THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0416

Appeal of New Hampshire Department of Transportation

(**State Employees' Association of NH, SEIU Local 1984 v. State Of New Hampshire, Department Of Transportation)**

APPEAL FROM A DECISION OF THE PUBLIC EMPLOYEE LABOR RELATIONS BOARD

BRIEF FOR THE NEW HAMPSHIRE DEPARTMENT OF TRANSPORTATION

STATE OF NEW HAMPSHIRE
DEPARTMENT OF TRANSPORTATION

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(Fifteen Minute Oral Argument)

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TEXT OF RELEVANT AUTHORITIES

***N.H. Admin. R.*, Pub 205.03 Appeal From Decision and Order on Rehearing**

Appeals from decisions and orders of the board shall be taken to the New Hampshire Supreme Court under RSA 541:6 within 30 days after the application for rehearing is denied or, if the application is granted, within 30 days after the decision on rehearing.

RSA 541:6 Appeal

Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal by petition to the supreme court.

RSA 273-A:1 Definitions

In this chapter:

[...]

XI. "Terms and conditions of employment" means wages, hours and other conditions of employment other than managerial policy within the exclusive prerogative of the public employer, or confided exclusively to the public employer by statute or regulations adopted pursuant to statute. The phrase "managerial policy within the exclusive prerogative of the public employer" shall be construed to include but shall not be limited to the functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and number of its personnel, so as to continue public control of governmental functions.

RSA 273-A:5 Unfair Labor Practices Prohibited

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

(a) To restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter;

(b) To dominate or to interfere in the formation or administration of any employee organization;

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

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

(e) To refuse to negotiate in good faith with the exclusive representative of a bargaining unit, including the failure to submit to the legislative body any cost item agreed upon in negotiations;

(f) To invoke a lockout;

(g) To fail to comply with this chapter or any rule adopted under this chapter;

(h) To breach a collective bargaining agreement;

(i) To make any law or regulation, or to adopt any rule relative to the terms and conditions of employment that would invalidate any portion of an agreement entered into by the public employer making or adopting such law, regulation or rule.

21-G:9 Powers and Duties of Commissioners

The commissioner shall be the chief administrative officer of the department and shall have the following powers and duties:

[…]

II. To perform the commissioner's duties, the commissioner shall have every power enumerated in the laws, whether granted to the commissioner, the department, or any administrative unit of the department. In accordance with these provisions, the commissioner shall:

(a) Biennially compile a comprehensive program budget which reflects all fiscal matters related to the operation of the department and each program and activity of the department.

(b) Adopt all rules of the department, whether the rulemaking authority delegated by the legislature is granted to the commissioner, the department, or any administrative unit or subordinate official of the department. All rules shall be adopted pursuant to RSA 541-A, unless specifically and explicitly exempted by law. The provisions of this subparagraph shall control existing legislative enactments unless the provisions of RSA 21-H through RSA 21-P that created the department specifically and clearly confer rulemaking authority on an administrative unit or a subordinate official. The provisions of this subparagraph shall also apply to subsequent legislative enactments unless such enactments are contained in RSA 21-H through RSA 21-P or are specifically exempted from the application of the provisions of this subparagraph by language expressly referring to this subparagraph. For the purposes of this subparagraph, "commissioner of the department of education" means the state board of education.

(c) Exercise general supervisory and appointing authority over all department employees, subject to applicable personnel statutes and rules.

(d) Delegate authority to subordinates as the commissioner deems necessary and appropriate, except that rulemaking authority shall not be delegated. The commissioner shall provide by delegation for a division director to exercise all authority of the commissioner in the commissioner's absence. All such delegations shall be made in writing, shall be disseminated to all division directors, shall clearly delineate the authority delegated and the limitations thereto, and shall be kept on file in the commissioner's office.

(e) Adopt practices which will improve the efficiency of the department and the provision of services to the citizens of the state.

(f) Provide cooperation, at the request of the heads of administratively attached agencies, in order to:

(1) Minimize or eliminate duplication of services and jurisdictional conflicts;

(2) Coordinate activities and resolve problems of mutual concern; and

(3) Resolve by agreement the manner and extent to which the department shall provide budgeting, recordkeeping and related clerical assistance to administratively attached agencies.

(g) Give bond, and require division directors to give bond, to the state as specified in RSA 93-B.

(h) Where functions of departments overlap or a function assigned to one department could better be performed by another department, a commissioner shall recommend.

21-L:2 Establishment; General Functions

I. There is established the department of transportation, an agency of the state under the executive direction of a commissioner of transportation.

II. The department of transportation, through its officials, shall be responsible for the following general functions:

(a) Planning, developing, and maintaining a state transportation network which will provide for safe and convenient movement of people and goods throughout the state by means of a system of highways, railroads, air service, mass transit, and other practicable modes of transportation, in order to support state growth and economic development and promote the general welfare of the citizens of the state.

(b) Performing any regulation of transportation activities required by law which is not within the jurisdiction of another state agency.

STATEMENT OF FACTS AND THE CASE

The State of New Hampshire Department of Transportation ("State" or "Department") is a public employer within the meaning of RSA 273-A:1, X and the State Employees' Association of NH, SEIU Local 1984 ("SEA") is the certified representative for certain Department employees, including those employees at issue in this matter. SO 50.[1] The parties' most recent collective bargaining agreement ("CBA") expired on June 30, 2019, but the contract contained an automatic extension, or "evergreen" clause, and as such, the 2018-2019 contract remains in force until a new contract is agreed upon. SO 50; *In re N.H. Dep't of Safety*, 155 N.H. 201, 203 (2007).

On April 4, 2019, the Department issued a memorandum outlining changes to the minimum qualifications for the following positions: Highway Maintainer I, II, and III; Assistant Highway Patrol Foreman; Highway Patrol Foreman; Construction Foreman; and Maintenance Supervisor/Supervisor III. SO 51; 63-65. These changes went into effect April 12, 2019, and directed that new hires and/or employees must possess a Medical Examiner's Certificate ("CDL medical card") at the time of hire and for any position change ("*i.e.* promotion, demotion, lateral, temporary promotion") into the above positions. SO 52; 63-65. The affected positions include employees that maintain Commercial Driver's Licenses ("CDL") and operate large equipment and vehicles, for example, ten-wheeled dump

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[1] References to the record are cited as follows:
"CR___" refers to the Certified Record and page number;
"PA___" refers to the appendix to the petition for original jurisdiction and page number;
"SO___" refers to the documents appended to this brief and page number—these documents are relevant documents that are also included in the certified record.

trucks with front plows, wing plows, and material spreaders that plow and treat snow and ice on the highways throughout the State. CR 200-225. The Department issued this memorandum unilaterally without first bargaining with the SEA. SO 51.

CDL medical cards are issued by a federally approved physician after a medical examination. SO 50; 49 C.F.R. § 391.43. The physician examines the driver for certain conditions that may interfere with a driver's ability to control and drive a commercial motor vehicle safely, including impairment to limbs, diabetes, cardiovascular illness, respiratory function, high blood pressure, muscular or vascular disease, epilepsy, and impaired vision, as specified by the Federal Motor Carrier Safety Administration ("FMCSA"). 49 C.F.R. § 391.41(b). The CDL medical card certifies that a driver is physically qualified to operate large commercial vehicles. SO 50; 49 C.F.R. § 391.43(g)(2). A CDL medical card is issued for a specified period of time, which may last for up to two years and is dependent upon the employee's medical condition. SO 50. The FMCSA requires all CDL holders to obtain a CDL medical card, but exempts state departments of transportation from this federal mandate. SO 50. Nevertheless, for some time FMCSA has discussed removing the exemption for state departments of transportation. SO 71-72. The Department instituted the CDL medical card requirement to promote the safety of the travelling public and the health of the Department's CDL drivers. SO 51; 72. Even SEA members recognize the enhanced safety benefits CDL medical cards can provide. SO 67 ("And there was also—we felt like that, you know, that we understood the State's perspective and we understood that they were looking to have the safe drivers, etcetera.").

The only language in the SEA's Collective Bargaining Agreement regarding CDL medical cards is contained in the Department's sub-unit contract which states as follows: "Employees defined in paragraph (a.) above[2] who obtain and maintain a valid CDL medical card and provide an acceptable copy to the NHDOT's Driver Qualifications Specialist shall receive an additional ten dollars ($10) per week in accordance with the above provisions." SO 78. This provision of the contract further specifies that the stipend is paid "from the pay period that includes the first day in November through the pay period that includes the last day of March each year." SO 78. Matthew Newland, the former State Manager of Employee Relations, testified that this stipend was implemented to help offset the costs of the examination required to obtain a medical card. SO 75-76.

As set forth in the Department's April 4, 2019 memorandum, the CDL medical card requirement did not impact current employees unless those employees left their position (*i.e.,* by demotion, promotion, lateral transfer, and temporary promotion). SO 52. The memorandum did impact all newly hired employees, who were now required to obtain the CDL medical card in order to be certified for the affected positions. SO 64. No employee had been terminated as a result of the CDL medical card requirement. SO 74. The SEA declined to bargain the impacts of the CDL medical card requirement. SO 68-70.

On April 30, 2019, the SEA filed an unfair labor practice complaint with the Public Employee Labor Relations Board ("PELRB" or "Board")

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[2] Employees who are determined by the Employer to be routinely engaged in winter maintenance and ancillary activities and are on the Employer's winter maintenance call out list.

alleging that the State failed to negotiate a mandatory subject of bargaining and improperly implemented a unilateral change in the terms and conditions of employment for covered State employees. The SEA claimed that the State violated RSA 273-A:5, I(a), (e), (g), and (h). CR 1. The SEA requested that the PELRB prohibit the Department from requiring employees to maintain CDL medical cards, order the Department to reverse pay adjustments related to medical cards, order the Department to follow Article 43.11(c) of the parties' CBA, and require the Department to bargain in good faith. CR 5. On May 1, 2019, the SEA amended its complaint to withdraw its request to reverse pay adjustments related to the CDL medical cards. CR 7. On September 9, 2019, the SEA again amended its complaint to withdraw its allegation that the State breached the CBA under RSA 273-A:5, I(h), leaving only the claims that the State violated RSA 273-A:5, I(a) (restrain, coerce, or otherwise interfere with employees in the exercise of rights conferred by RSA 273-A); RSA 273-A:5, I(e) (refusal to negotiate in good faith); and RSA 273-A:5, I(g) (failure to comply with RSA 273-A or any rule adopted by RSA 273-A). SO 49.

The PELRB held a hearing on February 18, 2020. CR 64. The Board heard testimony from:

- Jonathan Hebert-SEA Chapter 3 President and Steward;
- Daniel Brennan-SEA Chapter 17 Vice President and Steward;
- Randy Hunneyman-statewide Executive Branch Negotiator for the SEA;
- Alexis Martin-Administrator of the Department's Bureau of Human Resources; and

- Matthew Newland-former Manager of Employee Relations for the State of New Hampshire.

