THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2020-0416

APPEAL OF NEW HAMPSHIRE DEPARTMENT OF TRANSPORTATION

BRIEF FOR APPELEE
(State Employees' Association of NH, Inc., SEIU Local 1984)

(15 Minute Oral Argument)

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TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES AND OTHER AUTHORITIES

Statutes

Other Authorities

TEXT OF RELEVANT AURHORITIES

NH RSA 273-A:1 Definitions. –
In this chapter:
I. "Board" means the public employee labor relations board created by RSA 273-A:2.
II. "Board of the public employer" means the executive body of the public employer, such as the city council, board of selectmen, the school board or the county commissioners.
(a) For purposes of this chapter:
(1) The board of the public employer for executive branch state employees means the governor and council.
(2) The board of the public employer for the judiciary means the chief justice of the supreme court with the advice and consent of the judicial branch administrative council appointed pursuant to supreme court rule 54.
(b) In certain political subdivisions of the state the board of the public employer may also be the legislative body.
III. "Budget submission date" means the date by which, under law or practice, the public employer's proposed budget is to be submitted to the legislative or other similar body of the government, or to the city council in the case of a city, for final action. In the case of a town, school district or supervisory union it means February 1 of each year, except in the case of a city school district or city school administrative unit which has a separate budget submission date applied to it by the city.
IV. "Cost item" means any benefit acquired through collective bargaining whose implementation requires an appropriation by the legislative body of the public employer with which negotiations are being conducted.
V. "Grievance" means an alleged violation, misinterpretation or misapplication with respect to one or more public employees, of any provision of an agreement reached under this chapter.
VI. "Impasse" means the failure of the 2 parties, having exhausted all their arguments, to achieve agreement in the course of good faith bargaining, resulting in a deadlock in negotiations.
VII. "Legislative body" means that governmental body having the power to appropriate public money. The legislative body of the state community college system and university system shall be the board of trustees.
VIII. "Professional employee" means any employee engaged in work predominantly intellectual and varied in character, involving the consistent

exercise of discretion and judgment, and requiring knowledge in a discipline customarily acquired in a formal program of advanced study.
IX. "Public employee" means any person employed by a public employer except:
(a) Persons elected by popular vote;
(b) Persons appointed to office by the chief executive or legislative body of the public employer;
(c) Persons whose duties imply a confidential relationship to the public employer; or
(d) Persons in a probationary or temporary status, or employed seasonally, irregularly or on call. For the purposes of this chapter, however, no employee shall be determined to be in a probationary status who shall have been employed for more than 12 months or who has an individual contract with his employer, nor shall any employee be determined to be in a temporary status solely by reason of the source of funding of the position in which he is employed.
X. "Public employer" means the state and any political subdivision thereof, the judicial branch of the state, any quasi-public corporation, council, commission, agency or authority, the state community college system, and the state university system.
XI. "Terms and conditions of employment" means wages, hours and other conditions of employment other than managerial policy within the exclusive prerogative of the public employer, or confided exclusively to the public employer by statute or regulations adopted pursuant to statute. The phrase "managerial policy within the exclusive prerogative of the public employer" shall be construed to include but shall not be limited to the functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and number of its personnel, so as to continue public control of governmental functions.
XII. [Repealed.]

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

NH RSA 273-A:15 Actions by or Against Public Employee Organizations. – Actions by or against the exclusive representative of a bargaining unit may be brought, without respect to the amount of damages, in the superior court of the county in which it is principally located, or where the plaintiff resides or has its principal place of business, if the plaintiff is a resident of this state or is incorporated in this state.

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

NH 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.

Source. 1913, 145:18. PL 239:4. 1937, 107:17; 133:78. RL 414:6.

NH Admin. R. Per 101.02, (b) Scope

(a) Unless otherwise specified, these rules shall apply to full time classified state employees.

(b) In the case of terms and conditions of employment which are negotiated, the provisions of the collective bargaining agreements shall control.

(c) In accordance with the provisions of RSA 21-I:43, the director shall have sole authority, subject to the appeals process established under RSA 21-I, to adopt and interpret these rules.

(d) In accordance with the provisions of RSA 273-A:4, disputes arising out of an alleged violation, misapplication or misinterpretation of any provision of a collective bargaining agreement shall be resolved in accordance with the grievance procedures contained therein.

Source. (See Revision Notes at chapter heading for Per 100) #5373, eff 4-27-92; ss by *#6729, eff 4-21-98*; amd by *#8735, eff 10-18-06*; ss by *#10801, eff 5-17-15*

STATEMENT OF THE CASE/STATEMENT OF THE FACTS

The SEA agrees with much of the Statement of the Case/Statement of the facts provided by the Appellant, but seeks to provide additional clarification as provided herein.

The State asserts the April 4, 2019 memorandum sought to change the minimum qualifications of the listed positions, but the employees are not required to maintain CDL medical cards throughout employment, so these are not so much minimum qualifications for the listed positions, but instead are better described as hire, promotion, demotion, and lateral transfer qualifications. AB at 12[1]; CR at 256[2].

The State asserts the CDL medical card requirement outlined in the April 4, 2019 memorandum sought to promote safety of drivers and the public and went on to mention an SEA member recognized the enhanced safety benefits. AB at 13. However, the State's assertion here is not entirely supported by the record or the PELRB's finding of fact. CR at 258, 345-47. The State did not submit much, if any, evidence or testimony to support its conclusion that requiring CDL medical cards for new hires as well as for movement in positions internally actually created a safer work environment. CR at 258. The PELRB described the evidence of safety as "scant". CR at 264.

Further, while SEA member Jonathan Hebert did make an allusion to understanding that the State wanted its drivers to be safe, Mr. Hebert never acknowledged that he believed the April 4, 2019 memorandum achieved safety,

[1] References to the Appellant's Brief are cited as "AB" followed by the page number.
[2] References to Certified Record are Cited as "CR" followed by the page number.

nor did he speak in any great detail about it. CR at 307. SEA member Daniel Brennan spoke more to safety concerns regarding CDL medical cards and the majority of his testimony on that subject showed that he did not believe the memorandum improved upon safety and that CDL medical card examinations were insufficient given their lack of depth, lack of testing, and the practitioner's lack of background medical information. CR at 324, 345-46. Mr. Brennan described the CDL medical card process as a brief physical exam covering basic things like sight and reflexes, but does not include lab work or consider past medical history. CR at 324, 345-47. He went on to also say that having a CDL medical card does not prevent a medical emergency, and referenced a recent heart attack from an employee. CR at 346. The doctors providing these medical cards are not typically primary care physicians and do not access a person's general background medical information. CR at 345-46.

