THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2017-0514

APPEAL OF STATE EMPLOYEES' ASSOCIATION OF NEW HAMPSHIRE, INC.

SEIU, LOCAL 1984

APPEAL PURSUANT TO RSA 541:6 FROM A DECISION OF THE PUBLIC EMPLOYEES LABOR RELATIONS BOARD

BRIEF FOR APPELLEE THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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ISSUES PRESENTED

1. Did the Public Employee Labor Relations Board (PELRB) correctly hold that the State had successfully ended a past practice regarding a salary enhancement for future teachers hired at the Sununu Youth Center after the new collective bargaining agreement (CBA) took effect where the enhancement was on the table during negotiations, was specifically rejected by the State, and notice was given before the union approved the CBA without the enhancement that the past practice would end if not included in the CBA?

STATEMENT OF THE CASE AND OF FACTS

On April 4, 2014, the State Employees' Association Of New Hampshire, Inc., SEIU Local 1984 (SEA) filed a complaint under the Public Employee Labor Relations Act (RSA 273-A) claiming that an announced plan, to be effective on July 1, 2014, for elimination of salary enhancements for existing teachers at the Sununu Youth Center (SYSC) (while a then existing CBA was in effect and without any return to the bargaining table) was an unfair labor practice. The SEA argued that the salary enhancements had become a binding past practice and that any changes to this wage arrangement were subject to mandatory negotiations.

On July 31, 2014, the PELRB issued a decision (Decision No. 2014-184) finding that salary enhancements for current SYSC teachers was a "binding past practice," was subject to mandatory negotiation, and could not be unilaterally eliminated outside of bargaining. R.p. 38, (Joint Stip. Fact ¶C).[1] The PELRB determined that the State's "unilateral discontinuation" of the salary enhancement between collective bargaining sessions constituted an unfair labor practice. Appx. 27.[2]

After that decision, when collective bargaining for the new 2015-17 CBA started, on November 18, 2014, the SEA's Division of Juvenile Justice Services

[1] "R" refers to the record of the case below filed by the PELRB.

[2] "Appx" refers to the Appendix filed by the Appellant. The documents from prior PELRB cases including this order, as well as the stipulated exhibits, were available to the PELRB in this

("DJJS") sub-unit team submitted as Article 35.18.1 a proposal to include the enhancements "as part of the academic employee's salary." R. p. 38-39, (Joint Stip. Fact ¶G). Given that the enhancements impacted wages and constituted a money item, the parties agreed that the proposal had to be moved to the master level negotiations on the Executive Contract. *Id.* On November 20, 2014, the DJJS proposal was moved to the Master Contract negotiations. R.p. 39, (Joint Stip. Fact ¶H). During the master level negotiations, the State rejected the proposal. *Id.* After that rejection, the parties did not engage in further substantive conversation on the proposal. *Id.* An impasse was declared and the parties entered into the mediation phase of bargaining. R.p. 39, (Joint Stip. Fact ¶I). Ultimately, the SEA bargaining team withdrew the enhancement proposal during the mediation phase of negotiations after reaching a tentative agreement on a CBA that did not include the enhancements. *Id.* Therefore, the enhancements did not become part of the CBA submitted to the union for ratification. R.p. 39, (Joint Stip. Fact ¶I, J, K, L).

On February 26, 2015, before the new tentative CBA was ratified by the union, the State Manager of Employee Relations, Matthew Newland, notified the SEA, by letter, that "the current practice of salary enhancements at the Sununu Youth Services Center (aka Juvenile Justice Services), which is not part of our

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case, R.p.40, but were not included in the record submitted by the PELRB. Some are included in the Appellants Appendix.

collective bargaining agreement, shall come to an end on July 1, 2015, or, in the case of an evergreen situation,[3] when a new contract is effective, whichever is later, unless memorialized in the collective bargaining agreement." R.p. 39, (Joint Stip. Fact ¶J); Resp. Add. p. 19.[4] The letter went on to state that "[a]s of the date of this letter, the Parties have negotiated enhancements as evidenced by a union proposal marked 35.18.1, which was presented to the State on November 18, 2014 during sub-unit negotiations. The proposal was moved to the master level negotiations by mutual agreement. The Association withdrew the proposal at the master level during the mediation phase of negotiations upon reaching a tentative agreement." *Id.* The letter concluded by stating that the change to enhancements would be "implemented on a *prospective basis* and will *not* impact those employees who were part of the Public Employee Labor Relations Board decision number 2014-184 . . . . In other words, current employees will be grandfathered." *Id.*

On March 5, 2015, after receiving this notice, the SEA ratified the tentative agreement, which did not include the enhancements. R.p. 39, (Joint. Stip. Fact, ¶L). After an evergreen period during which the State continued to pay

[3] Under an evergreen provision, a collective bargaining agreement automatically continues until the successor agreement becomes effective through the legislative process.

