

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2017-0472

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

BRIEF FOR APPELLANT

STATE EMPLOYEES' ASSOCIATION OF NEW HAMPSHIRE, INC.,
SEIU, LOCAL 1984

State Employees' Association of New
Hampshire, Inc. SEIU, Local 1984
Through Counsel
By: Glenn R. Milner, Esq.
NH Bar #5568
207 North Main Street
Concord, NH 03301
(603) 271-6384

TABLE OF CONTENTS

TABLE OF CASES i

TABLE OF STATUTES AND OTHER AUTHORITIES ii

QUESTIONS PRESENTED FOR REVIEW 1

STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 3

STATEMENT OF THE FACTS 4

SUMMARY OF THE ARGUMENT 13

ARGUMENT 14

A. *Standard of Review.*

B. *RSA 273-A:12 requires a declaration of impasse in order for mediation and fact-finding to commence.*

C. *RSA 273-A:9 does not even mention dispute resolution.*

D. *The PELRB's ruling is 'unjust and unreasonable' and otherwise leads to absurd results.*

CONCLUSION 18

CERTIFICATIONS 18

TABLE OF CASES

<u>Appeal of State</u> , 138 N.H. 716 (1994)	14
<u>Appeal of Hillsborough County Nursing Home</u> , 166 N.H. 731 (2014).....	14
<u>Oullette v. Town of Kingston</u> , 157 N.H. 604 (2008).....	14
<u>Appeal of Routhier</u> , 143 N.H. 404 (1999)	15
<u>Appeal of N.H. Dept. of Transportation</u> , 144 N.H. 555 (1999).....	15,17
<u>K&J Assoc. v. City of Lebanon</u> , 142 N.H. 331 (1997).....	15
<u>State Employees’ Assoc. v. Cheney</u> , 119 N.H. 822 (1979).....	15
<u>Appeal of State Employees’ Ass’n of New Hampshire</u> , 120 N.H. 690 (1980)	15
<u>Appeal of Town of Derry Educ.Assoc.</u> , 138 N.H. 69,71 (1993)	17
<u>State v. Kidder</u> , 150 N.H. 600 (2004).....	17,18

TABLE OF STATUTES AND OTHER AUTHORITIES

Statutes

NH RSA 273-A	Passim
NH RSA 273-A:1, X	4
NH RSA 273-A:9	Passim
NH RSA 273-A:12	Passim

Other Authorities

Black’s Law Dictionary at 869 (10th Ed. 2014)	15
---	----

I. QUESTIONS PRESENTED FOR REVIEW

- A. Whether the PELRB acted unlawfully, unjustly or unreasonably by ordering the SEA to proceed to impasse where neither the SEA or the State declared impasse in their collective bargaining talks?
- B. Whether the PELRB acted unlawfully, unjustly or unreasonably by disregarding the clear and unambiguous language of the Public Employee Labor Relations Act by creating a requirement of "coalition bargaining" without statutory authority?
- C. Whether the PELRB acted unlawfully, unjustly or unreasonably by ruling that the committee format set for in RSA 273-A:9 supersedes the impasse resolution process set forth in RSA 273-A:12?

II. STATUTORY PROVISIONS

NH RSA 273-A:9 Bargaining by State Employees.

- 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.
- II. To assist in the conduct of such negotiations the governor may designate an official state negotiator who shall serve at the pleasure of the governor.
- III. The governor shall also appoint an advisory committee to assist in the negotiating process. The manager of employee relations appointed under RSA 21-I:44, II shall be a member of this committee.
- III-a. No person who is appointed to serve as a state negotiator or as a member of the state negotiating team or any person who serves as a member of the employee bargaining committee shall use his or her position to obtain anything of value for the private benefit of such person or the person's immediate family. Nothing in this section shall prevent an employee or taxpayer from serving on a negotiating team or bargaining committee.
- IV. The division of personnel, through the manager of employee relations and the manager's staff, shall provide administrative and professional support to the

governor in the conduct of negotiations.

V. [Repealed.]

Source. 1975, 490:2. 1986, 12:7. 1995, 9:35, 36. 1997, 351:53. 1999, 225:15, 16. 2004, 137:1, eff. July 18, 2004. 2010, 368:1(50), eff. Dec. 31, 2010.

NH RSA 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. 19 79, 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.