The State refers to and provides the current collectively bargaining language regarding CDL medical cards, but made no allusion to the bargaining history. AB at 14. The bargaining history clearly demonstrates the parties agreed to not mandate CDL medical cards for current employees under any circumstances. CR at 226-228, 257-258. The SEA contends that when the State adopted a policy that altered the agreed upon language, in the context of the bargaining history, without first negotiating, the State bargained in bad faith. CR at 244. Although the PELRB's decision was based upon the *Appeal of State* traditional three part test, the PELRB stated it believed there was merit to this argument as well. CR at 266.

The State notes no employees were terminated as a result of the new policy, but did not mention that several employees were impacted in terms of

internal movement, either choosing not to apply for a position because of the CDL medical card, having difficulty transferring, or in one instance outright resigning over the inability to move positions. AB at 14; CR at 55-62. The record demonstrates that the DOT itself would work with some employees to get around the new policy, but not others. *See id.*

The State notes the SEA declined to bargain the impact of the policy. AB at 14. For clarification, the SEA is unaware of any offer by the State to impact bargain this matter. CR at 298. The SEA chose not to seek to bargain the impact because it believed, and still believes, the subject is a mandatory subject of bargaining and thus, mere impact bargaining would be the improper action to take. CR at 239-244, 298.

The State provides that on May 1, 2019, the SEA amended its complaint to withdraw its request to reverse pay adjustments related to CDL medical cards. AB at 15. To provide further clarification, the SEA originally had been provided information that the mandate of CDL medical cards provided for in the April 4, 2019 memorandum was linked, in part, to labor grade increases for certain positions as part of a position reclassification. CR at 292. However, upon receiving formal discovery, the SEA learned that the CDL medical card mandate was not related to pay changes from position reclassifications, and thus withdrew this element. CR at 292.

SUMMARY OF ARGUMENT

The PELRB correctly determined that the State of New Hampshire, Department of Transportation committed an unfair labor practice when it unilaterally imposed the requirement for certain current employees to hold CDL

medical cards for internal movements (i.e. lateral transfer, demotions, promotions, etc…). CR at 266. The PELRB was further correct when it determined the subject matter of CDL medical cards was a mandatory subject of bargaining pursuant to the three step analysis established under *Appeal of State* because the subject is not exclusively reserved for management by statute, constitution or valid regulation; it primarily affects the terms and conditions of employment for current employees, and it does not regard matters of broad managerial policy; and were the subject incorporated into a collective bargaining agreement or "CBA" it would not interfere with public control of governmental functions. *See Appeal of State*, 138 N.H. 716 at 722-24 (1994); CR at 265-66.

Additionally, the State has already bargained with the SEA over CDL medical cards, and rather than requiring them, the parties have instead agreed to an incentive based agreement, where employees who choose to maintain a CDL medical card are entitled to an additional $10.00 per week during the months of November through March. *See* CR at 189, 226-228, 257-58. In fact, the parties had previously and subsequently entertained making CDL medical cards a requirement when the State made such a proposal in 2013, and the SEA rejected it. *See* CR at 257, 306-07. During the negotiations for the 2017-2019 CBA, the SEA proposed to make CDL medical cards a mandatory condition of employment in exchange for additional compensation, but the State rejected that proposal, and the parties agreed to maintain the incentive program that was previously negotiated. CR at 227, 317-319.

This plainly shows the parties intentions at the time of reaching agreement, on multiple occasions, was to preclude any mandate for the CDL

medical cards. *See* CR at 189, 227, 306-07, 317-319. While this case is not a grievance of the CBA, this information is relevant because the State knew that the parties agreed to a voluntary CDL medical card program and specifically rejected any mandatory program, and so when the State implemented the April 4, 2019 policy, it unilaterally changed the agreed upon terms of the contract without negotiation, which is a per se bad faith bargaining. *See Appeal of City of Nashua Bd. Of Educ.*, 141 N.H. 768, 772 (1997).CR at 137-39; 189, 227, 306-07, 317-319.

Moreover, the State is unable to meet its burden on appeal. CR generally. The State argues that the subject matter requiring current employees to have CDL medical cards is actually a prohibited subject of bargaining, or at most a permissive one. AB at 21, 37. However, the State failed to provide any evidence on the record to support its conclusion that the subject matter related to managerial rights and/or that policy promoted safety. CR generally.

Additionally, prior to this appeal, the State failed to raise an independent statute that reserves the subject of mandating CDL medical cards to the exclusive prerogative of the State, which is a requirement for a subject to be prohibited from being bargained. *See* Rev. Stat. Ann. 273-A:1(XI); *see Appeal of City of Nashua*, 141 N.H. at 774. The State now attempts to raise RSA 21-G:9 as that independent statute, however, said statute fails because it does not provide an "exclusive" managerial right for the "sole prerogative" of the employer regarding mandating CDL medical cards. *Appeal of State*, 138 N.H. 716, 722 (1994). Additionally, the record and the PELRB's findings of fact, which are "deemed *prima facie* lawful and reasonable" do not support the State's arguments and conclusions that the issue of mandating CDL medical

cards falls within managerial rights. Rev. Stat. Ann RSA 541:13; *see* CR generally.