[4] The joint stipulated exhibits, which included all exhibits in the prior PELRB cases, including the February 26, 2015 Newland letter, were available to the PELRB but were not included by the PELRB in the record filed. To the extent necessary for this brief and not provided in Appellant's Appendix, they are included in the addendum to this brief which is referred to as "Resp.Add."

enhancements to any newly hired SYSC teacher, the 2015-17 CBA became effective on October 3, 2015, when the new budget was finally approved. R.p. 39, (Joint Stip. Fact ¶¶ L-N).

On June 10, 2015, while the State was in an evergreen situation, the SEA filed a second unfair labor practice complaint (Case No. G-0148-4) alleging that the State violated the Board's July 31, 2014 Order and committed an unfair labor practice by unilaterally eliminating salary enhancements for SYSC teaching personnel positions commencing July 1, 2015, or, in the case of an evergreen situation, when a new contract is effective, whichever was later. R.p. 39, (Joint Stip. Fact ¶ O). Neither party requested a hearing or other relief. *Id.* As such, on January 27, 2016, the Board issued an Order dismissing the case. *Id.*

Subsequently, on March 1, 2016, the SEA filed a third unfair labor practice complaint (Case No. G-0148-5) relative to the SYSC teacher compensation, again alleging that the State violated the Board's July 31, 2014 Order by posting SYSC teacher positions without enhancement pay. On July 28, 2016, the Board issued a decision in Case G-0148-5 and dismissed the SEA's complaint because, based on the facts before it, the State had not actually hired any new SYSC employees without providing the salary enhancement. R.p. 40, (Joint Stip. Fact ¶ Q).

However, in early July of 2016, after briefing on Case No. G-0148-5 was completed and while the parties awaited a decision, the State filled the part-time

Teacher I – Library Media Specialist position, #TMPPT4906, without an enhancement. R.p. 40, (Joint Stip.Facts ¶ P).

Subsequently, on October 24, 2016, the SEA filed the unfair labor practice complaint at issue in this case, again alleging that the State committed an unfair labor practice under RSA 273-A:5, I(e), by unilaterally eliminating salary enhancement for the newly hired part-time position #TMPPT4906, Teacher I – Library Media Specialist. R.p. 40, (Joint Stip. Facts ¶ R). The case was submitted on stipulated facts and exhibits. *See* R.p. 38-41. After Opening Briefs, the PELRB specifically requested supplemental briefing on the question, which it held had not been answered in its previous order, of "whether and how the State may, with respect to new hires, alter a past practice concerning a term and condition of employment such as wages." *See* R. p. 70. After receiving those briefs, the PELRB, relying on New Hampshire case law, as well as looking to the same state and national authorities cited by this court, found that despite meaningful opportunity to bargain and clear notice, the SEA took no action when told that the enhancements would not be continued for new hires and therefore waived its bargaining rights. *See* R.p. 132.

SUMMARY OF THE ARGUMENT

During the negotiation process for the 2015-17 collective bargaining agreement, the SEA had a meaningful opportunity to bargain over the State's refusal to accept enhancements for *prospective* employees and chose to allow the past practice to cease by withdrawing the demand after mediation and by approving the tentative CBA after notice had been given that the practice would cease for new hires. The State did not violate its duty to bargain in good faith over this mandatory subject when it ended the past practice after rejecting the proposal at the bargaining table and subsequently providing notice that enhancements for *prospective* teachers would cease if not memorialized in the 2015-17 CBA.