III. STATEMENT OF THE CASE

This is a public sector collective bargaining case regarding the mechanics as to how bargaining is conducted between the State of New Hampshire (State) and State employees under RSA 273-A:9 and the impasse procedures set out in RSA 273-A:12. On March 24, 2017, the State Employees' Association (SEA) filed an Unfair Labor Practice charge (ULP) against the State because the State insisted that the SEA enter into the impasse resolution process without either party declaring impasse. For the first time since the enactment of RSA 273-A, the State now insists that simply because the procedure for bargaining involves a "single employee committee" made up of the four Unions representing "all interested bargaining units", where one Union declares impasse all other 'non impasse' Unions must enter into the impasse phase, whether they want to or not.

After the case was submitted on stipulated facts and briefs, a divided Public Employee Labor Relations Board (PELRB), on May 26, 2017, essentially adopted the State's novel argument that the single bargaining committee format (under RSA 273-A:9) must be followed in the impasse resolution proceedings (under RSA 273-A:12), even though neither section contains any such directive.

The SEA timely filed a Motion for Rehearing which was denied by the PELRB on July 12, 2017 (Board Member Hounsell, dissenting).

This appeal followed.

IV. STATEMENT OF THE FACTS

The parties stipulated as follows:

- A. The State of New Hampshire (the "State") is a "public employer" as defined by RSA 273-A:1, X.
- B. The Petitioner, the State Employees' Association, SEIU Local 1984 (the "SEA") is one of five certified bargaining representatives for public employees of the State of New Hampshire.
- C. On December 13, 2016, during the parties first session of bargaining, introductions were made by the members of the State and Association teams. Spokespersons were identified for each group, bargaining schedules were discussed, draft ground rules were presented to each group, suggested changes to the rules were discussed, and the rules were amended and signed. The order in which each union would make proposal presentations was discussed and agreed upon.

- E. On December 15, 2016, the SEA's master team met and presented proposals to the State's team.
- F. On December 20, 2016, the New England Police Benevolence Association ("NEPBA") team met and presented proposals to the State's team.
- G. On December 22, 2016, nine (9) SEA sub-unit teams met with the State's team for the first time and introductions were made and proposals were presented. The sub-unit teams represented: The Department of Transportation, Liquor Enforcement, the Department of Fish & Game, The Department of Education, OREO, The NH Veterans Home, The Department of Safety, Liquor Retail and Glencliff Home.
- H. On January 3, 2017, the New Hampshire Troopers Association ("NHTA") (Troopers and Sergeants) and (Command Staff) presented their contract proposals to the State's team.
- I. On January 5, 2017, both the Teamsters and NEPBA Fish and Game Officer units presented their contract proposals to the State's team.
- J. On January 17, 2017, an additional eight (8) SEA sub-unit teams met with the State's team for the first time, introductions were made, and proposals were presented. The sub-unit teams represented: The Department of Corrections, The Department of Environmental Services, The Department of Information Technology, NH Banking Commission, NH Hospital, The Department of Employment Security, The Department of Health & Human Services, and the Division of Juvenile Justice.
- K. On January 24, 2017, the master unit teams [SEA, NHTA (Troopers and

Sergeants) (Command Staff), Teamsters, and NEPBA] met with the State's team, discussed proposals on the table and exchanged additional proposals. At this meeting the State presented their proposals on Annual, Bonus and Sick Leave, Healthcare and Supplemental Sick Leave. The SEA asked for wage responses from the State. At this meeting the State claimed they would wait to respond on the any wage proposals.

- L. On February 2, 2017, the State's team and all master unit teams [SEA, NHTA (Troopers and Sergeants) (Command Staff), Teamsters and NEPBA] met and again exchanged proposals and had discussions on existing proposals on the table. The SEA asked for the State's position on wages and if there would be a proposal from the State. The State claimed it was waiting on the Governor's budget. The State asked for a response to their healthcare proposal and the SEA told the State that because healthcare was such a large part of the compensation package that they could not respond without the wage information.
- M. On February 7, 2017, the State's team and union master teams [SEA, NHTA (Troopers and Sergeants) (Command Staff}, Teamsters and NEPBA] had discussions on existing proposals on the table. The SEA asked for a response to their wage proposal. The State claimed it was still waiting for the Governor's budget.
- N. On February 14, 2017, the SEA sub-unit team for the NH Adjutant General's Office met with the State onsite at the Pease Fire House in Portsmouth. Introductions were made and the sub-unit team presented

their proposals.