The State also asks this Court to overrule *Appeal of City of Nashua Bd. Of Educ.* and argues that the tests to set aside *stare decisis* favors overruling that decision. *See* AB at 22, 27. However, these arguments are also incorrect. The requirement for having an independent statute to demonstrate a prohibited subject of bargaining is supported directly by RSA 273-A:1(XI), *Appeal of State*, and several other decisions. RSA 273-A:1(XI); 138 N.H. 716, 722-23. Public employers and unions have consistently and effectively worked within this framework for decades without issue. *See id.* Were the court to adopt the State's arguments in this case, it would not only overturn the "independent statute" requirement, but it would forever alter the three part test because tests one and two would largely be considering the same exact factors, so if a subject of bargaining was determined to fail the second test, it would now be considered a prohibited subject of bargaining. *See id.* This would have a severe and deleterious effect on every public sector CBA across the State, as it would render far more subjects of bargaining to be prohibited rather than permissive or mandatory, and it would remove benefits from employees that were bargained based upon the current standard. *See id.*

STANDARD OF REVIEW

Appeals from the PELRB are reviewed pursuant to the standards of RSA 541:13. Said statute provides as follows:

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

This appeal was brought forth by the State of New Hampshire and pertains to a final order rendered by the PELRB pursuant to RSA 273-A:15 and RSA 541:6. Past rulings of this honorable court have provided the following guidance on the standard of review for appeals from the PELRB: "[w]e defer to the PELRB's findings of fact, and absent an erroneous ruling of law, we will not set aside the PELRB's decision unless the [appellant] demonstrates by a clear preponderance of the evidence that the order is unjust or unreasonable." *Appeal of City of Nashua Bd. Of Educ.*, 141 N.H. 768, 772 (1997).

This court has further stated that "[e]ven if our interpretation of the PELRB's rationale is incorrect and the PELRB instead based its decision on other mistaken grounds, we will sustain the decision if there are valid alternative grounds to support it." *Id.* This court has held, "[a]n interpretation which preserves rights or benefits enjoyed under the common law is favored where the result avoids absurdity, retroactivity, unconstitutionality, is in keeping with good policy, is consistent with the purpose of the legislation, or is evident from a consideration of the statute read as a whole and conjunction with other statutes. *State v. Etienne*, 163 N.H. 57, 77 (2011).

The Court's review of PELRB rulings on issues of law are *de novo*. *Appeal of Professional Fire Fighters of Hudson, IAFF Local 3154*, 167 N.H. 46, 51 (2017).

ARGUMENT

I. THE PELRB CORRECTLY DETERMINED CDL MEDICAL CARDS ARE A MANDATORY SUBJECT OF BARGAINING PURSUANT TO THE THREE PART TEST ESTABLISHED IN *APPEAL OF STATE.*

Overview of Appeal of State Test and PELRB Decision

The PELRB did not err as matter of law, nor was its order unjust or unreasonable in determining the State committed an unfair labor practice. *See* CR at 266; *see Appeal of* State, 138 N.H. at 722-23; *see Appeal of City of Nashua*, 141 N.H. 768, 774 (1997); *see also Appeal of Town of North Hampton*, 166 N.H. 225, 230 (2014); *see also Appeal of Strafford County Sheriff's Office*, 167 N.H. 115, 120-21 (2014). In determining whether or not the State committed an unfair labor practice, the PELRB properly applied the three step test set forth in *Appeal of State*, which has since been consistently used to determine mandatory, permissive, and prohibited subject of bargaining for approximately twenty seven years. *See* 138 N.H. at 722-23; CR at 260-62.

Said three step test provides (1) in order 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 regulations"; (2) "the proposal must primarily affect the terms and conditions of employment, rather than matters of broad managerial policy"; and (3) "if the proposals were incorporated into a negotiated agreement, neither the resulting contract provision nor the applicable grievance process may interfere with public control of the governmental functions contrary to the provisions of RSA 273-A:1, XI." 138 N.H. at 722-23.

This test comes directly from the language in RSA 273-A:1(XI), and each test corresponds to a portion of the statute. *See id* at 721-22. The first test corresponds to the portion of RSA 273-A:1(XI) that reads "confided exclusively to the public employer by statute or regulations adopted pursuant to statute". *See* RSA 273-A:1(XI); *see id*. The second test refers to the portion of the statute stating "'[t]erms and conditions of employment' means wages, hours and other conditions of employment other than managerial policy within the exclusive prerogative of the public employer…[t]he 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". *Id.*

The third test corresponds to the portion of the statute which provides, "so as to continue public control of governmental functions", and establishes that if a subject of bargaining were included into a CBA, it would not "interfere with public control of governmental functions contrary to the provisions of RSA 273-A:1, XI." *See id.* If a subject fails the first test, then the subject is prohibited from being bargained. *Id.* at 722-23. If

the subject passes the first test, but fails the second and/or third, then it is a permissible subject of bargaining. *Id.* If the subject passes all three tests, then it is a mandatory subject of bargaining. *Id.* at 723.

Application and Analysis of the First Step of the Test to determine if a Subject is prohibited from being bargained.

In applying the first test, the PELRB correctly determined that there is no constitutional, statutory, or regulatory provision which reserves the subject matter to the exclusive managerial authority of the State. CR at 261. The PELRB further correctly established that the phrase in RSA 273-A:1, which reads "managerial policy…confided exclusively to the public employer by *statute*" must refer to an independent statute other than RSA 273-A:1(XI). Said conclusion is rational, reasonable, and consistent with precedent. *See Appeal of Nashua*, 141 N.H. at 774; *see also Appeal of County Sheriff's* Office, 167 N.H. at 120; see *also Appeal of Town of North Hampton*, 166 N.H. at 230 (Determining the unilateral decision by the employer to implement a paramedics program and set initial wages and benefits was an unfair labor practice because the matter was not exclusively reserved to the employer because there was no "*independent*" statute, constitutional provision, or valid regulation). To interpret this prong of the test in any other way would essentially invalidate or render redundant the second and/or third prong of the test, which address the remaining portions of RSA 273-A:1(XI), including whether or not a subject concerns managerial policy within the exclusive prerogative of the employer. *See id.*

Not only did the PELRB apply the correct test and standard for determining that the subject of mandatory CDL medical cards is not a

prohibited subject of bargaining, but the State's position on this matter is undercut by its own actions and the fact that the State has been bargaining this topic, and variations thereof, during every bargaining session going back to 2013. CR at 226-28, 257-58. In fact in 2013, the State was the party to actually propose that CDL medical cards be required for positions requiring a CDL and the SEA rejected the proposal. CR at 257. In 2015, the parties agreed to the current language pertaining to CDL medical cards, and in negotiations for the 2017-2019 CBA the parties yet again bargained the matter. CR at 226-28, 257-58. As a result, it seems somewhat disingenuous that the State now argues the subject matter is prohibited given the long history of bargaining specifically this subject. *See* CR at 226-28, 257-58.