CR 299-300; 323-24; 349; 361; 388. The Board also took several documents into evidence. CR 77. After hearing testimony and accepting evidence, the Board asked the parties to file briefs addressing legal issues. CR 403. On March 13, 2020, the parties submitted post-hearing memoranda to the PELRB. CR 235-254. The PELRB issued its Order on June 23, 2020 holding that, pursuant to *Appeal of State*,[3] the Department committed an unfair labor practice when it unilaterally imposed a CDL medical card requirement on current Department employees because it was a mandatory subject of bargaining. SO 59.

On July 23, 2020, the State filed a Motion for Rehearing/ Reconsideration pursuant to *N.H. Admin. R.* Pub 205.02 and RSA 541:3. PA 31. The Department argued that RSA 273-A:1, XI is a viable source of exclusive managerial authority regarding the selection of its personnel, but also that RSA 21-G:9, II(c) reserves to the Commissioner of the Department the exclusive authority to "[e]xercise general supervisory and appointing authority over all department employees." PA 32. The Department further argued that even if setting minimum job qualifications was not reserved exclusively to the managerial authority of the State, the CDL medical card requirement is at most a permissive subject of bargaining and the State was not obligated to bargain prior to its implementation. PA 34. The Department contended that the PELRB solely focused on the SEA's interests in bargaining the CDL medical card,

[3] *Appeal of the State of New Hampshire*, 138 N.H. 716 (1994).

ignoring the State's—and the public's—interest in the selection of a healthy workforce that is fit to drive large commercial vehicles. PA 35-36. Further, the Department noted that it was not within the PELRB's power to substitute its judgment for the State's in determining the suitability of its policy to achieve a healthy workforce. PA 36. Finally, the Department contended that the impacts of the CDL medical card requirement on employees, such as the added cost of the requirement, are items that may be impact bargained by the SEA. PA 37. For these reasons, the CDL medical card requirement was merely permissive and the State was not required to bargain before implementation.

The SEA filed its Response to the State's Motion for Rehearing/Reconsideration on July 30, 2020. PA 41. The SEA argued that RSA 273-A is not sufficient to establish a prohibited subject of bargaining. PA 41. The SEA further argued that the CDL medical card requirement was not a permissive subject of bargaining because it primarily affects the terms and conditions of employment, namely, wages. PA 42.

On August 18, 2020, the Board denied the State's Motion for Rehearing/Reconsideration. SO 61. On September 17, 2020, the State filed a Notice of Appeal pursuant to *Sup. Ct. R.* 10, which the Court accepted on October 30, 2020.

SUMMARY OF THE ARGUMENT

Selection criteria are prohibited subjects of bargaining, and the Board erred as a matter of law when it held that the Commissioner did not retain exclusive managerial authority to set minimum qualifications for hire. RSA 273-A:1, XI is a clear statutory source of exclusive managerial authority. The Board relied upon *Appeal of City of Nashua Board of Education,* 141 N.H. 768 (1997) ("*Appeal of City of Nashua*") in concluding that an employer must provide a statutory source independent of RSA 273-A:1, XI to establish exclusive managerial authority. *Appeal of City of Nashua* incorrectly interpreted RSA 273-A:1, XI. Therefore, this Court should rule that the definition of "managerial policy within the exclusive prerogative of the public employer" contained in RSA 273-A:1, XI is sufficient to establish a statutory basis for exclusive managerial authority, and overrule *Appeal of City of Nashua*. Further, the Board erred as a matter of law when it determined that RSA 21-G:9, which outlines the statutory responsibilities of State of New Hampshire agency commissioners, is also not a source of exclusive managerial authority. The statute mandates that commissioners shall "[e]xercise general supervisory and appointing authority over all department employees." RSA 21-G:9, II(c). Thus, two statutory grants of exclusive managerial authority exist to enable the Department to implement selection criteria unilaterally. The Board erred as a matter of law when it held that the CDL medical card requirement is not a prohibited subject of bargaining.

Even if the CDL medical card requirement is not a prohibited subject of bargaining, it is at most permissive and not mandatory. The PELRB

employed the incorrect standard and failed to justly consider the Department's broad managerial policy interests, focusing solely on the resulting impacts to the terms and conditions of employment. The Board failed to adequately weigh the evidence when it did not consider impact bargaining as the appropriate remedy to address subsequent burdens on terms and conditions of employment as a result of implementation of broad managerial policy. As such, the PELRB mandated bargaining where it should have been, at most, permissive, and its order is unjust and unreasonable. The PELRB's error is significant because it forces the State to bargain an issue that is reserved exclusively to the managerial powers of the State, unlawfully limits the Department's authority to set minimum qualifications for its employees, and obstructs the Department's efforts to ensure that state employees operating large equipment—such as highway snow removal vehicles—do not present an avoidable risk to the public.

STANDARD OF REVIEW

The Court's review of PELRB decisions is governed by RSA 541. RSA 273-A:14. "Pursuant to RSA 541:13 (2007), [the Court] will not set aside the PELRB's order except for errors of law, unless [the Court is] satisfied, by a clear preponderance of the evidence, that it is unjust or unreasonable." *Appeal of Professional Fire Fighters of Hudson, IAFF Local 3154*, 167 N.H. 46, 51 (2017). The PELRB's findings of fact are presumed *prima facie* lawful and reasonable. RSA 541:13. "In reviewing the PELRB's findings, [the Court's] task is not to determine whether [the Court] would have found differently or to reweigh the evidence, but, rather, to determine whether the findings are supported by competent evidence in the record." *Fire Fighters of Hudson*, 167 N.H. at 51. "[The Court] review[s] the PELRB's rulings on issues of law *de novo*." *Id.*

ARGUMENT

I. THE CDL MEDICAL CARD REQUIREMENT IS A PROHIBITED SUBJECT OF BARGAINING.

The Board erred as a matter of law when it determined that a minimum qualification for employment is not a permissive subject of bargaining.

In collective bargaining, a subject or proposal may fall into one of three categories: mandatory, permissive, or prohibited. *Appeal of the State of New Hampshire*, 138 N.H. 716, 722 (1994) ("*Appeal of State*"). An employer may not bargain a prohibited subject of bargaining; an employer may—but is not obligated to—bargain a permissive subject; an employer must bargain a mandatory subject. *Id*. at 721-22. This court has set forth three elements to consider when deciding whether a subject of bargaining is mandatory, permissive, or prohibited: (1) does the constitution, a statute, or a statutorily adopted regulation reserve the subject to the exclusive managerial authority of the public employer; (2) does the subject primarily affect the terms and conditions of employment, rather than matters of broad managerial policy; and (3) does the subject interfere with the public control of governmental functions. *Id*. at 722. If the proposed subject is reserved to the exclusive managerial authority of the public employer under element one, then the proposal is a prohibited subject of bargaining and the employer cannot bargain the issue. *Id*. at 723. If the proposal primarily affects matters of broad managerial policy or if the proposal interferes with public control of governmental functions under elements two and three, the proposal is merely permissive, meaning the public employer may, at its

discretion, bargain the issue. *Id*. To be a mandatory subject of bargaining, the subject must satisfy three conjunctive elements: it must not be reserved to exclusive managerial authority, it must primarily affect terms and conditions of employment, and it must not interfere with the public control of government function. *Id*. All three elements must be met to compel bargaining.

The Board erred as a matter of law when it found that the CDL medical card requirement was not a prohibited subject of bargaining. RSA 273-A:1, XI makes clear that a public employer maintains the exclusive authority in the "selection, direction and number of its personnel," which, as detailed below, must include the establishment of a minimum qualification for employment. Further, the Commissioner of the Department is required to "[e]xercise general supervisory and appointing authority over all department employees." RSA 21-G:9, II(c). As such, the requirement that employees hold a CDL medical card to certify for employment in certain positions is reserved to the exclusive managerial authority of the State by statute and constitutes a prohibited subject of bargaining.

A. The Court should overrule *Appeal of City of Nashua* and hold that RSA 273-A:1, XI provides a statutory basis for exclusive managerial authority in the selection of employees.

RSA 273-A:1, XI confers exclusive managerial authority to the public employer in the "selection, direction and number of its personnel." Setting minimum qualifications for a particular position is an integral aspect of the "selection" of personnel contained in RSA 273-A:1, XI such

that it must be an exclusive managerial right. *See F.O.P. Rose of Sharon Lodge No. 3 v. Pennsylvania Lab. Rels. Bd.*, 729 A.2d 1278, 1281 (Pa. Commw. Ct. 1999) ("We agree with the Board that a change in the minimum requirements for promotion relates directly to the City's managerial prerogative in selection and direction of personnel and is not subject to mandatory bargaining under Act 111."). Here, the State directed that certain operators obtain a CDL medical card prior to position change through a change to the classification and supplemental job description. SO 63-65. In short, the Department established a minimum qualification for employment. *See N.H. Admin. R.* Per 102.41 (defining minimum qualifications as "the requirements for education, experience, licensure, bona fide occupational qualifications or other special requirements established on the class specification and supplemental job description for a given class.").

It is vitally important that the State retain its exclusive managerial authority to set selection criteria of personnel. Selection criteria allow the State to set the minimum standards and criteria for hire. This, in turn, ensures that employees are fit to hold the jobs that keep the government functioning. In fact, in instances of layoff, minimum qualifications are the sole method of ensuring a qualified person is employed by the State. Per Article 16.10(3) of the CBA, SEA members have the right to "bump" less senior employees within the same division if they are "qualified for the position of the employees who is to be displaced." In the event of a layoff, minimum qualifications established by the State are the only means to ensure an employee who exercises his or her rights under Article 16.10 is qualified. Thus, the setting of minimum qualifications for employment is an

integral facet of the selection of personnel, and is a prohibited subject of bargaining because it is reserved to the exclusive managerial authority of the Department by RSA 273-A:1, XI.

The PELRB, relying upon *Appeal of City of Nashua*, found that "[a]s to the first part of the test, the 'by statute' reference contained in the RSA 273-A:1, XI phrase 'managerial policy … confided exclusively to the public employer *by statute*' means a statute other than RSA 273-A:1, XI." SO 54; PA 24) (emphasis in original). *Appeal of City of Nashua* holds that parties must cite to statute or constitutional provision or valid regulation independent of RSA 273-A:1, XI to demonstrate exclusive managerial authority. 141 N.H. at 774. In that decision, the Court "reject[ed] the city's bootstrapping attempt to utilize the statutory managerial policy exception as the statute that determines the scope and applicability of the managerial policy exception." *Id*. The Court, however, provided no further explanation why the statute that defines "managerial policy within the exclusive prerogative of the public employer" cannot define the scope and applicability of exclusive managerial authority.

While the Court cited to *Appeal of State* for support, that decision does not explicitly hold that RSA 273-A:1, XI cannot provide a statutory basis for exclusive managerial authority. To the contrary, *Appeal of State* expressly cites to RSA 273-A:1, XI when discussing exclusive managerial authority. *Appeal of State*, 138 N.H. at 722 ("First, to be negotiable, the subject matter of the proposed contract provision must not be reserved to the exclusive managerial authority of the public employer by the constitution, or by statute or statutorily adopted regulation." (*citing* RSA 273-A:1, XI)). Thus, the *Appeal of City of Nashua* Court erred when it held

that RSA 273-A:1, XI could not provide a statutory basis for the exclusive managerial authority of the public employer, and in relying on *Appeal of State* for that proposition. This appeal offers this Court the opportunity to correct that error by overruling *Appeal of City of Nashua.*

A proper construction of RSA 273-A:1, XI reveals the error in the *Appeal of City of Nashua* decision. In matters involving statutory interpretation, the "goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme." *State Employees Ass'n of N.H., SEIU, Local 1984 v. N.H. Div. of Personnel*, 158 N.H. 338, 343 (2009) (quotation and citation omitted). The statute must be interpreted according to the plain and ordinary meaning of the words used, "for the words used in the statute are the best indication of legislative intent." *Appeal of Richards*, 134 N.H. 148, 161 (1991) (citation omitted). It is also a fundamental principal that a statute must not be construed in a manner that would produce an absurd result. *Petition of Poulicakos*, 160 N.H. 438, 444 (2010).