- O. On February 21, 2017, the State's team and union master teams [SEA, NHTA (Troopers and Sergeants) (Command Staff), Teamsters and NEPBA] met and the State said that their response to all union wage proposals was "no". The State claimed that due to the anticipated increases in prescription drugs costs in the current healthcare market, that the Governor was not offering any wage increases during this bargaining cycle.
- P. On February 28, 2017, the State's team and union master teams [SEA, NHTA (Troopers and Sergeants) (Command Staff), Teamsters and NEPBA] continued with discussions on existing proposals on the table. The State withdrew their healthcare proposal in lieu of their position on no wage increases.
- Q. On March 2, 2017, eight (8) SEA sub-unit teams met with the State's team to receive responses to their initial proposals to the State. The teams present were: The Department of Corrections, The Department of Environmental Services, The Department of Fish and Game, Liquor Enforcement, The Department of Information Technology, NH Banking Commission, NH Hospital, The Department of Employment Security, and The Department of Transportation.
- R. On March 7, 2017, the State's team and Union Master teams met [SEA, NHTA (Troopers and Sergeants) (Command Staff), Teamsters and NEPBA]. The SEA went first and withdrew proposals, submitted amended

proposals, and discussed the remaining proposals on the table. The SEA made statements to the State's team challenging their position on no proposed wage increases.

The Teamsters union went after the SEA and requested from the State their final and best offer on wages. The State reiterated that there is zero (0) in wages being offered by the State.

In response to this the Teamsters made statements on the pay and working conditions at the different NH prisons and the discrepancies that exist between the NH Department of Corrections and the rate of compensation for corrections (Officers) at NH county and federal corrections facilities. The State claimed its position remained unchanged. The Teamsters then declared a bargaining impasse.

The NHTA (Troopers and Sergeants) team went third. The State responded "no" to the NHTA (Trooper and Sargent) proposals on the table. When asked by the State's team if the NHTA (Troopers and Sergeants) were declaring impasse, the NHTA (Troopers and Sergeants) representative replied yes.

The State took a caucus at 10:48 a.m. When they return they claimed that in light of the Teamsters and NHTA (Troopers and Sergeants) declaring impasse, they believed that all the unions would have to go into mediation.

The SEA disagreed with this statement and stated that they wished to continue with bargaining. The SEA then asked the State if they were

declaring impasse and the State responded "no". The parties agreed to break for lunch with the understanding that they were coming back that afternoon to meet. When asked if the State would have a response to the SEA's proposals, the State indicated that they were intending to reply to some of the proposals.

Break 11:30 a.m. to 1:30 p.m.

After the break, only the SEA returned to meet with the State. Matthew Newland, the negotiator for the State's team, stated that due to the unexpected actions of the Teamsters and the NHTA (Officers and Sergeants), they would not be responding to any proposals and that the unions need to decide upon a mediator. The SEA claimed that NH RSA 273-A did not support the State's assertion. The SEA asked the State how it could justify its position when in practice they did not try and force the other unions into mediation when the SEA had declared impasse in prior bargaining cycles including the 2014-2015 cycle. The State said it could not answer this question.

The SEA requested to schedule more bargaining sessions with the State and stated that it wanted to continue to negotiate the contract. The State made claims on the nature of the law, its position on coalition bargaining, and that the unions must speak with one voice. The SEA restated that it disagreed with the State's position and again asked the State's team how it can justify this position when in the last cycle, when the SEA declared

impasse, the State continued to bargain with the other union teams. Again Mr. Newland, for the State, said he could not answer that question. The SEA continued to press the State team to continue contract negotiations. The State claimed that they were 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.

Negotiations end at 2:00 p.m.

- S. On March 16, 2017, a bargaining meeting with the State's Team was held with the SEA, NHTA (Command Staff) & NEPBA to discuss the declarations of impasse made by the Teamsters and NHTA (Troopers and Sergeants) on March 7, 2017. Matt Newland for the State's team claimed that RSA 273-A says that all the unions speak with one voice and that if two of the unions declare impasse that all the unions must go to impasse.

The NEPBA and NHTA (Command Staff) agreed and supported the SEA's position when asked by the State.