As provided above, RSA 273-A:1(XI) cannot of itself be the statute that renders a subject of bargaining prohibited. *See* 141 N.H. 774; *see also* 166 N.H. at 230; *see also* 167 N.H. at 120. The State, however, argues that RSA 273-A:1(XI) does reserve the subject of mandating CDL medical cards to the exclusive right of management because there is an attenuated relationship between mandatory CDL medical cards and the "selection, direction, or number of personnel". *See* AB at 24.

In making this assertion, the State is blending the requirements of the first and second prongs of the three part test established in *Appeal of State*. This assertion, were it adopted, would completely alter the test from *Appeal of State* in a way that is entirely inconsistent with precedent. *See* 141 N.H. 774; *see also* 166 N.H. at 230; *see also* 167 N.H. at 120. It is very clear there is not any statute that expressly prohibits the bargaining of mandating CDL medical cards. Neither RSA 273-A:1(XI) or RSA 21-G:9 says anything about CDL medical cards, nor does it specifically mention the

establishment of other similar transfer, demotion, or promotional criteria. *See* RSA 273-A:1(XI); *see* RSA 21-G:9. As a result, the subject of mandating CDL medical cards cannot be a prohibited subject of bargaining, especially as long as the *Appeal of State* test remains intact. *See* 138 N.H. at 722.

The State's argument that the CDL medical cards touch on managerial rights is far more suitable under the second prong, which provides that "the proposal must primarily affect the terms and conditions of employment, rather than broad managerial policy". 141 N.H. 768, at 774. The court has separated the test in this manner going back to 1994, and imposes a balancing test to determine whether a subject is primarily a term and condition of employment, or a matter of broad managerial policy. *Id.* This will be analyzed in further depth in the subsequent section.

It is further worth noting the requirement to bargain the mandate of CDL medical cards does not strip away the State's rights to select its employees, nor does the record reflect that being unable to mandate CDL medical cards for employee transfers, demotions, or promotions remove the employer's right to selection of applicants. *See* CR generally. The right to select candidates still very much resides with the management of the State. *See* CR generally. Neither the Union, nor the individual employees, have been bestowed the right to select employees for the State by way of the PELRB's decision. *See* CR at 266. Instead, the State is merely prohibited from unilaterally taking actions that make changes to terms and conditions of employment such as wages, job advancement, and job security. *See* CR at 262-66.

On appeal, the State now raises the argument that RSA 21-G:9 provides for a reserved managerial right concerning requiring CDL medical cards. AB at 34. RSA 21-G:9 provides for the general duties of commissioners within a State department or agency. While RSA 21-G:9(II)(c) provides for the broad authority of commissioners, including the authority to "[e]xercise general supervisory and appointing authority over all department employees, subject to applicable personnel statutes and rules", the statute does delineate specific powers regarding subject of bargaining. RSA 21-G:9(II)(c). Likewise, RSA 21-G:9 does not provide for any authority that expresses that the subject of CDL medical cards "*are reserved exclusively for the State"* or "otherwise reserved to the sole prerogative of the public employer". RSA 21-G:9(II)(c); *see Appeal of* State, 138 N.H. at 722-23.

This court, has explained that it is not enough for a statute to provide for authority, but rather the authority must be "reserved *exclusively* for the State". *Id.* at 723; *see also State Employees' Ass'n v. N.H. PELRB*, 118 N.H. 885, 889-90 (1978) (Finding the "mere existence" of a law or regulation regarding a subject does not "ipso facto" bring that subject matter into the exclusive prerogative of the employer, but rather the statute or regulation must provide for the subject to be in the "sole prerogative of the employer" in order to exclude it from bargaining).

Additionally, RSA 21-G:9(II)(c) specifically yields to the "applicable personnel rules", which in turn yield to subjects that have been collectively bargained. RSA 21-G:9(II)(c); Per 101.02(b). The Personnel Rules governing State employees provide "[i]n the case of terms and conditions of employment which are negotiated, the provisions of the CBA

shall control." Per 101.02(b). Thus, just because a personnel rule may exist regarding a term and condition of employment, it does not mean that subject matter has been relegated to being exclusively reserved to the sole prerogative of the public employer, and in this case, the opposite is actually true, as the collectively bargained terms prevail when in conflict with a rule on the same topic. *See Appeal of* State, 138 N.H. at 722; *see also* Per 101.02(b); CR at 129.

As has been previously mentioned, the PELRB found that as a matter of fact, the parties have already agreed to make medical cards a voluntary program, and have rejected mandating the cards. CR at 226-28; 257-58. Thus, the current contractual language provides for a voluntary, incentivized type of benefit, and precludes the State from mandating that employees get CDL medical cards, and so when read in concert with the applicable personnel rules which yield to the CBA, RSA 21-G:9 does not grant exclusive authority to DOT to mandate CDL medical cards. *See* RSA 21-G:9; *see* Per 101.02(b); *see* CR at 226-28, 257-58.

For all of the reasons above, the PELRB correctly determined the subject of requiring CDL medical cards is not a prohibited subject of bargaining.

Analysis and Application of the Second Step determining if the Subject is primarily a Term and Condition of Employment or a Matter of Managerial Policy.

The PELRB next analyzed the second part of the test and determined that mandating CDL medical cards "primarily affect[s] the terms and conditions of employment, rather than matters of broad managerial policy."

CR at 262. This test "cannot be resolved through simple labels offered by" either party, but rather "[d]etermining the primary effect of the proposal requires an evaluation of the strength and focus of the competing interests". 138 N.H. at 722; 141 N.H. at 774. This Court has further acknowledged, "a proposal or action will touch on significant interests of *both"* parties. 141 N.H. at 774. The PELRB considered said interests reflected in the record, and applied the balancing test provided for in prior decisions such as *Appeal of State*, *Appeal of Nashua* and *Appeal of Strafford County Sheriff's Office*. 138 N.H. at 722; 141 N.H. at 774-75; 167 N.H. at 120-21; CR at 262-65. Based on balancing the interests of the parties, the PELRB determined the interests primarily favor terms and conditions of employment, rather than broad managerial policy. CR at 262-65.