In drafting and enacting RSA 273-A:1, XI, the legislature expressly provided that a public employer maintains unilateral authority over certain enumerated subjects in order "to continue public control of governmental functions." RSA 273-A:1, XI. The legislature categorized employment matters over which the employer has unilateral control as "managerial policy within the *exclusive* prerogative of the public employer." *Id.* (emphasis added). "Exclusive" means "excluding or having power to exclude" or "limiting or limited to possession, control, or use by a single individual or group." *Merriam–Webster's Collegiate Dictionary* (11th ed. 2012). The legislature described those matters within the employer's

"exclusive prerogative" to "include but shall not be limited to the functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and number of its personnel, so as to continue public control of governmental functions." RSA 273-A:1, XI. Thus, only a public employer may exercise authority over the statutorily enumerated core roles of an agency: its functions, programs, and methods; organizational structure; and selection, direction, and number of personnel. As detailed above, minimum qualifications must fall within the public employer's authority to select its personnel.

Further, RSA 273-A:1, XI excludes from the definition of terms and conditions of employment—which are traditionally mandatory subjects of bargaining—"managerial policy within the exclusive prerogative of the public employer, *or* confided exclusively to the public employer by statute or regulations adopted pursuant to statute." *Id*. (emphasis added). The use of the disjunctive "or" in the statute clearly contemplates that subjects that are "managerial policy within the exclusive prerogative of the employer" are distinct and independent from subjects "confided exclusively to the public employer by statute or regulations adopted pursuant to statute," and both may independently confer exclusive managerial authority to a public employer. *See State v. Roth*, 142 N.H. 483, 485 (1997) ("The legislature's use of the disjunctive 'or' indicates that the legislature considers suspended sentences and deferred sentences to be distinct sentencing options."). The ruling in *Appeal of City of Nashua* ignores entirely the actual statutory language of RSA 273-A:1, XI and its necessary effect, and creates an illogical scheme, contrary to the statutory language, in which "managerial

policy within the exclusive prerogative of the public employer" is not exclusive. The setting of a minimum qualification for hire, such as a CDL medical card, fits squarely within the statutory language of the "selection" or personnel, and must be reserved to the State's exclusive managerial authority as defined by the statute. Thus, the *Appeal of City of Nashua* Court erred when it decided that RSA 273-A:1, XI cannot provide a statutory basis for exclusive managerial authority.

If the Court finds that *Appeal of City of Nashua* is incorrectly decided, the Court must then determine whether the doctrine of stare decisis compels overruling. *See State v. Quintero*, 162 N.H. 526, 539 (2011) ("Upon determining that a case was poorly reasoned, the court then invokes the four stare decisis factors to decide whether to adhere to the precedent or overrule it, but the 'well-reasoned' inquiry is not itself part of the analysis."). "Stare decisis, the idea that today's Court should stand by yesterday's decisions, commands great respect in a society governed by the rule of law, and [the Court does] not lightly overrule a prior opinion." *Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325, 333 (2020) (quotations and citations omitted). The Court will only overturn a prior decision when "the ruling has come to be seen so clearly as error that its enforcement was for that very reason doomed." *Id*. (quotations and citations omitted). The Court considers four factors in its stare decisis analysis: "(1) whether the rule has proven to be intolerable simply by defying practical workability; (2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling; (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and (4) whether facts have

so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Id*. (*citing Ford v. N.H. Dep't of Transp.*, 163 N.H. 284, 290 (2012)). Although all factors are weighed, no one factor is dispositive. *Id*. Here, the stare decisis factors weigh in favor of overruling *Appeal of City of Nashua.*

First, the ruling in *Appeal of City of Nashua* does not work practically. At the outset, a decision that incorrectly interprets statutory language to an end that contradicts the legislature's intent, as expressed in the legislature's own words, is by definition not workable. By construing a statute to mean something that it does not, the *Appeal of City of Nashua* decision imposes a limitation on public employers that the legislature, by the language it employed in RSA 273-A:1, XI, never intended. The decision interferes with the operation of the public employer vis-à-vis the public employee that the legislature set forth by statute. Decisional law irreconcilable with statutory language is inherently unworkable.

In addition, in order to exert managerial authority over traditional managerial subjects such as functions, programs and methods, organizational structure, and the selection, direction, and number of personnel, a public employer must seek a statutory grant from the legislature or create a rule that must encompass a vast number of potential situations. Conveniently, RSA 273-A:1, XI already pinpoints which subjects the legislature considers in the "exclusive prerogative of the public employer." By its own words, the legislature specifically intended to include "the functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and number of its personnel" in the

meaning of "managerial policy within the exclusive prerogative of the public employer." RSA 273-A:1, XI. As described above, the statute is clear that the subjects included in RSA 273-A:1, XI are not merely a permissive subject of bargaining, as the Court in *Appeal of City of Nashua* attempts to define them. The subjects are unmistakably reserved to the *exclusive* prerogative of the public employer.

The exclusivity of these subjects is critical to promote the core functioning of a public agency. "Statutes exist which, in spite of the duty to bargain under RSA chapter 273-A, deprive the employer of the statutory authority to agree to certain subjects." *Appeal of City of Concord*, 139 N.H. 277, 280-81 (1994) (citation omitted), *see also Town of North Kingston v. International Ass'n of Firefighters, Local 1651 AFL-CIO*, 107 A.3d 304, 313 (R.I. 2015) ("[T]here are certain matters that may not be bargained away by a public employer. A public employer may not bargain away its statutory duties. Likewise, it is a basic rule of law that public employers are not at liberty to bargain away their powers and responsibilities with respect to the essence of their mission. … This prohibition can even hold true notwithstanding the fact that action taken related to the employer's mission or pursuant to a statutory obligation may impact something that is otherwise a mandatory subject of collective bargaining.") (citations and quotations omitted). RSA 273-A:1, XI is a statute in which the legislature explicitly names subjects that are so inherent to the inner workings of a public agency that they are exclusively reserved to the public employer and prohibited from bargaining. By reserving certain topics to the exclusive control of the public employer, the terms of these important policies must not altered by union negotiations or the notions of an arbitrator. Public

agencies must be able to exert sole power over certain vital subjects so that they can "continue public control of governmental functions." RSA 273-A:1, XI. To read RSA 273-A:1, XI any other way contradicts the plain language of the statute and markedly limits public employer managerial authority. Thus, by severely restricting the topics that are reserved to the exclusive authority of the public employer, the *Appeal of City of Nashua* Court's ruling has defied practical workability.

Second, there is no special reliance on this ruling. It is apparent that the Court and PELRB have relied on this ruling for its precedential value, as further addressed below, but there is no reliance that would lead to a special hardship on public employers or unions. "Reliance interests are most often implicated when a rule is operative in the commercial law context … where advance planning of great precision is most obviously a necessity." *Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. at 333 (citations and quotations omitted) (alterations in original). Here, no such interest is present, and it cannot plausibly be argued that any reliance has built up around *Appeal of City Nashua* that overruling it would undermine.

Third, there is some support in New Hampshire jurisprudence for overruling *Appeal of City of Nashua*, weighing factor three in favor of the State. Almost immediately after deciding *Appeal of City of Nashua*, this Court in *Appeal of Pittsfield School District* moved away from the holding and considered RSA 273-A:1, XI as a potential source of managerial authority, particularly the "selection" and "direction" language contained in the statute. *Appeal of Pittsfield School District*, 144 N.H. 536, 539-40 (1999). Just two years after deciding *Appeal of City of Nashua*, the Court

observed that RSA 273-A:1, XI may define the scope of exclusive managerial authority. *Id*. In re White Mountain Regional School District, decided by the Court in 2006, also contemplated RSA 273-A:1, XI as a potential source of exclusive managerial authority. 154 N.H. 136, 141 (2006) ("In order for a proposal to be a prohibited subject of bargaining, and therefore fall under the managerial policy exception, the subject matter of the proposal must be reserved to the exclusive managerial authority of the public employer by the constitution, or by statute or statutorily adopted regulation. … RSA 273-A:1, XI does not expressly except from bargaining teacher evaluation and performance review procedures. The renewals with reservations and required improvement plans do not involve *procedures for hiring teachers* or the standards by which teacher improvement will be assessed and therefore do not affect matters of managerial policy.") (citation omitted) (emphasis added). Additionally, in 2017, then-Chief Justice Lynn appeared ready to reexamine the decision in *Appeal of City of Nashua*, but the parties had not provided a stare decisis analysis or asked the Court to revisit that decision. *Appeal of Nashua School District*, 170 N.H. 386, 333 (2017). While the Court distinguished *Appeal of City of Nashua* and found that there existed no unfair labor practice on other grounds, Chief Justice Lynn stated, "Although we are thus bound to adhere to [the *Appeal of City of Nashua* decision], we are under no obligation to expand [its] reach." *Id*. The Court also recognized the existence of "management prerogatives pursuant to RSA 273-A:1, XI." *Id*. at 397.

In further support factor three, the issue of exclusive managerial authority was not robustly discussed in *Appeal of City of Nashua*, and there are a dearth of ensuing cases that advance the law on this issue. The Court

"owe[s] somewhat less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations." *See State v. Duran*, 158 N.H. 146, 155 (2008). The *Appeal of City of Nashua* Court offered very little explanation, performed no statutory interpretation, and cited to a prior case that did not support the proposition attributed to it. Subsequent cases have relied upon *Appeal of City of Nashua*'s two-sentence conclusory holding for the premise that RSA 273-A:1, XI cannot be a statutory source of managerial authority.[4] As in *Appeal of City of Nashua*, not one of these subsequent cases has reviewed the language of the statute or provided an analysis explaining why the definition contained in RSA 273-A:1, XI fails to adequately define exclusive managerial authority. The lack of examination of *Appeal of City of Nashua* in subsequent decisions that have simply relied on it uncritically further demonstrates the need to reexamine and revise the Court's decision in *Appeal of City of Nashua*.

