union Committee format accordingly. The SEA and NEPBA complaints are dismissed.

So ordered.

May 26, 2017

/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 find that the State has committed an unfair labor practice as charged, as explained in his dissenting decision below.

Dissenting Opinion:

I disagree with the majority's conclusion that all five unions are still subject to the Union Committee format and must all appear together at the bargaining table or at impasse mediation. There is no language in RSA 273-A:9, I or RSA 273-A:12 which effectively allows the Union Committee format to override the right of the SEA and the NEPBA to remain at the bargaining table over common terms and conditions of employment, or to prevent the Teamsters and the NHTA from utilizing statutory impasse procedures. There is also no support for this result in RSA 273-A:3, I. This sub-section of the Act, cited by the State in support of the argument that negotiations at the bargaining table and impasse resolution proceedings are, in substance, synonymous, only states that "cooperation" in impasse resolution is part of good faith negotiations. It does not equate "impasse resolution" with "negotiation" as that term is used, for example, in RSA 273-A:9, I.

The "bargaining impasse" in this case literally means that negotiations have stalled. The resulting legal status is that the Teamsters and NHTA are no longer actively engaged in "negotiations" within the meaning of RSA 273-A:9, I. Therefore, they are no longer subject to the Union Committee format. Instead, their rights and obligations, together with those of the State, are governed by RSA 273-A:12. This sub-section of the Act is detailed and

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."

Whether the parties are engaged at the bargaining table or are participating in impasse mediation or fact-finding, the purpose (reaching agreement) is the same. Each of these three options represents a different approach to this common objective, and therefore all are part of the overall statutory negotiation scheme. Impasse resolution proceedings are simply negotiations conducted with the intervention and assistance of a professional mediator or fact-finder. A contract can be settled[5] during impasse mediation, or following impasse fact-finding, just as can happen at the bargaining table. Activity which can result in an agreement must be deemed part and parcel of the negotiation process.

In accordance with the foregoing, we conclude that RSA 273-A:9, I requires all five unions to use the Union Committee format during "negotiations" with the State over common terms and conditions of employment, inclusive of any impasse mediation or fact-finding, and even when there is a split among the unions about how to proceed, as has happened in this case. This is also consistent with the purpose of the Union Committee format, which is to create efficiencies in the bargaining process and organize and structure negotiations between the State and the various State employee bargaining units at issue in this case. It also avoids a diminution of, or strain upon, the State's bargaining resources that might occur if the State is compelled to address contractual provisions common to all bargaining units in different forums and at different times in the event of a bargaining impasse.

The State is prepared to engage with the Union Committee at the bargaining table or in impasse resolution. The unions must now coordinate with each other to determine the forum in

[5] Subject to the approval of cost items under RSA 273-A:3.

comprehensive, and it does not contain a Union Committee requirement for state employee bargaining units.

The forced maintenance of the Union Committee structure given the split between impasse and non-impasse unions is also unworkable. Union action through a unified Union Committee is impossible at this juncture. Can two of the five unions force the other three into impasse mediation or fact-finding? Can the three non-impasse unions force the other two impasse unions to remain at the bargaining table? How such issues are to be resolved is unclear.

The PELRB has certified each of the five unions as the "exclusive" representative of the state bargaining units referenced in the findings of fact. Each represents employees working in different areas of state government, and each is working on finalizing their own collective bargaining agreement with the State. The fact that the five unions have not moved "in lock step" into impasse resolution is not surprising giving the divergent working conditions and responsibilities which characterize the different bargaining units. Contrast, for example, Teamsters represented corrections officers working at the Department of Corrections with SEA represented employees working at the Division of Administrative Services, the Insurance Department, and the Department of Education. Given such fundamental differences between the various bargaining units it is especially important to avoid infringing upon the right of individual unions (Teamsters and NHTA) to leave the bargaining table and pursue impasse resolution without prejudicing the right of non-impasse unions (SEA and NEPBA) to continue at the bargaining table. Continuation of the Union Committee format, however, interferes with, and improperly limits, these important statutory rights. It also gives the State an unfair advantage in the difficult task of settling common terms and conditions of employment because of the

restrictions that are placed upon the unions' ability to fully utilize the tools and options available to them under the Act.

For all these reasons I disagree with the majority decision in this case. The five unions are not bound by the Union Committee format in the event of a bargaining impasse over common terms and conditions of employment. Therefore, the State's refusal to continue to meet the SEA and the NEPBA at the bargaining table to discuss common terms and conditions as demanded is a clear violation of the State's bargaining obligations, and the State has committed an unfair labor practice as charged. The State should be ordered back to the bargaining table to resume negotiations with the SEA and the NEPBA over common terms and conditions of employment.

May 26, 2017

/s/ Mark Hounsell
Mark Hounsell, Board Member

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