In this case, the PELRB determined from the record there were several significant impacts to terms and conditions of employment from the requirement to have CDL medical cards for transfers, promotions, demotions, etc.… including "costs to employees [change to wages], how the card requirement effects opportunities for advancement or movement to a preferred location, and job security." CR at 262-65. This determination is consistent with precedent where the court acknowledged that "proposals and actions that primarily affect wages" are consistently recognized as mandatory subjects of bargaining. 141 N.H. at 775. Additionally, in *Appeal of State*, the court held proposed language regarding promotion and transfer procedures were important to "job advancement", "which are closely connected to terms and conditions of employment". 138 N.H. at 728.

The PELRB reasoned that because the cost of obtaining a CDL medical card falls to the employee, the new requirement has the total effect

of a wage reduction, which can be substantial considering some employees may have to take the exam multiple times, thus incurring multiple fees, which cost approximately $65.00 to $150.00 just to apply. CR at 262, 344.

The PELRB further noted the employer does not reimburse the cost to the employer, ostensibly because said reimbursement is a cost item and a mandatory subject of bargaining. *Id.* With the CDL medical card being so inextricably intertwined with its cost and the impact that cost effectively has on wages, the PELRB determined that the two issues cannot be separated from the other, and thus the change to wages, which is plainly a term and condition of employment, is not a matter of broad managerial policy. CR at 263.

This outcome is consistent with the precedent established in *Appeal of Town of North Hampton*. There, the town sought to create new paramedic/firefighter positions, and unilaterally created said positions and set initial pay and benefit levels. *See* 166 N.H. at 230. The Town argued its actions were permissible because it is within the managerial prerogative to create new town programs and positions. *Id.* at 229. The court determined even though it is in the managerial prerogative to create new positions and programs, it is not in its prerogative to unilaterally impose wages associated therewith. *Id.* at 230. Because the town unilaterally implemented a wage and benefit structure without first bargaining, it committed an unfair labor practice, even though the matter of creating positions and designing a program falls into the prerogative of management. *Id.* The same analysis follows here because while the State may have a managerial interest in establishing employment criteria, it cannot unilaterally impose the criteria when doing so unilaterally changes and affects the wages associated

therewith, not to mention other terms and conditions of employment such as job advancement and security. *See id.*; *see* CR at 262-65.

The PELRB further provided that the CDL medical card requirement impacted the terms and conditions of employment relative to transfer, promotion, or demotion, which impacted advancement and security. CR at 263. This finding is consistent with *Appeal of State*, which found in relevant part that proposals related to promotion and transfer procedures were related to terms and conditions of employment, and not broad managerial policy. 138 N.H. at 728. The requirement for CDL medical cards for internal job movement also affects other terms and condition of employment in the CBA including "bumping rights" under the layoff section, which permits for the employee to essentially opt to be demoted into a lower grade position, rather than be laid off, but under the CDL medical card mandate, the employee would not qualify to exercise those bumping rights unless he/she obtained a CDL medical card prior to being laid off. CR at 264.

The PELRB does acknowledge that setting criteria for job requirements, such as CDL medical cards, relates to the "selection, direction and number of its personnel", but reasons that selection of personnel refers to initial hiring, which is not at issue in this case. CR at 264. The PELRB reasoned the statute is less clear whether "selection" refers to existing personnel who have already been "selected" but now seek movement via transfer, promotion, or demotion. CR at 264. In analyzing the State's interests under this portion of the test, the PELRB considered that the State provided scant evidence to show the one time requirement of

CDL medical cards for transfer, promotions, or demotions, in any way related to overall safety at work. CR at 265.

In short, the PELRB determined there was no established safety issue, and the policy does not seem to improve safety in any tangible way. CR at 264-65. For example, an employee can drive trucks for decades in the same position in one location without ever needing a CDL medical card, but if he/she wants to change locations, he/she must obtain a CDL medical card, which can then lapse after as little as three months following the transfer, and said employee can then continue to work in the new location for additional decades without a card. CR at 264. The nature of when current employees must have a CDL medical card under the policy at issue results in a completely arbitrary and nonsensical practice, where only very occasionally, employees must get cards. *See* CR at 137-39; 264. What makes perhaps even less sense under the policy is if an employee were to apply for a transfer from Concord to Manchester and fails a medical card exam, he/she would not be permitted to transfer to Manchester, but it would remain perfectly acceptable under the policy for the employee to continue to operate CDL type vehicles in Concord. *See* CR at 137-39; 263-64.

The State did not establish there was any existing safety issue without the April 4, 2019 memorandum, nor was it able to express in any specific or measurable terms how the implementation of the policy would improve safety. *See* CR at 137-39, 263-64. The PELRB, thus appropriately found that with such little utility to be gained from the CDL medical cards in addition to the total lack of evidence that the memorandum achieved in addressing a managerial goal such as promoting safety, the board determined that there were not significant managerial interests being

achieved as a result of the new policy detailed in the April 4, 2019 memorandum. *See* CR at 137-39, 263-65. Such a finding is consistent with precedent which requires the PELRB to not simply accept "simple labels" offered by management, but instead "requires an evaluation of the strength and focus of the competing interests." 141 N.H. 774; CR at 263-65.

As a result, with the strong factors of the medical card requirement significantly impacting terms and conditions of employment such as wages, transfers, promotions, demotions, discipline, and layoff rights (i.e. bumping), compared to the far more tenuous relationship mandating CDL medical cards has on the selection of employees and safety, the PELRB correctly determined that the factors weighed more heavily in favor of significantly impacting terms and conditions of employment rather than broad managerial policy. *See Appeal of Town of North Hampton*, 166 N.H. at 230; *see also Appeal of Nashua*, 141 N.H. 768, 774 (1997); CR at 264-65.

Analysis and Application of the Third Step Determining if the Subject were incorporated into a negotiated agreement, would it interfere with Public Control of Governmental Functions Contrary to RSA 273-A:1(XI).

Finally, the PELRB assessed the third part of the test, which asks "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." *Appeal of State*, 138 N.H. at 722; CR at 265. This Court has noted that "an overly expansive view of the proposals

or actions that 'interfere with public control of governmental functions' could embrace *any* term of employment, thereby eliminating the category of mandatory subjects and thwarting the collective bargaining process required by RSA chapter 273-A." *Appeal of City of Nashua*, 141 N.H. at 775-76. In *Appeal of State*, the court provided additional guidance that a subject should pass this test as long as the interference is not "serious". *See* 138 N.H. at 728. (Finding that proposals for promotion and transfer processes did not interfere with public control of governmental functions).