The fourth stare decisis consideration—whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification—is not squarely at issue here. Yet it is worth considering that, without support or rigorous analysis, *Appeal of City of Nashua* severely restricted prior factual scenarios that the Court deemed within a public employer's exclusive managerial authority. Prior to *Appeal of City of Nashua*, this Court explicitly acknowledged that "[a]t stake in public collective bargaining is the continued operation of State

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[4] *See Appeal of Strafford County Sheriff's Office*, 167 N.H. 115, 121 (2014); *Appeal of Town of North Hampton*, 166 N.H. 225, 230 (2014); *In re Hillsboro-Deering School Dist.*, 144 N.H. 27, 32 (1999).

government." *State Employees' Ass'n of N.H., Inc. v. N.H. Public Employee Labor Relations Bd.*, 118 N.H. 885, 890 (1978), overruled on other grounds by *Appeal of State*, 138 N.H. 716 (1994). Due to the potential for deleterious consequences on the operation of State government, the Court held that the "PELRB properly gave a broad definition of 'managerial policy within the exclusive prerogative of the public employer.'" *State Employees' Ass'n of N.H., Inc.*, 118 N.H. at 890, *citing* RSA 273-A:1, XI. However, since the Court's decision in *Appeal of City of Nashua*, public employers have only been found to retain exclusive managerial authority in one case. *See In re New Hampshire Troopers Ass'n*, 145 N.H. 288 (2000). The interpretation of exclusive managerial prerogative under RSA 273-A:1, XI has over time become so restrictive that it puts at risk the continued public control of governmental functions. This case, in which the PELRB prohibits the State from implementing a small change in the minimum qualifications of certain commercial vehicle operators—one that all sides seem to appreciate from a public safety perspective—underscores the severe limitations that have resulted from *Appeal of City of Nashua*, which gave no indication that it intended such a sweeping reach.

For the reasons stated above, the four stare decisis factors weigh in favor of the State. The Court should overturn the ruling in *Appeal of City of Nashua* and hold that RSA 273-A:1, XI may confer a statutory basis for exclusive managerial authority to public employers.

The State clearly acted within is exclusive managerial authority when it implemented the CDL medical card requirement. By the plain meaning of the statute, RSA 273-A:1, XI reserves to the State exclusive control of the selection and direction of its personnel. Here, the State

implemented selection criteria for employees, namely, CDL medical cards. By requiring proof of a CDL medical card every time an employee changes position, the State ensures that, at least at the time of hire or position change, its CDL drivers are safe on the road. In exercising its selection authority, the State made a policy decision to place a premium on drivers who were deemed medically fit to drive large vehicles, in turn promoting the health of employees and the security of the travelling public. This policy decision and implementation of selection criteria falls squarely within the Department's exclusive managerial rights. The PELRB erred as a matter of law when it decided RSA 273-A:1, XI was not a source of exclusive managerial authority for the State. The Court should overrule *Appeal of City of Nashua*, reverse the Board's decision, and dismiss the unfair labor practice complaint.

B. RSA 21-G:9 provides an additional statutory basis for the exclusive managerial authority of the State in implementing the CDL medical card requirement.

Regardless of *Appeal of City of Nashua*, RSA 21-G:9 provides an additional statutory basis for the Department to exercise exclusive managerial authority over the selection of its employees. The key powers and duties of the commissioners of every department in the State are laid out in RSA 21-G:9. The statute provides in part:

> The commissioner shall be the chief administrative officer of the department and shall have the following powers and duties:
>
> […]

> II. To perform the commissioner's duties, the commissioner shall have every power enumerated in the laws, whether granted to the commissioner, the department, or any administrative unit of the department. In accordance with these provisions, the commissioner *shall*:
>
> […]
>
> (c) Exercise general supervisory and appointing authority over all department employees, subject to applicable personnel statutes and rules.

RSA 21-G:9, II(c) (emphasis added). The legislature mandated that the Department's Commissioner exercise supervisory control and appointing authority over all department employees. Within this appointing authority is the duty to set minimum selection criteria. Under the State's Rules of Personnel, an appointing authority is responsible for developing and updating a supplemental job description ("SJD") for agency employees. *N.H. Admin. R.* Per 301.03. The SJD must include "[a] section specifying the minimum qualifications for the position consistent with the class specification, including the minimum formal education, specific job experience and any licensure or certification requirements for entry into the position." *N.H. Admin. R.* Per 301.03(d)(8). Thus, the Department cannot exercise that supervisory and appointing authority if it cannot establish the minimum qualifications against which to appoint an applicant. Selection criteria are essential to the appointment process.

Here, the Commissioner of the Department of Transportation revised the SJDs for Highway Maintainers, Assistant Highway Patrol Foreman, Highway Patrol Foreman, Construction Foreman, and Maintenance Supervisor/Supervisor III to include possession of a CDL medical card as a

minimum qualification. SO 63-65. It would produce an absurd result and would fail to serve the public interest if the Department's Commissioner was barred from exercising her appointing authority to set minimum selection criteria, as the Board's order appears to do. The Department's Commissioner is charged with ensuring that he or she has employed a workforce fit to promote the Department's charge to ensure the "economic well-being and physical safety of the citizens of New Hampshire." RSA 21-L:1. Setting selection criteria is central to the appointing authority of a commissioner. *See N.H. Admin. R.* Per 301.03. If subjected to bargaining, hiring criteria deemed critical by a commissioner, such as minimum education requirements and licensure, may be altered through negotiations, which diminishes a commissioner's core role as appointing authority. *See Town of North Kingston*, 107 A.3d at 313 ("A public employer may not bargain away its statutory duties. Likewise, it is a basic rule of law that public employers are not at liberty to bargain away their powers and responsibilities with respect to the essence of their mission.") Here, the Department's Commissioner intended to select personnel that were safe to operate heavy machinery to carry out the vital task of maintaining our roads and securing the wellbeing of the traveling public. RSA 21-G:9, II(c) demonstrates the legislature's intent to imbue agency heads with the power to hire and appoint the appropriate staff to execute the crucial tasks of each agency of the State.

Both RSA 273-A:1, XI and RSA 21-G:9, II(c) reserve to the State the exclusive authority to establish selection criteria for its employees. Thus, the CDL medical card requirement is a prohibited subject of bargaining.

II. IF NOT PROHIBITED, THE CDL MEDICAL CARD REQUIREMENT IS AT MOST A PERMISSIVE SUBJECT OF BARGAINING.

Even if setting minimum job qualifications were not reserved exclusively to the managerial authority of the State, the CDL medical card requirement is at most a permissive subject of bargaining and certainly not mandatory. A public employer is not obligated to bargain a subject unless it also primarily affects the terms and conditions of employment, rather than matters of broad managerial policy *and* does not interfere with the public control of governmental functions. *Appeal of State*, 138 N.H. at 722. Setting the minimum qualifications for employment does not primarily affect the terms and conditions of employment, and in fact, is a matter of broad managerial policy. Limiting minimum qualifications would also interfere with public control of governmental functions. As such, it is a permissive subject of bargaining.

A. Selection criteria are matters of broad managerial policy.

The Board's order was unjust and unreasonable when it determined that the *primary* effect of the CDL medical card requirement was on the terms and conditions of employment rather than matters of broad managerial policy. "Matters of managerial policy include, at least, 'the functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and number of its personnel.'" *Appeal of State*, 138 N.H. at 722 (quoting RSA 273-A:1, XI). The public employer and the union may

both have "significant interests affected by a proposal," but the Board must evaluate "the strength and focus of the competing interests." *Id*.

The selection of employees is a core managerial prerogative. *F.O.P. Rose of Sharon Lodge No. 3*, 729 A.2d at 1281 ("It is within a Township's prerogative to establish and utilize a method to aid in selecting and directing its personnel and in measuring and evaluating their performance. The ability to formulate policies in these areas is essential for the proper and efficient functioning of a police force."); *In re Carnelli*, 228 A.3d 990, 994 (Vt. 2020) ("The establishment of minimum qualifications for a classified position is likewise an inherent management prerogative."). "In general, although not always, proposals … that propose to establish policy, standards or criteria for decision-making will not [be mandatory subjects of bargaining]." *Appeal of State*, 138 N.H. at 723.

Here, the Department imposed a criteria for decision-making in establishing minimum qualifications for its drivers. For the reasons cited in Section I(B), *supra*, setting the minimum qualifications for employment is fundamental to the selection of personnel. *See also F.O.P. Rose of Sharon Lodge No. 3*, 729 A.2d at 1281 and *In re Carnelli*, 228 A.3d at 994. The Department has a significant, critical interest in the fitness of its employees for positions. In support of that interest, the Department offered evidence that demonstrated the CDL medical card requirement would be an important step towards safer drivers and risk management for the Department. SO 71-72. The CDL medical card confirms that drivers address potential health concerns and is one way the Department can ensure that it selects drivers physically qualified to operate large commercial vehicles.

Despite these significant managerial policy interests, the Board focused solely on the SEA's interests in bargaining the CDL medical card requirement. The Board stated, "In terms of value of the CDL medical card to the State, there was scant, if any, evidence at hearing which showed that there has been an increase in accidents or incidences involving DOT employees attributable to any of the areas covered by a CDL medical exam." SO 57. The Board employs the wrong standard by assessing the overall value of the proposal rather than examining the competing interests. *Appeal of State*, 138 N.H. at 716 ("Determining the primary effect of the proposal requires an evaluation of strength and focus of the *competing interests*.") (emphasis added). It is not within the Board's power to substitute its judgment for the Department's in determining the suitability of a policy in achieving Departmental goals. *See In re Town of Bethlehem*, 154 N.H. 314, 321 (2006) (the court is "reluctant to substitute [its] judgment for the expertise of the administrative agency"); *see also In re Carnelli*, 228 A.3d at 994 ("We conclude, however, that establishing minimum qualifications for classified positions is one area in which the Board does not have authority to substitute its own judgment for that of the State.") (citation and quotation omitted). The Department produced sufficient evidence of its substantial managerial policy interests.

The Board also cited to *N.H. Admin R.* Per 1003.01 to demonstrate that there are already supervisory systems in place to adequately address an employee's fitness for duty. However, non-disciplinary removal for medical purposes requires that the Department and employee already know of the employee's medical condition. By contrast, the CDL medical card provides an avenue to screen for potential dangerous health conditions

before they are known or cause a significant threat to public safety. In any event, the Board's role is not to act as a super-department, setting or eliminating policy the Department deemed worthy to put in place. By preventing implementation of the requirement, the Board frustrated the Department's ability to exercise its managerial prerogative to select a healthy a safe workforce.

The Board also stated that employees' interests include "costs to employees, how the card effects opportunities for advancement or movement to a preferred location, and job security." SO 55. Here, the Board evaluates the secondary impacts of the CDL medical card policy, rather than the primary competing interests of the parties. The Department did not set or alter pay requirements in relation to the CDL medical card requirement—it simply set a minimum qualification for hire. The Board stated that "the cost to employees and the implementation of the medical card requirement are inextricably intertwined and one cannot be separated from the other and examined in isolation for purposes of our analysis." SO 56. The Department respectfully disagrees. This Court recognizes that impact bargaining is part and parcel to the labor negotiation process and impacts to terms and conditions of employment may be separately bargained from policy implementation. *See Appeal of Nashua School District*, 170 N.H. at 398 ("The District continues to be obligated to engage with the Union in impact bargaining regarding, for example, such matters as severance benefits for the custodians who will lose their jobs as a result of the District's decision to subcontract."); *see also Appeal of Berlin Educ. Ass'n*, 125 N.H. 779, 784 (1984) ("It is important to note that this case involves only the issue of wages for extracurricular duties. It does not affect

the board's authority to decide whether to offer extracurricular programs or to consider the number of such programs. These latter issues clearly are matters of managerial policy within the exclusive prerogative of the board."). The CDL medical card requirement is on its face a policy regarding the selection of CDL drivers. It may impact employees through cost or opportunities for advancement, but these interests are secondary to the primary managerial prerogative of selection of employees. Any impact the CDL medical requirement has on the terms and conditions of employment may be impact bargained by the SEA. The SEA refused to bargain the impacts of the CDL medical card requirement, but that cannot preclude the State from implementing broad managerial policy. Thus, because the SEA cannot satisfy element two of the test in *Appeal of State*, the Board's order was unjust and unreasonable.