The State took a brief caucus at 9:30 a.m. and returned at 10:08 a.m.

The State returned and responded to the argument presented to them by restating that they believe the law says the unions speak with one voice in bargaining and because two of the unions declared impasse that all units must go to mediation or all units must return to the bargaining table.

NEPBA and the SEA challenged this and asked for an explanation as to why the last round of bargaining in 2014-2015, when the SEA declared impasse, the State continued to meet with the other unions and reached agreement with them.

The State responded that it worked in past negotiations, which does not bind future negotiations.

The State then asked the unions if they could come to any agreement without wages. The SEA responded that there are many proposals remaining on the table beyond wages. The NHTA (Command Staff) and the NEPBA concurred and stated that they did not have a complete picture yet on what can be agreed upon and that they could possibly come to an agreement without wages.

The SEA and the other unions continued to question the State on its willingness to meet, and the State said they were willing to bargain if all the unions could agree on what process they wanted to follow:

Impasse/mediation or resume the regular bargaining process. The SEA stated that they disagreed with the State's position, they were not responsible for coordinating the actions of the other unions, and that they would seek relief with the NH Public Employee Labor Relations Board.

The SEA then asked if the State would schedule sub-unit negotiations. The State responded that they were willing to meet with sub-unit teams on February 21, 2017. The representatives of the NEPBA then challenged the State on the contradiction to their position on impasse and not being

willing to continue bargaining with them (NEPBA), but willing to bargain with the SEA sub-units. The State claimed that SEA sub-units were unique to agencies.

The State then said they were willing to continue bargaining with the SEA sub-units and would agree to set up a schedule for the following weeks.

The meeting ended at 10:30 a.m.

S. Neither the SEA nor the State has declared impasse.

In sum, on March 7, 2017, the “single employee committee” met where, as is customary, each Union took a turn presenting issues, unique to them, and, in turn, hearing the State’s response. Certified Record (CR) at 52-54. The SEA presented first, made proposals and commented on the State’s position on wages. The Teamsters followed that same path, but also declared impasse in light of the State’s ‘no wages’ stance. The Troopers went next and received a negative response to their proposals. In response to the State’s question, NHTA (Troopers and Sergeants) declared impasse.

After a caucus, the State returned and, for the first time since the enactment of RSA 273-A, took the position that because of the declaration of impasse by the Teamsters and NHTA, all Unions now were forced to go to mediation. CR 52. The State explained that “due to the unexpected actions of the Teamsters and NHTA ... they would not respond to any proposals...”. CR 53. When reminded by the SEA that in the previous bargaining cycle, the SEA declared impasse and went into mediation with the State while the State continued to bargain with the other Unions, the State responded that “it could

not answer that question”.¹ CR 53. A similar colloquy occurred when the parties’ met on March 16, 2017.

V. SUMMARY OF ARGUMENT

As required by RSA 273-A:12 and in conformance with common sense and a 40-year history between the State and the SEA, one or both parties must declare impasse in order to animate the mediation and fact-finding components of the dispute resolution process. A declaration of impasse means that bargaining is over and the ‘single employee committee’ format falls away. This has been how the SEA and State have operated in negotiations since the enactment of RSA 273-A in 1975. Neither the State nor SEA have declared impasse, yet somehow these parties just completed fact-finding.

The State’s new position rests entirely on this sentence:

All cost items and terms of 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.

RSA 273-A:9. (italics added).

Of course the State ignores the very next sentence:

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.

Id. (italics added).

¹ Similarly, in 2007 the State and SEA went through Fact-Finding with the State alone.

Nowhere in either section 9 or 12 did the Legislature say anything close to what is now the State's position that all bargaining units must appear at fact-finding (or all appear back at the table). Rather, the Legislature inserted clear language that impasse precedes dispute resolution and that individual bargaining units have a right to negotiate their issues separately.

Indeed, to leave the PELRB's decision untouched would lead to absurd results including for example, an impasse declaration by the Teamsters over a safety boot stipend could drag the SEA into impasse even though the State and SEA are near agreement on a 20-million-dollar wage proposal. The decision below should be reversed.