The PELRB applied this test to the subject of the CDL medical card requirement and found there is no real evidence to support the conclusion that requiring to bargain this subject would interfere with governmental control. CR at 265. Again, while the State made broad allusions to managerial goals of employee health and safety, the PELRB found there was no actual or specific evidence that requiring CDL medical cards for internal movement had any impacted on safety or employee health, which were the alleged managerial interests. *See* CR at 265. Because the State failed to provide any such evidence, the PELRB was justified in its conclusion as there is not any "public control of governmental functions" even at issue.

The PELRB's decision is further consistent with precedent such as *Appeal of North Hampton*. There, the court determined the requirement to bargain wages connected with the creation of new paramedic positions/program did not interfere with public control of governmental functions based upon the conclusion that while it is within the managerial prerogative to determine training issues, "it is well established that employees may negotiate the costs connected with training without

significantly impinging on the managerial prerogative." 166 N.H. at 231. (Citing to *NJ Transit Auth. v. Transit PBA*, 714 a.2d 329, 333 (N.J. Super. Ct. App. Div. 1998). The current facts present an even stronger case than those in *Appeal of Town of North Hampton* because the employer in that case was able to argue the importance of creating a paramedics program, which has a demonstrably important governmental function, but even with that level of interference to governmental functions, the employer could not overcome the employees' rights to bargain wages and benefits. *Id.*

In this case, the same issue exists regarding the requirement to bargain wages because the ongoing cost of maintaining a CDL medical card imposes a wage reduction (as well as impacts other terms and conditions of employment including advancement and job security), but the State has failed to provide evidence that the medical card requirement falls into necessary governmental functions. *See* 166 N.H. at 231; CR at 258-59, 265-66. In other words, even if the State must bargain the requirement of CDL medical cards for transfers, promotions, and demotions, as well as the CDL medical card's effect on employee wages, it is, and has been, still able to carry out its governmental functions with regard to transportation. *See Appeal of State*, 138 N.H. at 728; *see also Appeal of Town of North Hampton*, 166 N.H. at 231; CR at 265-66. As a result, being required to bargain the CDL medical cards does not have any *serious* impact on the public control of governmental functions, and thus meets the third test. (Emphasis added) *See Appeal of State*, 138 N.H. at 728; *see also Appeal of Town of North Hampton*, 166 N.H. at 231.

On appeal, the State continues to assert that depriving it of the ability to require CDL medical cards for employee transfers, promotions and

demotions "interferes with its essential governmental function of providing a safe transportation network". AB at 41. However, the State is still unable to show that this program, in any way, improves upon transportation safety because there is no such evidence in the record, and in fact, the PELRB has found as fact that said program does not increase safety, and the PELRB's findings of fact are "deemed to be *prima facie* lawful and reasonable". RSA 541:13; *see* CR generally.

The State further tries to liken the CDL medical card requirement to numerous other fictitious factual scenarios not currently before this court, while drawing strong predictions concerning its rights to establish minimum qualifications. AB at 42. However, each example provided by the State is underdeveloped and easily distinguishable with the current matter, as each proposed fact scenario opens the door for a new analysis under the three part test. *See Appeal of State*, 138 N.H. at 722; *see* AB at 42-43; *see* CR generally. For example, requiring a lawyer to have a license, which is required by law, is materially different from requiring a DOT employee to have a CDL medical card for internal movement purposes, when such card is not linked to any legal requirement or even any rational basis in fact to support safety. *See* CR at 262. In any case, we need not examine every "what if" scenario in order to reach a conclusion on the matter before this Court currently.

The State also argues that requiring the State to bargain minimum qualifications would lead to an absurd result. AB at 43. First, it is important to note that this case is not addressing the question of whether or not the State must bargain all minimum qualifications for hires due to the cost of obtaining the qualification. CR at 255-66. This case is narrower and deals

with the specific facts heard before the PELRB, which after weighing the evidence on record, determined the unilateral change expressed in the April 4, 2019 memorandum concerned a mandatory subject of bargaining. CR at 266. Were the facts to materially change, the analysis could very well end in a different result, as the analysis will have changed. *See Appeal of* State, 138 N.H. at 722-23. For example if the facts actually showed that a minimum requirement had a connection with governmental functions, the subject might not pass the test, thus making it a permissive subject. *See id.* Here, however, the record does not support the State's arguments and conclusions, and as a result it fails to meet its burden on appeal. *See* RSA 541:13; CR generally. Therefore, upholding the PELRB's decision would not lead to an absurd result, but overturning it would because such decision would be relying on arguments and conclusions not supported by fact in the record or as determined by the PELRB, and would forever alter this well-established test. *See Appeal of State*, 138 N.H. at 728; *see also Appeal of Town of North Hampton*, 166 N.H. at 231; *see Appeal of City of* Nashua, 141 N.H. at 774-75; CR at 257-58, 264-65.

II. *APPEAL OF NASHUA* SHOULD NOT BE OVERTURNED DUE TO STARE DECISIS.

The State argues this court should overrule *Appeal of Nashua* pursuant to the four factors provided for in *Ford v. N.H. Dep't of Transportation*. *Ford v. N.H. Dep't of Transportation*, 163 N.H. 284, 290 (2012). Overruling a case carries a high burden, and "[t]he doctrine of stare decisis demands respect in a society governed by the rule of law, for when

governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will and arbitrary and unpredictable results." *Id.* Additionally, the court has stated that "the question is not whether we would decide the issue differently *de novo*, but whether the ruling has come to be seen so clearly as error that its enforcement was for that very reason doomed." *Id.*

The four factor test is as follows: "(1) whether the rule has proven to be so 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 consequences 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 differently, as to have robbed the old rule of significant application or justification." *Id.* The court added "[a]lthough the factors guide our judgment, no single factor is wholly determinative because the doctrine of stare decisis is not one to be either rigidly applied or blindly followed." *Id.*

Analysis of whether the rule has proven to be so intolerable simply by defying practical workability.

The rule has not "proven to be so intolerable simply by defying practical workability". *Id.* The State largely argues that *Appeal of City of Nashua* was incorrectly determined because RSA 273-A:1(XI) provides for specific examples that are considered "managerial policy", and therefore should any subject fall into one of these specified categories, it must per se be a prohibited subject of bargaining because it has been reserved to the rights of management by statute. *See* AB at 28. The State further argues

that the requirement for an independent statute places a limitation on public employers not intended by the legislature. AB at 28.