B. The Board's order interferes with the public control of governmental functions.

Finally, mandating bargaining over criteria for selection of personnel interferes with the public control of governmental functions under element three of the test in *Appeal of State*. By compelling bargaining on this subject, the Board allowed the SEA to interfere with the Department's selection of its own personnel and promotion of a healthy workforce. Further, the Department of Transportation's essential governmental function is to maintain safe roadways. Per RSA 21-L:2, the Department *shall be* responsible for "[p]lanning, developing, and maintaining a state transportation network which will provide for *safe* and convenient movement of people and goods throughout the state." RSA 21-L:2, II

(emphasis added). In requiring CDL medical cards for employees who move into new positions, the State took a significant step to further its essential governmental function of providing a safe transportation network. Employees who moved into new positions would be required to examine the status of their health, and ensure that they were fit to operate heavy equipment and large vehicles on the roadways of the State. Public safety simply cannot be subject to collective bargaining. *See Se. Pennsylvania Transp. Auth. v. Transp. Workers' Union of Am., AFL-CIO*, 525 A.2d 1, 3-4 (1987) ("We believe the medical standards at issue here promote the declared public policy in favor of promoting transportation safety and clearly reflect the exercise of managerial discretion in the explicitly reserved area of 'selection and direction of personnel.'").

Still more, taken to its logical conclusion, the Board's order would prevent many State agencies from placing minimum qualifications on a large number of positions if that qualification involved an expense to the employee, which is an absurd result. Agency attorneys are obligated to obtain and maintain admittance to the New Hampshire Bar at their own cost. In fact, many State employees, including engineers in the Department's bargaining unit, are required to maintain professional licensure at their own cost. Even an educational requirement, such as a GED, bachelor's degree, or master's degree, might incur associated costs. Employees moving into new positions may be required to obtain a higher education degree or professional licensure, but the SEA has never challenged these minimum qualifications because they are inherent to the State's managerial rights. The State has implemented policy decisions that professional licensure and/or education establish that employees meet

certain minimum competencies that will ensure that employees are fit to perform their duties. Similarly, the CDL medical card is a certification from a federally approved physician that operators of large commercial vehicles are physically fit to perform the functions of their jobs. To limit the Department's minimum qualifications for hire due to cost of obtaining that minimum qualification would lead to an absurd result—with ramifications throughout the State classification system—and severely interfere with the public control of government functions.

Because the CDL medical card requirement is a matter of broad managerial policy and to bargain it would interfere the public control of governmental functions, the requirement is at most permissive and the Department is not obligated to bargain the subject. Thus, the Court should overturn the Board's unjust and unreasonable order and hold that the State may act unilaterally in implementing a CDL medical card requirement.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court revers the judgment below and dismiss the unfair labor practice complaint.

The State certifies that the appealed decision is in writing and is appended to this brief.

The State requests a fifteen-minute oral argument.

Respectfully submitted,

STATE OF NEW HAMPSHIRE
DEPARTMENT OF TRANSPORTATION

By its attorneys,

THE OFFICE OF THE NEW HAMPSHIRE
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March 19, 2021

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CERTIFICATE OF COMPLIANCE

I, Jessica A. King, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief, exclusive of tables and texts of relevant authorities, contains approximately 8,476 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

March 19, 2021 *<u>/s/Jessica A. King</u>*
Jessica A. King

CERTIFICATE OF SERVICE

I, Jessica A. King, hereby certify that a copy of the State's brief shall be served on Gary J. Snyder, Esquire, counsel for the State Employees' Association of New Hampshire, SEIU, Local 1984, through the New Hampshire Supreme Court's electronic filing system.

March 19, 2021 *<u>/s/Jessica A. King</u>*
Jessica A. King

ADDENDUM TABLE OF CONTENTS

State of New Hampshire

Public Employee Labor Relations Board

State Employees' Association of NH, SEIU Local 1984

v.

State of New Hampshire, Department of Transportation

Case No. G-0240-2
Decision No. 2020-128

Appearances: Gary Snyder, Esq. Concord, New Hampshire for State Employees' Association of NH, SEIU Local 1984

Jill Perlow, Esq. and Jessica King, Esq., Attorney General's Office, Concord, New Hampshire for the State

Background:

On April 30, 2019, the State Employees' Association of NH, SEIU Local 1984 (SEA) filed an unfair labor practice complaint because of the State's unilateral implementation of a Commercial Driver's License (CDL) medical card[1] requirement for certain Department of Transportation (DOT) employees. The new requirement must be met by current employees in order to complete a position change like a promotion, temporary promotion, lateral transfer, and demotion. The SEA claims that the State has failed to negotiate a mandatory subject of bargaining and improperly implemented a unilateral change in the terms and conditions of employment for the affected DOT employees. The SEA charges that the State has violated RSA

[1] State and local governments are exempt from the federal CDL medical card regulations since the Federal Motor Carrier Safety Administration (FMCSA) has no regulatory authority over "intrastate" driving.

273-A:5, I (a)(to restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter); (e)(to refuse to negotiate in good faith with the exclusive representative of a bargaining unit, including the failure to submit to the legislative body any cost item agreed upon in negotiations); and (g)(to fail to comply with this chapter or any rule adopted under this chapter).[2] The SEA requests that the PELRB order the State to cease and desist from requiring CDL medical cards for current employees and order the State to bargain in good faith with the SEA over the terms and conditions of employment.

The State argues that whether to require certain current DOT employees to obtain CDL medical cards in connection with a position change is a matter of managerial prerogative and is a prohibited subject of bargaining. The State emphasizes that obtaining a CDL medical card is not a condition of employment for current DOT employees as long as such employees do not change positions. However, the State claims that it is entitled to mandate that in connection with a position change, such as a promotion or temporary promotion, a lateral transfer,[3] or a demotion,[4] the affected current DOT employee must obtain, but is not required to renew or maintain, a CDL medical card. The State maintains that it did not violate its bargaining obligations and it was entitled to unilaterally adopt the new CDL medical card requirement for current employees.

The board held a hearing on February 18, 2020[5] and both parties have filed post hearing briefs. The board's decision in this case is as follows.

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[2] The SEA's September 9, 2019 motion to amend its complaint, which included the withdrawal of a sub-section (h) claim (to breach a collective bargaining agreement), was granted by prior Decision No. 2020-036.
[3] Performing the same job at a different location.
[4] For example, in the event of a layoff employees who exercise contractual bumping rights may be demoted.
[5] Three earlier hearing dates were continued for various reasons.

Findings of Fact

1. The State is a public employer within the meaning of RSA 273-A:1, X.

2. The SEA is the certified exclusive bargaining representative for certain classified DOT employees, including those to whom the CDL medical card requirement applies.

3. The parties' most recent collective bargaining agreement was executed on June 7, 2018 and "shall remain in full force and effect through June 30, 2019 or until such time as a new Agreement is executed." (2018-19 CBA). See Joint Ex. 1.

4. Federal Motor Carrier Safety Administration (FMCSA) CDL medical card requirements are set forth in 49 CFR 391 and do not apply to the New Hampshire DOT bargaining unit employees involved in this case.

5. CDL medical cards are issued by federally approved medical examiners who determine an individual driver's physical qualifications based on criteria listed in federal regulations.[6] The cost of the required medical exam ranges from $65 to $150 and is similar to a routine physical. It covers areas like health history, vision, hearing, pulse, blood pressure, and general physical condition. A CDL medical card qualifies a driver for as little as three months or up to two years, depending on the medical examiner's rating.

6. The parties' bargaining history includes a 2013 State proposal to require a CDL medical card for all employees whose positions require a CDL. See SEA Exhibit 1. The State's proposal anticipated possible loss of employment for employees unable to meet the medical card requirement. The SEA rejected this proposal.

7. In 2015 the parties agreed to a State counter proposal that provided eligible employees who voluntarily "obtain and maintain a valid CDL medical card" with an additional ten dollars per week from November 1 through the pay period that includes the last day of March. See SEA

[6] See 49 CFR 391.41.

Ex. 2. This language is included in CBA Article 43.11 of the 2018-19 DOT sub-unit agreement. See Joint Ex. 1.

8. In 2017 the SEA made two CDL medical card proposals that would have exempted employees with ten years of service from the medical card requirement and also provided a wage increase to those employees required to hold, or who voluntarily have, a CDL medical card. See SEA Exhibits 3-4. The State rejected both proposals.

9. In early April of 2019 the DOT Commissioner issued a written notification which reviewed the revisions to Job Classification and Supplemental Job Descriptions for Highway Maintainer I, II, and III, Assistant Highway Patrol Foreman, Highway Patrol Foreman, Construction Foreman, and Maintenance Supervisor (collectively the "CDL medical card positions"). DOT employees in these positions operate a variety of vehicles which require a commercial driver's license, including, for example winter maintenance equipment like large plow trucks. The Commissioner's notification included a new CDL medical card requirement applicable to current employees which was not negotiated with the SEA. See Joint Ex. 2.

10. As justification for the new CDL medical card requirement, the State has raised general concerns about roadway safety and employee health and maintains that the medical card will address certain risks the State perceives in these areas. The State did not support these explanations with any data or specific examples which indicate the State has identified a problem area which can be effectively addressed through the CDL medical card requirement. The State also explained that its prior bargaining about CDL medical cards was part of an effort to maintain good relations and persuade unit employees to "buy-in" to a CDL medical card program via the CBA Article 43 DOT sub-unit stipend.

11. The new CDL medical card requirement means that a DOT employee who currently holds a CDL medical card position is not required to obtain a medical card as a condition of continued employment in their current position. But, in the event of promotion, temporary promotion, lateral transfer, or demotion, this CDL medical card position employee will be required to possess or obtain a CDL medical card, and the CDL medical card exam fee is the employee's responsibility. However, there is no requirement that the employee renew or maintain the medical card once it expires as a condition of continued employment.

12. A "demotion" position change from one of the CDL medical card positions to another will trigger the CDL medical card requirement, and it can occur in the event a CDL medical card position employee is notified of layoff, and the employee exercises so-called "bumping rights" under CBA Article 16.10, which provides as follows:

> Rights at Lay Off: A bargaining unit employee who has ten (10) or more years of continuous full-time state service who receives a notice of layoff shall be entitled to displace (bump) another employee within the same division under the following conditions:
>
> 1. The employee receiving the notice of layoff notifies the Employer of the intent to bump an employee within the same division within five (5) working days of receipt of the notice of layoff; and,
>
> 2. The employee who is to be bumped has less than ten (10) years of continuous full-time state service and is in a position with a lower salary grade; and,
>
> 3. The employee receiving the notice of layoff and wishing to bump an employee within the same division is certified by the Employer as qualified for the position of the employee who is to be displaced.
>
> 4. An employee who receives a notice of lay off and fails to notify the Employer of an intent to bump another employee within the same division within the five (5) working days shall lose the right to bump.