The SEA's unsupported theory that the parties had to expressly write into the CBA any agreement to eliminate the enhancements in order for the State to be able to end this past practice was correctly rejected by the PELRB. Indeed the opposite of the SEA position is true. Although there is no explicit New Hampshire authority on this subject, the New Hampshire statutory language and case law do not support the SEA's theory. The State fulfilled its duty to bargain the subject of enhancements by considering and rejecting the proposal during the 2015-2017 CBA negotiations under RSA 273-A:3. To adopt a rule that the State cannot end a past practice for prospective employees through bargaining without mutual agreement would be contrary to RSA 271-A:3 and contrary to the statutory mandate that cost items must be bargained.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews decisions of the PELRB on matters of law de novo but defers to the PELRB's decisions on questions of fact, unless on a clear preponderance of the evidence, the Court determines the order is unjust or unreasonable. *Appeal of New Hampshire Department of Safety*, 155 N.H. 201, 202-203 (2006). "In reviewing the PELRB's findings, our task is not to determine whether we would have found differently or to reweigh the evidence, but, rather, to determine whether the findings are supported by competent evidence in the record." *Appeal of Hillsborough Cty. Nursing Home,* 166 N.H. 731, 733 (2014). In this case, there are both factual findings, as well as statutory interpretation at issue.

II. THE PELRB CORRECTLY HELD THAT THE STATE HAD SUCCESSFULLY ENDED A PAST PRACTICE AFTER NEGOTIATIONS AND NOTICE.

A. The PELRB Correctly Determined That The July 31, 2014 PELRB Order Had Not Decided The Issues In This Case.

The union first attacks the PELRB for determining that its prior order had not covered the facts at issue here. There is no basis for that attack. The July 31, 2014 PELRB Decision No. 2014-184 ("2014 order") determined that the State's

previous attempt, *outside of collective bargaining*, to reduce *current* SYSC employee wages by eliminating the enhancements constituted an unfair labor practice because the enhancements constituted a past practice. That order made clear that, because the enhancements affected wages, they are a cost item that is a mandatory subject of bargaining. Appx. p. 41. With that clarity, at the very next opportunity to bargain, the State properly ended the past practice of paying salary enhancements for *prospective* SYSC teachers hired on or after October 3, 2015, the effective date of the new 2015-17 collective bargaining agreement. The State did so by rejecting the enhancements during the collective bargain negotiations and, moreover, providing written notice before the tentative agreement was voted on by the union that approving the tentative CBA without the enhancements would end the practice as to new hires. R.p. 38-39. These facts are substantially different than what was before the PELRB in the original 2014 case. As such, the PELRB correctly determined that the issue of how to end a past practice, during CBA negotiations, specifically as to new hires, had not been before it in the earlier case. R.p. 70.

B. The State Successfully Ended The Past Practice Of Salary Enhancement For Future Teachers Hired At The Sununu Youth Center Under The New CBA By Rejecting The Enhancement During Negotiations And Giving Notice Before The Union Approved The CBA That The Past Practice Would End If Not Included In The CBA.

In November 2014, during negotiations for the current CBA, the SEA proposed to write the enhancements into the CBA. R.p. 38-39, (Joint Stip. Fact ¶ G). After the State rejected its proposal, the SEA chose to withdraw the proposal and ratified the tentative agreement with full knowledge that the State would not pay enhancements to newly hired SYSC teachers once the CBA became effective. R.p. 39, Joint Stip. Fact ¶¶ I-L. The State informed the SEA, by letter, before the new CBA was approved by the Union that it intended to eliminate salary enhancements *prospectively* for teachers hired on or after the effective date of the new CBA, unless the SEA had the enhancements memorialized in the CBA. R.p. 39, (Joint Stip. Fact, ¶J); Resp. Add. 19. Given these facts, the SEA could not reasonably have expected when signing the new CBA that the parties intended the practice of salary enhancements for *prospective* employees to remain in force. Rather, the SEA knew of the State's intention and had the opportunity to bargain about it prior to implementation, and failed to do so. Therefore, as the PELRB found, the SEA waived any right to try to enforce the past practice as to new employees.

The SEA's decision to withdraw its proposal as part of mediation does not translate into a failure on the part of the State to bargain in good faith over a mandatory subject of bargaining. 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, but the statute makes clear that "the obligation to negotiate in good faith shall not compel either party to agree to a proposal or to make a concession." RSA 273-A:3. Thus, while the July 2014 PELRB Order could, and did, compel the parties to bargain over enhancements by finding that the enhancements are a mandatory subject of bargaining, the PELRB could not determine the results of that bargaining.