The State's argument falls short on showing this rule is intolerable simply by defying practical workability, and instead simply argues that it believes the court in *Appeal of Nashua* was incorrect based upon the statutory language and then proceeds to cite reasons why it is important to protect managerial rights. AB at 28-29. Even if the State were correct, which it is not, these arguments do not speak to the test at hand, and does not provide a valid reason to overrule *Appeal of City of Nashua*. *See Ford*, 163 N.H. at 290. (Finding that courts do not overrule a case "merely because an opinion is poorly reasoned"). The State, further, does not show any actual examples of how public employers have been harmed by the rule or how the rule is otherwise "so intolerable simply by defying practical workability." AB at 28-29.

This likely is because the reality is that the rule is extremely workable. *See Appeal of City of* Nashua, 141 N.H. at 774; *Appeal of Town of North Hampton*, 166 N.H. at 230. This standard for determining prohibited, permissive, and mandatory subjects of bargaining is adhered to on a daily basis across the State, and strikes a navigable balance between the bargaining rights of public employers and employees. *See id.* The current standard has been used for decades to interpret RSA 273-A:1(XI).

This current rule offers the parties a much wider array of negotiable subjects, than would the new standard proposed by the State. *See id.* This benefits both public employers and employees because by increasing the number of negotiable subjects, it leaves for more options for the parties to shape CBAs that apply to their circumstances. To restrict this ability by

effectively making more subjects prohibited would inhibit creative solutions to labor disputes and would undermine the purpose of RSA 273-A and labor peace in the State of New Hampshire. *See* RSA 273-A. It is further worth noting that while in the present case, the issue of requiring CDL medical cards is a mandatory subject of bargaining, many if not most bargaining subjects are permissive, and thus don't normally require the items be bargained by the employer. *See* CR at 266.

Analysis as to whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling.

Overruling *Appeal of Nashua* and permitting RSA 273-A:1(XI) to serve as its own statutory authority to reserve exclusive managerial rights to public employers, by itself, would not only change that decision, but would also necessarily completely alter the three part test provided for in *Appeal of State*. *See* 138 N.H. at 722-23; AB at 27-30. If RSA 273-A:1(XI) can act as its own statutory authority to reserve managerial rights so as to render those subjects to be prohibited subjects of bargaining, and those listed items are per se prohibited, regardless of the impact said subject may have on wages and other terms and conditions of employment, then the three part test will be fundamentally altered and may have essentially become a two part test because steps one and two essentially ask the same question as to whether the subject is prohibited. *See id.* It also has the impact of eliminating the balancing test performed within the second test. *See id.* Most importantly though, it is certain to greatly increase the number of prohibited subject of bargaining, thereby greatly decreasing the rights of both employees and the public employers to freely contract. *See id.*

Numerous public employers and unionized employees have been relying on the *Appeal of* State, three part test and its standards for determining prohibited, permissive, and mandatory subject of bargaining for several decades since it was first decided in 1994. *See* 138 N.H. at 716. This reliance includes the requirement that when asserting a subject be prohibited, it must be based upon an independent statute as set forth in *Appeal of City of Nashua* and *Appeal of North Hampton.* 141 N.H. at 774; 166 N.H. at 230. As a result of this precedent, every time a public sector CBA is negotiated, the parties enter bargaining with a fundamental and consistent understanding of what subjects must be negotiated, what may be, and what cannot. *See id.* Conversely, when not actively bargaining, the test, informs the parties what they can and cannot unilaterally do. *See id.*

Changing this standard, as the State is requesting, would not only disadvantage the SEA and DOT employees, but it would change standards for all other public employers, unions, and most importantly would invalidate numerous of provisions within contracts across the State, which would be rendered prohibited subjects of bargaining. *See id.* Thus overturning *City of Nashua* goes against the notion that courts favor a result that "avoids absurdity, [and] retroactivity". *See Etienne*, 163 N.H. at 77.

Should this court overrule *Appeal of City of Nashua*, even long held bargain-able subjects like wages would become potentially prohibited subjects of bargaining under the State proposed interpretation. For example, in *Appeal of Town of North Hampton* the Town unilaterally set wages regarding new paramedic positions, and argued the action was permissible because it has the authority to create programs per RSA 273-A:1(XI). 166 N.H. at 229-230. The court decided that even though it was within the

Town's rights to create programs, as provided for in RSA 273-A:1(XI), it still needed to negotiate the wages and other terms and conditions of employment. *Id.* at 230.

Under the State's argument, the court would have been forced to determine that the subject is a prohibited subject of bargaining because of the Town's managerial right to create programs under the statute, despite the strong impact to employee wages. *See id.* Such an outcome would completely strip the rights and bargaining power away from the employees to bargain the initial wages of these positions, thus rendering useless the requirement for public employers to bargain in good faith over terms of employment with the exclusive representative. *See id.*

It can be generally presumed that every time a provision is agreed to in a CBA, a party made some sacrifice elsewhere, or chose not to pursue a different objective in order to achieve that goal. To overturn *Appeal of City of Nashua* and the three part test from *Appeal of State* and subsequent interpretations of the test, such as that in *Appeal of Town of North Hampton*, would be to deprive numerous parties across the State from the benefits of their bargains, as surely this would invalidate negotiated benefits that are now considered mandatory or permissive subjects of bargaining. *See* 141 N.H. at 774; *see* 138 N.H. at 722; *see* 166 N.H. at 230.

Analysis of whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine.

RSA 273-A was first enacted in 1975. Since its enactment, the statute, including RSA 273-A:1(XI) has gone relatively unchanged, with only minor differences between its current form and original form. *See*

RSA 273-A. The related principles of law concerning public sector bargaining have not changed in any major way, but rather case law is very consistent in upholding the same standard test for determining mandatory, permissive, and prohibitive subjects of bargaining, including the requirement that there must be an independent statute, not merely RSA 273-A:1(XI) by itself. The cases of *Appeal of City of Nashua* (1997), *Appeal of Town of North Hampton* (2014); and *Appeal of Strafford County Sheriff's Office* (2014) have all upheld this standard without deviation from the standard that an independent statute is required to reserve an issue to management, and render it a prohibited subject. 141 N.H. at 774; 166 N.H. at 230; 167 N.H. at 121.