13. A current CDL medical card employee could also be transferred "laterally" from an existing work location to a new work location. This CDL medical card position employee would

continue in the same position, but would now be subject to the CDL medical card requirement. In this scenario, a failure to obtain the card could conceivably lead to loss of State employment.

Decision and Order

Decision Summary:

The CDL medical card requirement for current employees qualifies as a mandatory subject of bargaining under the *Appeal of State* three step analysis. The CDL medical card requirement is not a prohibited subject of bargaining, it primarily affects the terms and conditions of employment for current employees, and not matters of broad managerial policy, and requiring the State to bargain on the subject will not interfere with public control of governmental functions. Accordingly, the SEA's request for a cease and desist order is granted. The State is directed to refrain from applying the new CDL medical card requirement to current employees.

Jurisdiction:

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

Discussion:

In general, the State is obligated to negotiate in good faith the 'terms and conditions of employment" with the SEA. Terms and conditions of employment means:

> [W]ages, hours and other conditions of employment other than managerial policy within the exclusive prerogative of the public employer, or confided exclusively to the public employer by statute or regulations adopted pursuant to statute. The phrase "managerial policy within the exclusive prerogative of the public employer" shall be construed to include but shall not be limited to the functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and number of its personnel, so as to continue public control of governmental functions.

See RSA 273-A:1, XI and 273-A:3, I. During bargaining, or as a consequence of unilateral action by a public employer, disputes may arise over the extent of the employer's bargaining obligations, as has happened in this case. These issues are settled by the application of the court's three step analysis which sorts potential bargaining subjects into three categories: prohibited, permissive, or mandatory.

> First, to be negotiable, the subject matter of the proposed contract provision must not be reserved to the exclusive managerial authority of the public employer by the constitution, or by statute or statutorily adopted regulation.... Second, the proposal must primarily affect the terms and conditions of employment, rather than matters of broad managerial policy....Third, if the proposal were incorporated into a negotiated agreement, neither the resulting contract provision nor the applicable grievance process may interfere with public control of governmental functions contrary to the provisions of RSA 273-A:1, XI. *A proposal that fails the first part of the test is a prohibited subject of bargaining. A proposal that satisfies the first part of the test, but fails parts two or three, is a permissible topic of negotiations, and a proposal that satisfies all three parts is a mandatory subject of bargaining.* (emphasis added).

Appeal of State, 138 N.H. 716, 724 (1994). As to the first part of the test, the "by statute" reference contained in the RSA 273-A:1, XI phrase "managerial policy...confided exclusively to the public employer *by statute*" means a statute other than RSA 273-A:1, XI (emphasis added). See *Appeal of Nashua Board of Education*, 141 N.H. 768, 774 (1997). In *Appeal of Nashua*, the court rejected the city's prohibited bargaining argument when it evaluated the city's obligation to negotiate the reorganization of its custodial workforce:

> Applying the three-step inquiry to the facts of this case, we hold that the city's reorganization was a mandatory subject of collective bargaining. First, the parties cite no *independent statute*, or any constitutional provision or valid regulation, that reserves to the city the exclusive authority to lay-off full-time employees and replace them with part-time employees. *We reject the city's bootstrapping attempt to utilize the statutory managerial policy exception as the statute that determines the scope and applicability of the managerial policy exception* (citations omitted)(emphasis added).

Id. And in *Appeal of State*, the State's attempt to rely on RSA 21-I:42, I, and :43, II(j) and (k) for the proposition that employee discipline and removal are prohibited subjects of bargaining failed

because the cited statutory provisions "do not state that the listed functions of the (division of personnel) or the subjects of the (division's rules) *are reserved exclusively for the State*" (emphasis added). *Appeal of State,* 138 N.H. at 723.

In the present case, the State has not identified any "independent statute, or any constitutional provision or valid regulation" that states that subjects like CDL medical cards *are reserved exclusively for the State.* The only statute the State has cited to support its prohibited subject of bargaining argument is RSA 273-A:1, XI itself, which is legally insufficient under the cited authorities. Therefore, the first step in the analysis is satisfied, and the subject of CDL medical cards is not a prohibited subject of bargaining.

As to the second part of the test, we must determine whether the State's actions "primarily affect the terms and conditions of employment or matters of broad managerial policy." *Appeal of State* 138 N.H. at 723. This part of the test "cannot be resolved through simple labels offered by management...or through conclusory descriptions urged by employees..." *Appeal of Nashua,* 141 N.H. at 774. Often, both parties will have significant interests affected by the disputed action, and "determining the primary effect of the action requires an evaluation of the strength and focus of the competing interests." *Appeal of State,* 138 N.H. at 722.

In evaluating the strength and focus of the parties' respective interests in this case we take into account the numerous ways certain DOT employees are affected, including costs to employees, how the card requirement effects opportunities for advancement or movement to a preferred location, and job security. For example, this program is being implemented at the individual employee's expense and has effect of a wage reduction. Employees are responsible for the CDL medical card exam fees and an employee who takes the exam multiple times in an effort to obtain a medical card will incur multiple exam fees. There is no right to reimbursement

included in the medical card mandate, presumably because the State recognizes that reimbursement is a cost item which is subject to mandatory bargaining. But the cost to employees and the implementation of the medical card requirement are inextricably intertwined and one cannot be separated from the other and examined in isolation for purposes of our analysis. In other words, the State cannot disregard or ignore the costs to employees, and justify the card mandate as a simple exercise of managerial prerogative. In this regard, the CBA Article 43 stipend provides no refuge. This is a bargained contract provision that is part of an incentive program pursuant to which eligible DOT employees who choose to obtain a medical card wholly independent of, and unrelated to, any change in position, will receive a temporary stipend during the specified period.

The medical card requirement affects other areas of employment as well. A successful CDL medical card exam is now required before an employee can obtain a promotion or accept a temporary promotion. The card is required before affected DOT employees can complete a lateral transfer (same position in a different location). This means an employee could, for example, remain at the employee's current location (e.g. Nashua) and continue to operate a plow truck without a CDL medical card, but the employee cannot laterally transfer to Concord to perform the same job without obtaining the CDL medical card. Additionally, if such an employee obtains a three month card and transfers to Concord there is no requirement that the employee "renew" the medical card as a condition of continued employment at the Concord location. In effect, the employee will revert to the same medical card status (no card) the employee was in before the transfer. This clearly dilutes the utility of the medical card as a tool to monitor DOT employee fitness for the duties of their positions, and undermines any argument

that the medical card requirement is somehow necessary to maintain and promote safety on the roads.

The CDL medical card requirement also creates a potential barrier to the exercise of contractual "bumping rights" in the event a laid off employee who is already operating a plow truck is willing to accept a demotion into another plow truck operator position that requires a CDL medical card.

These significant employee interests must be weighed against the State's interests in imposing the new CDL medical card requirement and we must, therefore, evaluate how the CDL medical card requirement serves and advances the interests of management. Per RSA 273-A:1, XI, the State's managerial prerogative includes "the functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and number of its personnel." The CDL medical card requirement clearly relates to the "selection" of personnel, which happens when an employee is first hired into state service. However, this does not apply to current DOT employees. Whether "selection of personnel" can reasonably be said to describe the promotion, temporary promotion, lateral transfer, or demotion of current personnel is less clear because those actions involve the reassignment or movement of existing personnel into different positions or locations. In terms of the value of the CDL medical card to the State, there was scant, if any, evidence at hearing which showed that there has been an increase in accidents or incidents involving DOT employees attributable to any of the areas covered by a CDL medical exam. Also, as discussed, there is no medical card renewal requirement. Finally, there was also little or no evidence that existing supervisory systems are inadequate to address a particular DOT employee's fitness to safely

perform the duties of a particular position. See, e.g., Admin. Rules, Per 1003, Removal for Non-Disciplinary Reasons, which provides as follows:

> Per 1003.01 Purpose. The purpose of this rule shall be to provide for the removal of a full-time employee for non-disciplinary reasons, when:
>
> (a) The employee is physically or mentally unable to perform the essential functions of the position to which appointed;
>
> (b) The employee's physical or mental condition creates a direct threat or hazard for the employee, the employee's co-workers or clients of the agency which cannot be eliminated except by removing the employee from the position;
>
> (c) The employee's presence in the workplace, because of the medical condition, is deleterious to the employee's health; or
>
> (d) The employee is a qualified individual with a disability who, with or without a reasonable accommodation, is unable to perform the essential functions of the position to which appointed.

After due consideration of the parties' respective interests, we conclude that the CDL medical card requirement primarily affects the terms and conditions of employment of current employees, and not matters of broad managerial policy. The SEA's argument that CDL medical cards for current employees is a mandatory subject of bargaining passes the first two steps of the *Appeal of State* analysis.

As to the third step in the analysis, we find that there is insufficient evidence to show that treating the CDL medical card requirement as a mandatory subject of bargaining will interfere with public control of governmental functions. The State's interests in the physical fitness of DOT employees to perform their job duties is already adequately addressed in PER 1003, and there is a dearth of evidence which demonstrates that the introduction of a medical card requirement is needed or significant to any meaningful degree to the fulfillment or advancement of any State objectives to improve employee health or roadway safety.

In accordance with the foregoing, we find that any CDL medical card requirement for current DOT employees is a mandatory subject of bargaining under *Appeal of State.* We note that the SEA also argues there is another basis for ruling that the State has violated its bargaining obligations, which is that the parties have already bargained about CDL medical cards and reached agreement to establish a voluntary program with an employee stipend as an incentive as evidenced by CBA Article 43. While we believe there is merit to this argument, we base this decision on the more fundamental bargaining obligations of the State under *Appeal of State,* as discussed.

In accordance with the foregoing, we find that the State has committed an unfair labor practice in violation of RSA 273-A:5, I(a)(to restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter); (e)(to refuse to negotiate in good faith with the exclusive representative of a bargaining unit, including the failure to submit to the legislative body any cost item agreed upon in negotiations); and (g)(to fail to comply with this chapter or any rule adopted under this chapter). The affected bargaining unit employees were entitled to have the subject of CDL medical cards negotiated, and the State's unilateral action violated its duty to bargain. The SEA's request for a cease and desist order is granted. The State shall not implement any requirement that current DOT employees in any of the affected positions obtain a CDL medical card as a condition of a promotion, temporary promotion, transfer, or demotion.

So ordered.

Date: June 23, 2020

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

By unanimous vote of Chair Andrew Eills, Esq., Board Member James M. O'Mara, Jr., and alternate Board Member Glenn Brackett.

Distribution: Gary Snyder, Esq.
Jill Perlow, Esq.
Jessica King, Esq.

State of New Hampshire

Public Employee Labor Relations Board

State Employees' Association of NH, SEIU Local 1984

v.