VI. ARGUMENT

A. *Standard of Review.*

In appeals like this one, presenting solely questions of law, the Court will review the decision below for errors of law and reverse the decision if it is unjust or unreasonable. Appeal of State, 138 N.H. 716, 719 (1994), RSA 541. PELRB's rulings on issues of law are reviewed de novo. Appeal of Hillsborough County Nursing Home, 166 N.H. 731,733 (2014).

This Court no longer accords deference to the PELRB's interpretation of the provisions of RSA 273-A. Appeal of State, 138 N.H. at 720 (twenty years after labor act's passage, continued deference to PELRB's statutory interpretation no longer necessary or desirable). Oullette v. Town of Kingston, 157 N.H. 604, 612 (2008) (under de novo standard, no deference given to rulings being reviewed).

When presented with a question of statutory construction, the Court begins its analysis with the statutory language. Appeal of Routhier, 143 N.H. 404, 405 (1999). “[W]here possible, [the Court will] ascribe the plain and ordinary meanings to words used”. Appeal of N.H. Dept. of Transportation, 144 N.H. 555, 556 (1999) (citation omitted). It is axiomatic that sections of a statute will be read together and not viewed in isolation. Id., (brackets and quotations omitted). Only where the language is ambiguous will the Court review its legislative history. K&J Assoc. v. City of Lebanon, 142 N.H. 331, 333 (1997). Finally, this Court is “the final arbiter of the intent of the legislature as expressed in the words of a statute”. State Employees’ Assoc. v. Cheney, 119 N.H. 822, 826 (1979) (quotation omitted).

B. RSA 273-A:12 requires a declaration of impasse in order for mediation and fact-finding to commence.

Section 12 of RSA 273-A (“Resolution of Disputes”) controls that phase of bargaining where the parties’ negotiations have come to a halt. See, Black’s Law Dictionary at 869 (10th Ed. 2014) (impasse: a point in negotiations at which an agreement cannot be reached). There is no dispute that RSA 273-A:12 applies to State bargaining. See generally, Cheney, 119 N.H. 822; Appeal of State Employees’ Ass’n of New Hampshire, 120 N.H. 690 (1980).

There are essentially three phases in the resolution dispute process under RSA 273-A:12 and they all are triggered by either the declaration of impasse or the failure to resolve the impasse. Where the parties “have bargained to impasse” the chief negotiators may request an audience with the other party’s board of the public employer, here

Governor and Council² and the SEA membership. RSA 273-A:12(a). “If the impasse is not resolved”, mediation and possibly fact-finding come into play. RSA 273-A:12(b). Finally, if “the impasse” is not resolved following the action of the legislative body, negotiations reopen. RSA 273-A:12.

Simply put, you need a dispute to resolve, a point in negotiations where an agreement cannot be reached, or an impasse to breach in order to animate the functions of RSA 273-A-12. Here neither the State nor the SEA reached that point in negotiations. Instead, the State invents a new process not contemplated by the Legislature and not agreed upon by the SEA. See, RSA 273-A:12, V (parties must “agree upon” any lawful, alternative “impasse” procedures).

C. RSA 273-A:9 does not even mention dispute resolution.

RSA 273-A:9 sets out the mechanics as to how the State will bargain with State employees for example: the Governor represents the State; state bargaining units meet together with the State; unique items are negotiated with bargaining units separately; there is an advisory committee; and the division of personnel provide administrative support. There is no text in section 9 referencing dispute resolution or referencing 273-A:12. This is because section 12 controls that phase of bargaining where negotiations have failed.

Nonetheless, the State would have this Court believe that in one sentence creating a “single employee committee” to “negotiate” with the State, a process is created where

² RSA 273-A:1(II)(a)(1).

the State interacts with this same committee when negotiations have ended. Had the Legislature intended that, they certainly would have said so somewhere in section 9 or 12 and they certainly would not have included the “unique to individual bargaining units” language in section 9.³

All words of a statute will be given effect. Appeal of Town of Derry Educ.Assoc., 138 N.H. 69,71 (1993). To graft into RSA 273-A:9, out of whole cloth, a novel dispute resolution process, would require the Court to ignore the express provisions of RSA 273-A:12. Rather, construed together, section 9 handles the mechanics of State bargaining and section 12 set out the dispute resolution process. Appeal of N.H. Dept. of Transportation, 144 N.H. 155 (sections of a statute to be interpreted harmoniously).