As mentioned above, this analysis and legal principles are still being followed today, and likely thousands of public sector contracts have been bargained with these standards in mind. As is pointed out in Appellant's brief, there is dearth of cases on this issue, which if anything generally supports the notion that the rule has remained relevant over these several decades, and the parties to public sector bargaining tend to find the rule navigable, workable, and understandable. *See* AB at 31. It is also worth mentioning that if the current statutory scheme were no longer relevant, the legislature could update the statute accordingly. *See* RSA 273-A:1(XI). Because the legislature has not sought to change the law for permissible, mandatory, and prohibited subjects, it suggests no such adjustment is necessary. *See id.*

Analysis whether facts have so changed, or come to be seen differently, as to have robbed the old rule of significant application or justification.

As provided above, nothing noteworthy has changed to warrant the overruling of *Appeal of City of Nashua.* The statute is still intact, the general functions of public employers and the roles of unions are largely the same. *See id.* In this corresponding section, the State seems to acknowledge it does not have any on point argument to overturn *City of Nashua* based upon this test, but instead makes several policy type arguments, asserting that this Court ought to overturn *City of Nashua* because the test has become too restrictive, limiting the ability of management. AB at 32-33. While this is untrue, it is also not the duty of this Court to make decisions based upon such policy exceptions, but instead must uphold the law as it exists, not as one party wishes it to be. *See Appeal of New England Police Benevolence Association*, 198 A.3d 905, 911 (N.H. 2018) (Finding "[b]ecause our function 'is not to make laws, but to interpret them, any public policy arguments relevant to the wisdom' of the statutory scheme 'and its consequences should be addressed to the General Court'"). If the State has policy concerns regarding the statute and its decades of consistent interpretation, it should petition the legislature, not this Court. *See id.* The State continues to insist it was clearly within its managerial rights, but this is plainly erroneous based upon the case law, and the fact that its actions unilaterally changed terms and conditions of employment for State employees. AB at 33-34; CR at 262-64.

Summary Analysis of Stare Decisis.

In consideration of all four factors, it is decidedly apparent that the factors greatly favor upholding *Appeal of City of Nashua. See Ford*, 163 N.H. at 290. The first two tests especially weigh heavily in favor of upholding the rule as the rule is objectively workable, and there is significant and special reliance on the rule because hundreds of CBAs have been shaped by decades of adhering to the rule, and to overturn the rule would mean rendering those contracts, and many of the negotiated benefits therein, invalid. *See Appeal of City of Nashua*, 141 N.H. 774-75; *see Ford*, 163 N.H. at 290. The latter two factors likewise support upholding the rule, even if they are less relevant to the analysis. *See id.* The legal principles surrounding the rule have not changed in any great or meaningful way, and so the rule is still entirely relevant. *See id.* Additionally, there are no applicable facts that have changed that warrant overturning the rule in *Appeal of City of Nashua. See id.*

III. THE STATE COMMITTED AND UNFAIR LABOR PRACTICE WHEN IT UNILATERALLY CHANGED PREVIOUSLY BARGAINED TERMS UNDER THE CBA.

In addition to the traditional three part test argument from *Appeal of State*, the SEA also asserted as a separate alternate theory that the State also committed an unfair labor practice when it unilaterally changed previously bargained language in the CBA pertaining to CDL medical cards, without regard to whether or not the bargaining topic was permissive or mandatory.

CR at 238, 244, 266. Under the current language of the CBA, the parties have negotiated language that provides for a $10.00 per week incentive for those that choose to hold a CDL medical card. CR at 129; 257-58. The current contract language is provided below:

> *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:*
>
> > *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.* CR at 129. (Sub article (a) and (b) excluded).

There is a rich bargaining history concerning this provision. As was acknowledged by the PELRB in its findings of facts, in 2013, the State proposed that CDL medical cards be required for all positions that require a CDL, which the SEA rejected. CR at 257. In 2015, the parties reached agreement on the above language, which the PELRB determined in its finding of fact to be a voluntary program for eligible employees who maintain a valid CDL medical card. *Id.* In return for the getting the cards, each employee receives an additional $10.00 per week for each week between November first and the last day of March. *Id.* In negotiating the 2017-2019 CBA, the parties bargained this issue, this time with the SEA proposing to require that employees with CDLs be required to maintain CDL medical cards in exchange for additional compensation. CR at 227.

The State rejected the proposal, and the parties agreed to maintain the same language agreed to in the 2015-2017 CBA. CR at 129.

Despite this, the State imposed the requirement for CDL medical cards to be required for all internal movements, which clearly altered the agreed upon terms. CR at 137-39. As a result, even if the bargaining subject of CDL medical cards was merely a permissive subject, the action by the State still constituted an unfair labor practice because once a subject is bargained, regardless of being mandatory or permissive, the subject then becomes part of the mandatory terms to bargain if the parties wish to change the agreed upon terms. *See Appeal of Strafford County Sheriff's* Office, 167 N.H. at 120. (Finding that unilaterally imposing mandatory subject of bargaining is unlawful). To alter the terms unilaterally, especially during the contract period or in "evergreen" status, is a per se act of bad faith bargaining. *See id.*

CONCLUSION

For the reasons set forth above, the Appellee requests this Honorable Court uphold the decision of the NH Public Employee Labor Relations Board.

SEA requests a fifteen-minute oral argument.

CERTIFICATE OF COMPLIANCE

In accordance with the Supplemental Rules of the Supreme Court of New Hampshire for Electronic Filing Rule 4, the undersigned hereby

certifies that this brief has been electronically filed with the Supreme Court on this 19th day of May, 2021.

In accordance with Supplemental Rules of the Supreme Court of New Hampshire for Electronic Filing Rule 18, the undersigned hereby certifies that this brief has been electronically filed with the State's representatives: Attorney Jessica King, Attorney Jill Perlow, and Attorney Daniel Will.

Date: May 19, 2021

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Appellee's brief shall be served on Attorney Jessica King, Attorney Jill Perlow, and Attorney Daniel Will, counsels for the State of New Hampshire Department of Transportation, through the New Hampshire Supreme Court's electronic filing system.

Date: May 19, 2021

Gary Snyder

Gary Snyder, General Counsel