State of New Hampshire, Department of Transportation

Case No. G-0240-2
Decision No. 2020-176

Order on Motion for Rehearing

The State filed a motion for rehearing of PELRB Decision No. 2020-128 (June 23, 2020) on July 23, 2020. The SEA filed an objection on July 30, 2020. Motions for rehearing are governed by RSA 541:3 and Pub 205.02, which provides in part as follows:

> **Pub 205.02 Motion for Rehearing.**
>
> (a) Any party to a proceeding before the board may move for rehearing with respect to any matter determined in that proceeding or included in that decision and order within 30 days after the board has rendered its decision and order by filing a motion for rehearing under RSA 541:3. The motion for rehearing shall set out a clear and concise statement of the grounds for the motion. Any other party to the proceeding may file a response or objection to the motion for rehearing provided that within 10 days of the date the motion was filed, the board shall grant or deny a motion for rehearing, or suspend the order or decision complained of pending further consideration, in accordance with RSA 541:5.

Upon review, the State's Motion for Rehearing is denied.[1]

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[1] We note that as additional support for its prohibited bargaining argument the State now cites and relies upon RSA 21-G:9, II (c), which provides that a commissioner's authority includes the power to exercise "general supervisory and appointing authority over all department employees..." Assuming the CDL medical card requirement at issue in this case is within the scope of this provision, this statutory language is insufficient to establish that CDL medical cards are a prohibited subject of bargaining because it does not state that this general supervisory and appointing authority "is reserved exclusively for the State." See *Appeal of State*, 138 N.H. 716, 723 (1994)(Union discipline proposal not a prohibited subject of bargaining). See also *Sugar River Education Association, NEA-NH v. Claremont School District*, PELRB Decision No. 2016-176 (July 29, 2016)(Class schedule not a prohibited subject of bargaining under RSA 189:1-a).

So ordered.

August 18, 2020

/s/ Andrew B. Eills
Andrew B. Eills, Esq.
Chair/Presiding Officer

By unanimous vote of Chair Andrew B. Eills, Esq., Board Member Carol M. Granfield, and Alternate Board Member Glenn Brackett.

Distribution: Gary Snyder, Esq.
Jill Perlow, Esq.
Jessica King, Esq.

NEW HAMPSHIRE DEPARTMENT OF TRANSPORTATION
INTRA-DEPARTMENT COMMUNICATION

FROM: Victoria Sheehan
Commissioner

DATE: April 4, 2019

SUBJECT: Changes to Classifications and Supplemental Job Descriptions

TO: Applicable Employees in the Division of Operations

As part of an effort started by the Bureau of Highway Maintenance to ensure maintenance position responsibilities and skill requirements were properly recognized, revised Job Classification and Supplemental Job Descriptions for the following positions were submitted to the Department of Administrative Services, Division of Personnel for review and consideration under Per 303 of the Administrative Rules:

- Highway Maintainer I
- Highway Maintainer II
- Highway Maintainer III
- Assistant Highway Patrol Foreman
- Highway Patrol Foreman
- Construction Foreman
- Maintenance Supervisor

The Division of Personnel review has resulted in updated Supplemental Job Descriptions for all of the positions above, as well as allocation (labor grade) changes for the following positions:

Position	Current Labor Grade	New Labor Grade
Highway Maintainer I	7	9
Highway Maintainer II	9	11
Highway Maintainer III	12	14
Assistant Highway Patrol Foreman	14	15
Maintenance Supervisor	21	23

Due to the utilization of several different "foreman" job classifications across the Division of Operations, that range in labor grade, DOP had difficulty in their review of the Highway Patrol Foreman and Construction Foreman submittals. At this time there are no changes in labor grade for these positions. DOP will work with the Department and intends to review all Foreman related positions at the Department in relation to each other.

CHANGES TO MINIMUM QUALIFICATIONS

As part of the revisions to each of the positions listed above, there are changes to the minimum qualifications, as detailed below:

Position	Current Education Requirement	New Education Requirement	New Requirement at time of hire/position change
Highway Maintainer I	8th grade	High school diploma or equivalent	CDL medical card
Highway Maintainer II	10th grade *(can substitute experience up to 2 years)*	High school diploma or equivalent	CDL medical card
Highway Maintainer III	10th grade *(can substitute experience up to 2 years)*	High school diploma or equivalent	CDL medical card
Assistant Highway Patrol Foreman	High school diploma or equivalent *(can substitute experience up to 2 years)*	Associates Degree *(can substitute experience up to 2 years)*	CDL medical card
Highway Patrol Foreman	Associates Degree *(can substitute experience up to 2 years)*	Associates Degree *(can substitute experience up to 2 years)*	CDL medical card
Construction Foreman	Associates Degree *(can substitute experience up to 2 years)*	Associates Degree *(can substitute experience up to 2 years)*	CDL medical card
Maintenance Supervisor (now Supervisor III)	Associates Degree *(can substitute experience up to 2 years)*	Bachelor's Degree *(can substitute experience, unlimited years)*	CDL medical card

These new requirements will NOT impact current employees unless those employees leave their current position (i.e. promotion, demotion, lateral, temporary promotion). HMI employees who promote in their current position through a progression series to an HMII will need a CDL medical card as part of the certification process.

All changes to these positions are effective April 12, 2019. Each impacted employee will be asked to review and shall sign an updated Supplemental Job Description.

On the next page, you will find a list of "frequently asked questions" that may assist in this transition.

Lastly, I thank you for your dedication, knowledge and experience you bring to the Department. Public service often goes unrecognized. Your work efforts play a critical role in providing a safe and secure transportation system for the state of New Hampshire.

Frequently Asked Questions (FAQ)

I am currently an HMI. To get the promotion to an HMII, will I need a CDL medical card?
Yes. As of April 12, 2019, those intending to promote to any position requiring a CDL medical card must have one as part of the certification process.

Are CDL medical exams covered under the State's health insurance?
No. CDL medical exams are not a covered service under the State's health insurance plans. A list of qualified medical exam providers can be found here on the Federal Motor Carrier Safety Administration website:
https://www.fmcsa.dot.gov/medical/driver-medical-requirements/national-registry-certified-medical-examiners

If I plan on staying in my HMIII position for the rest of my career, do I need to get a medical card?
No. If you do not apply for any other positions (including a temporary promotion), you are not required to have a medical card.

I am currently an HMII, labor grade 9, step 8 ($18.04). What is my new rate of pay?
As per 303.06 (a) of the Rules, if the director reallocates or reclassifies a position into a class with a higher salary grade because of a documented change in the position's job function, the incumbent's salary shall be increased to the lowest level in the new class which shall provide an increase equaling at least one annual increment in the former class. Therefore, an HMII currently at a step 8 would go to a labor grade 11, step 7 ($18.74). The full A130 wage schedule can be found on the Department of Administrative Services here:
https://das.nh.gov/hr/SalarySchedules/2019_Represented/DAS-DOP-EE-REL-A130-WAGE-SCH-JAN-2019.pdf

I am currently an Assistant Foreman labor grade 14 step 8, and have been for 1 year. When I move to a labor grade 15, step 8, will I need to wait a full 3 years for an increment to a step 8 or will I get 1 year "credit" for my time in the step 8?
No, for most employees, increment dates will not change from currently scheduled. There may be certain situations where an employee is going from a 2 year increment waiting period to a 1 year increment waiting period.

Do I need to maintain a CDL medical card after a promotion?
No. The requirement is the have a CDL medical card at the time of hire or other position movement (promotion, lateral, demotion).

When will I see any change to my paycheck?
Employees will see changes in the paycheck issued May 10, 2019. Use https://sson.nh.gov/ to access NH FIRST to see your pay and other personal information.

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

STATE EMPLOYEES' ASSOCIATION OF NEW HAMPSHIRE, SEIU LOCAL 1984	Supreme Court Case. No. 2020-0416
V.	
STATE OF NEW HAMPSHIRE, DEPARTMENT OF TRANSPORTATION	PELRB Case No. G-0240-2

HEARING - 2/18/2020
TRANSCRIBED FROM AUDIO

Appearances:

For the SEA: Gary Snyder, Esquire
SEA
207 North Main Street
Concord, NH 03301

For the State: Jill Perlow, Esquire
Jessica King, Esquire
Attorney General's Office
33 Capitol Street
Concord, NH 03301

Board: Andrew Eills, Esquire, Chair
James O'Mara, Jr., Member
Glenn Brackett, Member

1 an arbitrator.

2 HEARING OFFICER: So at this point, you're

3 not offering SEA Exhibit 1. You're just asking the

4 witness to identify it. Correct?

5 MR. SNYDER: I am going to ask that it be --

6 HEARING OFFICER: Well when you -- if you

7 offer it as a full exhibit, then you can make your

8 objection and then the Chair can rule.

9 MR. SNYDER: Okay.

10 BY MR. SNYDER:

11 Q. And what was the SEA's response to this

12 proposal?

13 A. We declined. We were -- this particular

14 proposal we didn't -- you know, we didn't feel that

15 it was -- there was enough compensation for the

16 drivers involved. There was no compensation for the

17 drivers involved. And there was also -- we felt like

18 that, you know, that we understood the State's

19 perspective and we understood that they were looking

20 to have the safe drivers, etcetera. But we just

21 weren't happy with this particular proposal.

22 Q. Okay. So the SEA rejected this proposal?

23 A. We did.

1 A. That was a compromise. So we actually asked
2 for more but we compromised on that.
3 Q. But it's currently five months, 10 dollars a
4 week --
5 A. Correct.
6 Q. So that would be approximately 20 weeks and
7 200 dollars?
8 A. Approximately, yes.
9 Q. Give or take how many weeks in a month.
10 A. I'm not good at math on the fly but I will
11 take your word.
12 Q. I'm doing simple 5 times 4 is 20.
13 A. I see no harm in accepting that.
14 Q. And you also mentioned that this change in
15 the DOT policy happened during bargaining, so you
16 could have addressed it during bargaining.
17 A. We were actively negotiating it at the time
18 they dropped it, and that's the reason we felt that
19 it was inappropriate because the State was engaged in
20 negotiations on this topic and then unilaterally
21 changed it.
22 Q. So we obviously have a dispute between
23 policy and the compensation aspect that you could

1 have continued to negotiate the impact of this policy
2 change and the compensation?
3 A. That would have been a compromise to us
4 because at this time we didn't feel that the State's
5 position was legitimate, that it circumvented the
6 mandatory major bargaining and the topic at hand. We
7 felt that that was bad faith. So we continued to
8 bargain for what the intent we thought was beneficial
9 to the agency as well as beneficial for the
10 employees.
11 Q. So you didn't bargain -- you stopped
12 bargaining on the impact then?
13 A. We hadn't been bargaining on the impact. We
14 had been bargaining on what you see in that proposal
15 in the packet with regards to changes and the
16 sections.
17 Q. Could you bargain the impact now?
18 A. No. We already (inaudible).
19 Q. So there's no ability to continue bargaining
20 --
21 A. If the parties were willing to come up with
22 -- I suppose there's always the option to go back,
23 but at this point, the position the State's taken and

1 the position the SEA's taken, as you're aware, we're
2 at impasse and we can't go forward. We've actually
3 filed for (inaudible) ruling of the Board with
4 regards to (inaudible).
5 Q. I don't have anything further on that. I
6 have nothing further.
7 CHAIR EILLS: Any questions?
8 MR. BRACKETT: No.
9 CHAIR EILLS: No further questions.
10 MR. SNYDER: I have nothing further either.
11 The only thing I want to make sure, I'm not sure if
12 we ever actually admitted the collective bargaining
13 agreement (inaudible).
14 HEARING OFFICER: All the joint exhibits are
15 in as full exhibits.
16 MR. SNYDER: All right. Then we're all set.
17 THE WITNESS: Thank you very much.
18 CHAIR EILLS: Thank you. Do you want to
19 take a recess? Okay. We're going to take -- are you
20 going to do -- put on your case in a second?
21 MS. PERLOW: Um-hmm. Yeah.
22 CHAIR EILLS: Okay. We're going to take a
23 ten-minute recess. We'll come back at 10:30.