Further, the SEA sent the CBA proposal to its members, who ratified the tentative agreement, without the enhancements, even after the State made clear the intention to cease enhancements for prospective employees hired on or after the effective date of the CBA if the CBA failed to memorialize the enhancements. *See* R. p. 39, (Joint Stip. Fact ¶ J, K, L). The SEA was well aware when it finalized the CBA that if it did not memorialize enhancements in the CBA, the State took the position that the enhancement had been bargained away and the State would cease paying enhancements *prospectively*. The SEA cites no authority for its bald assertion that the State only provided notice after negotiations were over. That is because there is none. As the PELRB found, "Even though a tentative agreement had been reached, and the ratification process was underway

the SEA still had the right to suspend ratification and demand that the State reopen negotiations to bargain based on the State's February 26, 2015 letter." R. p. 131. The record as a whole supports the PELRB factual finding that the SEA had a meaningful opportunity to bargain the issue prior to ratification of the contract, but chose to ratify the CBA without memorializing the enhancements.

As a leading treatise on the issue of past practices explains, a past practice is not by nature unalterable. Richard Mittenthal, "*Past Practice and the Administration of Collective Bargaining Agreements,*" R. at 77-115.[5] "Where the conditions which gave rise to a practice no longer exist, the employer is not obligated to continue to apply the practice." *Id.* p.57, R. p. 104. Mittenthal further explains that "in the face of a timely repudiation of a practice by one party, the other must have the practice written into the [CBA] if it is to continue to be binding." *Id.*p. 56, R. p. 103. This court has previously relied on Mittenthal in addressing when a past practice has been created. *Appeal of N.H. Dep't of Corr.,* 164 N.H. 307, 309 (2012). That the State and the Union are required to renegotiate rights and duties every biennium regarding all cost items expressly recognizes that there are inevitable changes in economic and employment conditions.

[5] The article is in the record in its entirety, but can also be found under Richard Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements," Michigan Law Review, Vol. 59, No. 7 (May, 1961).

The issue before the PELRB in the 2014 order was the State's scheduled implementation of a salary reduction via the elimination of salary enhancements to current SYSC teachers during an existing CBA. In the 2014 order, the PELRB determined that enhancements to SYSC teachers are a past practice and a subject of mandatory bargaining, and that the State could not attempt to change the practice without negotiating with the SEA *during a contract term.* Appx. p. 40. That is the full extent of the 2014 order, regardless of how broad and sweeping the SEA may argue it is. The 2014 order does not, as the SEA argues, require that enhancements must be expressly written out of the CBA in order for the State to have successfully ended the past practice.

As stated previously, the PELRB also made the factual finding, entitled to deference here, that during the negotiation process for the 2015-17 collective bargaining agreement, the SEA had a meaningful opportunity to bargain over the State's decision to eliminate enhancements for *prospective* employees and chose to allow the past practice to cease by withdrawing the demand after mediation. R. 131. The State did not violate its duty to bargain in good faith over this mandatory subject when it provided notice that enhancements for *prospective* teachers would cease if not memorialized in the 2015-17 CBA. *See Cal. State Employees' Assn. v. Public Employment Relations Bd.*, 51 Cal. App. 4th 923, 936 (1996) ("[A] collective bargaining agreement is not an ordinary contract. An employer may not

change terms or conditions of employment after expiration of such an agreement until it affords the union an opportunity to bargain over those changes. Consequently, the terms of the expired contract must generally be maintained by the employer *until* bargaining on a successor agreement is completed by reaching a successor agreement, or until completion of impasse.") (emphasis added).

The SEA's criticism of the PELRB for looking to national labor relations principles for guidance in this matter is without merit. As recently as 2012, this court has cited with approval the directive given to the PELRB to look to decisions of the National Labor Relations Board for guidance regarding what constitutes a past practice. *Appeal of N.H. Dep't of Corr.*, 164 N.H. 307, 309 (2012) (citing *Sunoco, Inc.*, 349 N.L.R *Sunoco, Inc.*, 349 N.L.R.B. 240, 244 (2007).B. 240, 244 (2007); *see University System v. State*, 117 N.H. 96, 99, 369 A.2d 1139 (1977) (suggesting that newly created PELRB look to decisions of the National Labor Relations Board for guidance).

The SEA's argument that the "Notice and Bargain" rule conflicts with New Hampshire law also lacks merit. Nothing in RSA 273-A prohibits the State from ending a past practice. To the contrary, RSA 273-A:3, I, specifically provides that "the obligation to negotiate in good faith shall not compel either party to agree to a proposal or to make a concession." The closest New Hampshire case to address the issue of how a past practice can be ended appears to be *Appeal of N.H. Dep't of Safety (N.H. Pub. Employee Labor Rels. Bd.),* 155 N.H. 201, 211-12 (2007) in

which the court held that the Department of Safety could not modify a long standing leave deduction policy, which the court also said was a mandatory subject of bargaining, "without first negotiating with the Association." Thus, the PELRB correctly rejected the SEA's theory that past practices can only be ended by affirmatively being written out of a CBA. Like any other mandatory subject of bargaining, the State was free to end the enhancements after fulfilling its duty to bargain, where the SEA agreed to a new CBA that did not include the enhancements after the State provided notice of its intent to stop the past practice if the enhancements were not expressly included in the new CBA.