D. *The PELRB’s ruling is ‘unjust and unreasonable’ and otherwise leads to absurd results.*

The PELRB’s divided opinion should not stand. This new process, never before followed, has a host of unknowns and leads to absurd results. State v. Kidder, 150 N.H. 600 (2004). Is it that one bargaining unit declaring impasse over a clothing allowance will effectually throw all other units into impasse? How does the fact-finding report get voted on, a majority or unanimous bargaining committee vote? What if one unit declares impasse where another unit is nearing or likely to reach an accord with the State?

The policy of the State is to “foster harmonious and cooperative relations between public employers and their employees...”. Preamble RSA 273-A. The goal of statutory interpretation is to apply statutes in light of the legislature’s goal in enacting them and in

³ Adding to the curiousness of the State’s ‘all for one and one for all’ stance is this: the law allows the State to get to fact-finding with all interested bargaining units (perhaps not together at once). The State can simply declare impasse with each.

light of the policy sought to be advanced by the entire statutory scheme. State v Kidder at 602. Allowing the State and PELRB to invent a dispute resolution process so unfair and unreasonable and so devoid of any statutory basis injures that lofty goal.

VII. CONCLUSION

Upholding the PELRB's ruling would not only rewrite the 273-A but would setback State negotiations 40 years. The dissent has it right:

- 1) there is no statutory language that allows the committee format to override the right of the SEA to remain at the bargaining table or the right of the Unions declaring impasse to proceed under RSA 273-A:12; and
- 2) to bargain to impasse literally means that negotiations have stalled and RSA 273-A:9 falls away and RSA 273-A:12 rises. CR. 00137.

The decision below should be reversed.

VIII. 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 29th day of January, 2018.

In accordance with New Hampshire Supreme Court Rule 16 (10), the undersigned hereby certifies that two (2) copies of Brief of Appellant have been hand-delivered to Nancy Smith, Esq., Jill Perlow, Esq., two (2) copies forwarded, via first

class mail, postage prepaid, to Peter Perroni, Esq., and one (1) copy hand-delivered to the PELRB.

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 Glenn R. Milner, Esq. 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: January 29, 2018

Glenn R. Milner, General Counsel



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: Glenn Milner, Esq., State Employees Assoc. of NH,
Concord, New Hampshire for the SEA, SEIU Local 1984

Peter J. Perroni, Esq., Nolan Perroni, P.C.
No. Chelmsford, Massachusetts for the NEPBA

Nancy J. Smith, Esq., Senior Assistant Attorney General, and
Jill Perlow, Esq., Assistant Attorney General
Concord, New Hampshire for the State

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 complaint¹ 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

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 Corrections 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,³ 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.

³ Incorporated herein by reference.

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 corrections 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.

Decision and Order

Decision Summary

By a 2-1 vote, a majority of the Board (Members Eills and O'Mara) find that RSA 273-A:9, I requires all five unions to utilize the Union Committee format at the bargaining table and

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 units⁴ 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

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 settled⁵ 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.

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

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

Distribution: Peter J. Perroni, Esq.
Glenn Milner, Esq.
Jill Perlow, Esq.
Nancy J. Smith, Esq.



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. 2017-109

Order on Motion for Rehearing

The SEA and the NEPBA filed motions for rehearing of PELRB Decision No. 2017-094 (May 26, 2017) on June 26, 2017. The State filed an objection to both motions on July 5, 2017. 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, by a 2-1 vote, the motion for rehearing is denied.

Date: July 12, 2017

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

Chair Andrew Eills, Esq. and Board Member James M. O'Mara, Jr. vote to deny the motion for rehearing. Board member Senator Mark Hounsell votes to grant the motion, as explained in his dissenting decision below.

Dissenting Opinion:

I vote to grant the motion. Both the NEPBA and the SEA have raised new arguments that should be heard by the PELRB. It would be a disservice to the people of the state if the PELRB were to ignore their pleadings. Additionally, it would be a disservice to the thousands of state employees whose livelihood depends on being heard in order to proceed within a proper contract negotiating framework. The severity of this case is such that to deny the motion for a rehearing would be harmful to many. What is the harm in hearing more on the matter?

Date: July 12, 2017

/s/ Mark Hounsell
Mark Hounsell, Board Member

Distribution: Peter J. Perroni, Esq.
Glenn Milner, Esq.
Jill Perlow, Esq.
Nancy J. Smith, Esq.