STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2021 – 0027

APPEAL OF THE NEW HAMPSHIRE TROOPERS ASSOCIATION, NEW HAMPSHIRE TROOPERS ASSOCIATION-COMMAND STAFF, NEW HAMPSHIRE PROBATION AND PAROLE OFFICERS ASSOCIATION AND NEW HAMPSHIRE PROBATION AND PAROLE-COMMAND STAFF ASSOCIATION

AND

CASE NO. 2021 – 0028

APPEAL OF THE STATE EMPLOYEES' ASSOCIATION OF NH, INC., SEIU LOCAL 1984

APPEAL BY PETITION FOR REVIEW PURSUANT TO RSA 541:6

BRIEF FOR APPELLANTS, NEW HAMPSHIRE TROOPERS ASSOCIATION, NEW HAMPSHIRE TROOPERS ASSOCIATION-COMMAND STAFF, NEW HAMPSHIRE PROBATION AND PAROLE OFFICERS ASSOCIATION AND NEW HAMPSHIRE PROBATION AND PAROLE-COMMAND STAFF ASSOCIATION

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TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES AND OTHER AUTHORITIES

Statutes

Other Authorities

QUESTIONS PRESENTED FOR REVIEW

1. Whether the PELRB acted unlawfully, unjustly or unreasonably in failing to apply the clear and unambiguous language of the impasse resolution mechanism provided by statute (RSA 273-A:12) which allows the state legislature to "accept or reject so much of the recommendation as otherwise permitted by law" when it is settled case law that the term "as otherwise permitted by law" means cost items? CR 151

2. Whether the PELRB acted unlawfully, unjustly or unreasonably when it incorrectly extended and/or misinterpreted the precedent of Appeal of Derry Educ. Ass'n, 138 N.H. 69 (1994) and determined that the State legislature's vote on a fact finder's report regarding cost items is non-binding? CR 151

3. Whether the PELRB acted unlawfully, unjustly or unreasonably when it failed to properly apply the principles of contract construction regarding the interaction between RSA 273-A:9 and RSA 273-A:12? CR 152

4. Whether the PELRB acted unlawfully, unjustly or unreasonably by failing to recognize the interactive process of the legislative and executive branch in the determination of the government's interaction with their employees contained within the statutory scheme of RSA 273-A:1, *et seq.* providing for checks and balances by allowing one individual to frustrate the bargaining process? CR 153

5. Whether the PELRB acted unlawfully, unjustly or unreasonably in failing to distinguish their own precedent, AFSCME Local 3657, Hillsborough County Sherriff's Office v. Hillsborough County, PELRB Decision no. 2016-288, from the present matter and failing to recognize that they exceeded their authority in this determination and contravened the supremacy of the precedent of the New Hampshire Supreme Court? CR 152

6. Whether the PELRB acted unlawfully, unjustly or unreasonably when it failed to recognize the statutory mandate that the legislature, as a co-equal branch of government, can bind the state on cost items, particularly the wages to be paid to public employees? CR 65, 152

7. Whether the PELRB acted unlawfully, unjustly or unreasonably by allowing one individual to frustrate the harmonious relationship and uninterrupted governmental services in violation of the statutory requirement of RSA 273-A:9 and 12 and the statutory scheme of the public employee labor relations act by denying the will of the sovereign (the people) as expressed by their chosen representatives? CR 153

STATUTORY PROVISIONS

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.

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NH RSA 273-A:3 Obligation to Bargain.

I. It is the obligation of the public employer and the employee organization certified by the board as the exclusive representative of the bargaining unit to negotiate in good faith. "Good faith" negotiation involves meeting at reasonable times and places in an effort to reach agreement on the terms of employment, and to cooperate in mediation and fact-finding required by this chapter, but the obligation to negotiate in good faith shall not compel either party to agree to a proposal or to make a concession.

II. (a) Any party desiring to bargain shall serve written notice of its intention on the other party at least 120 days before the budget submission date; provided, however, that bargaining with state employees shall commence not later than 120 days before the deadline for submission of the governor's proposed operating budget.

(b) Only cost items shall be submitted to the legislative body of the public employer for

approval at the next annual meeting of the legislative body, unless there is an emergency as defined in RSA 31:5 or RSA 197:3. If the legislative body rejects the submission, or while accepting the submission takes any action which would result in a modification of the terms of the cost item submitted to it, either party may reopen negotiations on the entire agreement. No cost item agreed to by the public employer and the employee organization shall be modified by the legislative body of such public employer.