1 they don't have to have a medical card to work for
2 the State due to an exception with the federal
3 government. Some people come to us when they cannot
4 work as commercial drivers -- commercial motor
5 vehicle operator in private industry because they
6 cannot get a medical card. So we saw it as an
7 opportunity while we were making these changes to
8 address that as well.
9 Q. And you touched on it a little bit, but why
10 was the medical card implemented?
11 A. Sure. So it's a risk management strategy
12 mostly. As I mentioned, the Federal Motor Carrier
13 administration creates the rules around commercial
14 motor vehicles and those who operate them. And as a
15 public employer, we are given a significant number of
16 exemptions from those requirements. We really only
17 have two in reality that we have to meet and one is
18 the drug and alcohol program, that we must maintain a
19 pre-employment random post-accident drug and alcohol
20 program. And then the second is that the operator
21 must have a commercial driver's license. So we were
22 exempt from many, many other pieces of that due to
23 what we do. That poses a very large risk. So as I

1 mentioned, for the past probably 10 years, there has
2 been talk at the federal level to remove that
3 exemption, because the reason for the exemption
4 really doesn't offer anything to the safety of the
5 traveling public. And so -- I lost my track -- my
6 train of thought. So we saw it as an opportunity at
7 that point, truly risk management, we had had a
8 handful of incidents where an employee had had a
9 condition while they were driving that put the public
10 and themselves at risk. So we felt risk management
11 wise, that had to be done.
12 Q. So to sum up, safety of the general public
13 and health (inaudible).
14 A. Yes.
15 Q. And I'm just going to touch quickly on the
16 transfers that we've been talking about a little bit
17 today.
18 A. Yes.
19 Q. Can you explain how DOT, barring everything
20 else, assuming that a transfer would happen and that
21 the person is qualified for a transfer --
22 A. Yeah.
23 Q. -- but they did not have a CDL medical card,

1 can you explain how the DOT would transfer that
2 position?
3 A. Okay. So we need to talk a little about
4 certification. So we have approximately 2,000
5 employees. About 1,650 of them are full time. The
6 majority of them are classified. So in order to move
7 from your position into a similar position -- so if I
8 wanted to go to another Administrator III position
9 somewhere else in the agency, technically the rules
10 allow for a transfer. So it's the -- in the best
11 interests of myself. Maybe I'm requesting it or the
12 State is saying, we really need you over here and we
13 want to move you as an asset over here. You have to
14 certify for that position. So even though the same
15 classification may be in place, there can be
16 different qualifications for a position. But if you
17 just want to talk about highway to highway, then the
18 classifications are all the same. So we can do that
19 in two different ways. One is, if there's an opening
20 and it's advertised, or perhaps not advertised, an
21 employee can -- in most cases this is what happens
22 with us, is an employee says, I want to move from
23 Epping to Epsom and I know that there's an HM-II open

1 there. I'm an HM-II. Is there a way that we can
2 just transfer. Because otherwise you go through the
3 application process to apply for the position, be
4 selected for the position, and that can take up to
5 about a month just with the internal workings of
6 processing that move. So another thing that the
7 rules allow us to do is -- and it was read before --
8 is we can take a person in their position number --
9 so my position's I, II, III, IV, and this position
10 over here is V, VI, VII, VIII, and we can move this
11 position in -- we pick you up in your position
12 number, drop you over here, take that position and
13 move it back over here. We move positions around a
14 lot based on skillsets, based on needs, based on
15 sheds closing down or new roads created. We want to
16 make sure that we're allocating our resources to the
17 greatest area of need.
18 Q. And has anybody been terminated as a result
19 of not obtaining a CDL medical card?
20 A. No.
21 Q. That's all I have.
22 MR. SNYDER: I have a few questions on
23 cross, if you don't mind.

1 Commissioner of DOT, we started a conversation about
2 the need to, as Alexis just testified, to make sure
3 we do whatever we can to keep our roadway safe and to
4 keep our employees healthy. And that conversation
5 related to the medical cards for the commercial
6 driver's license folks at DOT. And at that time, we
7 were also having a discussion about whether or not
8 the federal rules were going to change and mandate
9 these rules on the State, because currently as
10 previous testimony has said, we are exempt from the
11 federal requirements. So part of our conversation
12 was what could we do in the interim to -- from an
13 employee relations standpoint, get employees on board
14 with the idea of having a medical card. So we
15 started the process from the Union's perspective and
16 bargaining, even though we had been talking about it
17 before then, and tried to come up with some
18 proposals, tried to get the Union on board with the
19 idea that they would be mandated. And we went back
20 and forth and ended with an incentive, is what I
21 would call it, of 10 dollars a week for the five
22 months during the winter, which equates to about 200
23 dollars. We talked about the price of the medical

1 card being between 65 and whatever number you want to
2 pick on the other end of it. But in any case, no
3 matter what the number was, the 200 dollars from the
4 State's vantage point would cover the cost for the
5 employees in getting that. And in addition, if
6 someone happened to get a medical card for two years,
7 they would have the extra incentive of receiving the
8 200 dollars twice, because the 10 dollars would be
9 for both years during the months of the winter. And
10 so as that -- as that progress went on, we continued
11 the process of seeing where the federal government
12 was going to land on mandating the cards, and it
13 became apparent that it was going to take a lot
14 longer than anticipated. And what we didn't want was
15 for anyone to be harmed, the public or the employees,
16 by a medical condition happening on the highway,
17 driving, you know, a ten-ton vehicle, and someone be
18 harmed in that way. And we continue to have these
19 conversations both in and out of bargaining with the
20 Union as we've gone over a number -- we're talking
21 years here, not, you know, a number of months. This
22 has been a longtime conversation. So at this point,
23 the Commissioner, Victoria Sheehan, current

Article XLIII
TRANSPORTATION
(Effective September 17, 2015)

43.1. The Department will provide reflective vests, hard hats, and stop/slow paddles.

43.1.1. The Employer agrees to conduct appropriate work environment testing or to take other appropriate action within thirty (30) days of the date a documented need or a demonstrated problem is presented to the Employer.

43.2. A classified employee who receives a change in project location assignment may state orally or in writing to the appropriate supervisor any adverse conditions which may result from the assignment.

43.3. Employees attending meetings which include representatives of both management and the Association or subsequent meetings resultant there from as authorized will be allowed to convene during work hours. Employees who desire to meet for matters relating to Association duties or activities, except Stewards in pursuit of their designated function related to the grievance procedure, shall do so at times other than during normal work hours.

43.4. Articles of uniform, protective clothing or other protective devices now provided to employees shall continue to be provided and shall be uniformly provided within job classifications by the Employer.

43.5. **Employee rights**: No employee's rights to drive DOT vehicles shall be suspended for reasons related to the employee's driving record without first having a personal meeting/hearing with their Employer.

43.6. **Rental & Fees:** The Employer agrees to enter into a tool rental agreement with mechanics wherein the Employer shall pay a fee for the employee's use of such tools in the service of the Employer. The agreement shall be of legal form and shall contain as minimum provisions the following:

a. Rental fee of four hundred dollars ($400.00) per year.

b. Ownership and use shall remain vested in the employee.

c. The employee shall furnish tools of less than one (1) inch.

d. A pro rate termination fee schedule.

43.7. Full time employees shall be allowed to accrue compensatory time at the rates specified in 7.1 and 7.1.2 in lieu of overtime pay or holiday payment for time worked for amounts not to exceed the hours equivalent to their basic workweek (37 ½ or 40 hours.) Use or payment of accrued compensatory time shall be as specified in 7.1.4 b. and c. When an employee has compensatory leave accruals, the compensatory leave must be used before annual leave is requested. Compensatory time accrued beyond the equivalent of one basic workweek shall be upon mutual agreement between the Employer and the Employee.

43.8. The Employer agrees to provide a payroll deduction program for employees who elect to participate in a uniform/clothing cleaning service. The Employer's responsibility is limited to the deduction of appropriate amounts from participating employees and payment of that amount to the vendor(s) selected by the employees. The program shall be limited to no more than two (2) vendors.

43.9. **Employer Rights:** The Employer has the right to develop and implement a substance abuse testing program, consistent with current policies, to include Drawbridge Operators and Gate Operators, and employees in positions assigned permanently or temporarily to the Traffic Management Center.

43.10. The Employer shall provide a reimbursement to any employee whose PPE assessment indicates a need for prescription safety glasses. The allowance shall be paid for a one-time purchase of safety glasses or safety sunglasses/shades. Safety glasses shall be purchased in accordance with the following provisions:

a. The amount of the reimbursement shall be one-hundred fifty dollars ($150.00) per employee.

b. When the Employer determines that an employee's safety glasses have been damaged due to job related activities, or when the employee's prescription changes enough to necessitate the purchase or repair of new safety glasses, that the employee shall be reimbursed for the cost not to exceed one-hundred fifty dollars ($150.00).

c. The Employer retains the right to determine the appropriate style, which shall accommodate top and side shields.

d. Prescription safety glasses shall meet current personal protective equipment standards.

43.11. **Maintenance Activities**: In recognition of their obligation to respond to winter maintenance call outs, the Employer agrees to pay a stipend of thirty-five dollars ($35.00) per week to certain employees from the pay period that includes the first day in November through the pay period that includes the last day of March each year in accordance with the following conditions:

a. The stipend shall be paid to those employees who are determined by the Employer to be routinely engaged in winter maintenance and ancillary activities and are on the Employer's winter maintenance call out list.

b. Other employees who are not routinely engaged in winter maintenance and ancillary activities but who possess a Commercial Driver's License may volunteer for placement on the winter maintenance call out list, provided that any employee who refuses a call to perform winter maintenance and ancillary duties may be removed from the list, may cease to receive the stipend, and may be required to reimburse the Employer for stipends received since the date of the last winter maintenance call out.

c. Employees defined in paragraph (a.) above who obtain and maintain a valid CDL medical card and provide an acceptable copy to the NHDOT's Driver Qualifications Specialist shall receive an additional ten dollars ($10) per week in accordance with the above provisions.

43.12. All professional positions requiring a Professional Engineer License/Engineer in Training Certificate shall be scheduled to work 40 hours per week and shall be paid in accordance with the A130 40 Hour Wage Schedule. This Section shall take effect on the first payday following execution of a unit agreement between the Employer and the Association if sufficient funds are available to fund this schedule change. If sufficient funds are not available to fund this schedule change, then the schedule change shall become effective on the first pay day when sufficient funds are available to fund this schedule change following the execution of a unit agreement by the Employer and the Association.