The PELRB also correctly refused to adopt the SEA's unsupported theory that the parties had to expressly write into the CBA an agreement to eliminate the enhancements in order for the State to be able to cease paying enhancements *prospectively*. "The law and the policy of collective bargaining may well require that the employer inform the Union and that he be ready to discuss the matter with it on request. But there is no requirement of mutual agreement as a condition precedent to a change of a [past practice]." *In re Ford Motor Co.*, 19 Lab. Arb. (BNA) 237 (1952). Requiring mutuality to end any past practice, at least as to cost items, that is not expressed in the agreement, when it has been rejected in negotiations, would be contrary to the statutory requirement that cost items are required to be negotiated and must be approved by the legislative body of the public employer. *See* RSA 273-A:1,IV; 273-A:3,II,(b); 273-A:5,I(e); 273-A:9,I.

Here, the SEA was well aware of the State's position when it ratified the tentative agreement after union proposal 35.18.1 had been on the table during the 2015 bargaining, but rejected by the State. Therefore, the enhancements were negotiated and were permissibly subject to termination at the end of the 2013-15 CBA evergreen period. *See* Elkouri & Elkouri, *How Arbitration Works* (K. May ed., 7th Ed. 2012) c. 12 pp. 12-14 to 12-17. ("[A] practice that is not subject to unilateral termination during the term of the collective bargaining agreement is subject to termination at the end of said term by giving due notice of intent not to carry the practice over to the next agreement; after being so notified, the other party must have the practice written into the agreement to prevent its discontinuance."). In fact, "[i]n face of a timely repudiation of a practice by one party, the other must have the practice written in to the agreement if it is to continue to be binding." Mittenthal, "*Past Practice and the Administration of Collective Bargaining Agreements,*" R. p. 103. The PELRB correctly found that the SEA had a meaningful opportunity to negotiate the enhancements and failed to do so.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the PELRB decision.

The State requests a 15-minute oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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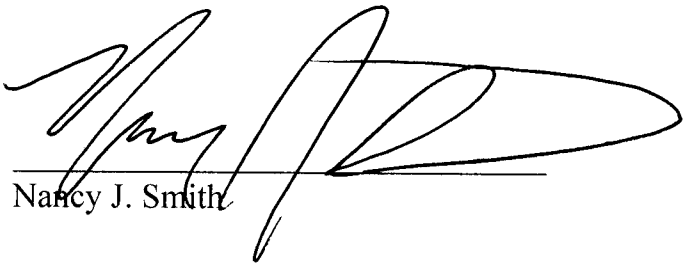
March 20, 2018

I hereby certify that two copies of the foregoing were mailed this day, postage prepaid, to, counsel of record.



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STATE'S ADDENDUM

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February 26, 2015

The State Employees' Association of New Hampshire, Inc. (SEA)
Service Employees International Union, Local 1984
CTW, CLC
207 North Main Street
Concord, NH 03301

Attn: Rich Gulla, President

Re: Salary Enhancements

Dear Mr. Gulla,

Please be advised that the current practice of salary enhancements at the Sununu Youth Services Center (aka Juvenile Justice Services), which is not part of our collective bargaining agreement, shall come to an end on July 1, 2015 or, in the case of an evergreen situation, when a new contract is effective, whichever is later, unless memorialized in the collective bargaining agreement.

As of the date of this letter, the Parties have negotiated enhancements as evidenced by a union proposal marked 35.18.1. which was presented to the State on November 18, 2014 during sub-unit negotiations. The proposal was moved to the master level negotiations by mutual agreement. The Association withdrew the proposal at the master level during the mediation phase of negotiations upon reaching a tentative agreement.

Please note, this will be implemented on a prospective basis and will not impact those employees who were part of the Public Employee Labor Relations Board decision number 2014-184 dated July 31, 2014. In other words, current employees will be grandfathered.

Best,

Matthew J. Newland
Manager of Employee Relations

cc: Commissioner Nicholas Toumpas, DHHS
Mark Bussiere, HR Administrator DHHS