(c) If the public employer is a local political subdivision with a city or town council form of government cost items shall be submitted within 30 days to the city council or aldermen or to the town council for approval. Within 30 days of the receipt of the submission, the city council, aldermen, or the town council shall vote to accept or reject the cost items. If the city council or aldermen or the town council rejects any part of the submission, or while accepting the submission takes any action which would result in a modification of the terms of the cost item submitted to it, either party may reopen negotiations on all or part of the entire agreement.

III. Matters regarding the policies and practice of any merit system established by statute, charter or ordinance relating to recruitment, examination, appointment and advancement under conditions of political neutrality and based upon principles of merit and competence shall not be subjects of bargaining under the provisions of this chapter. Nothing herein shall be construed to diminish the authority of the state personnel commission or any board or agency established by statute, charter or ordinance to conduct and grade merit examinations from which appointments or promotions may be made.

IV. Each public employer shall record its budget submission date with the board.

Source. 1975, 490:2. 1977, 437:2. 1979, 374:3. 1985, 39:1. 1998, 205:1, eff. Aug. 17, 1998. 2013, 244:1, eff. Sept. 22, 2013.

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

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

II. To assist in the conduct of such negotiations the governor may designate an official state negotiator who shall serve at the pleasure of the governor.

III. The governor shall also appoint an advisory committee to assist in the negotiating process. The manager of employee relations appointed under RSA 21-I:44, II shall be a member of this committee.

III-a. No person who is appointed to serve as a state negotiator or as a member of the state

negotiating team or any person who serves as a member of the employee bargaining committee shall use his or her position to obtain anything of value for the private benefit of such person or the person's immediate family. Nothing in this section shall prevent an employee or taxpayer from serving on a negotiating team or bargaining committee.

IV. The division of personnel, through the manager of employee relations and the manager's staff, shall provide administrative and professional support to the governor in the conduct of negotiations.

V. [Repealed.]

VI. There shall be a joint legislative committee known as the joint committee on employee relations.

(a) The joint committee on employee relations shall include the following members:

(1) The president of the senate.

(2) The speaker of the house of representatives.

(3) The majority leader of the senate.

(4) The majority leader of the house of representatives.

(5) The minority leader of the senate.

(6) The minority leader of the house of representatives.

(7) The chairperson of the senate finance committee.

(8) The chairperson of the senate capital budget committee.

(9) The chairperson of the house of representatives finance committee.

(10) The chairperson of the senate ways and means committee.

(11) The vice chairperson of the house of representatives finance committee.

(12) The chairperson of the house of representatives public works and highways committee.

(13) The chairperson of the house of representatives labor, industrial and rehabilitative services committee.

(14) The ranking minority member of the house of representatives labor, industrial and rehabilitative services committee.

(15) The chairperson of the senate commerce committee.

(16) The vice chairperson of the senate commerce committee.

(b) Members of the committee shall receive mileage at the legislative rate. The chair of the committee shall rotate biennially between the president of the senate or designee and the speaker of the house of representatives or designee, provided that the speaker of the house of representatives shall serve as the first chairperson under the provisions of this subparagraph. In the event that the presiding officer or designee serving as chairperson resigns or for any reason is unable to serve, the other presiding officer or designee shall become chairperson, provided that such substitution shall not change the rotation provided for in this subparagraph.

(c) The joint committee on employee relations shall meet with the state negotiating committee after the first Wednesday in December in the even-numbered years as necessary, to discuss the state's objectives in the bargaining process. The meeting shall be at the call of the chairperson of the joint committee on employee relations.

(d) The joint committee on employee relations shall hold hearings on all collective bargaining agreements with state employees and on all fact-finders' reports relative to the collective bargaining process with state employees and shall submit any recommendation on such

agreements or reports to the members of the senate and the house of representatives.

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

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NH RSA 273-A:10 Elections. –

I. If a petition is filed by:

(a) At least 30 percent of the employees in the bargaining unit seeking recognition, alleging that they wish to be represented in collective bargaining by an employee organization as their exclusive representative or asserting that the employee organization which has been certified by the board is no longer the representative of the majority of employees in the bargaining unit; or

(b) A public employer alleging that one or more employee organizations has petitioned to be recognized as the exclusive representative of a majority of employees in a bargaining unit; the board shall investigate such petition and may hold hearings for the purpose of determining whether or not grounds exist for conducting an election. Upon so finding, the board shall order an election to be held under its supervision and in accordance with rules prescribed by the board. Otherwise, it shall dismiss the petition.

II. The petition shall consist of separate forms for each employee, whose names shall not be disclosed.

III. The ballot shall contain a space permitting a vote against representation by any employee organization whatever; and no election shall be held within 12 months after an election in which a majority of those voting cast ballots against representation by any employee organization.

IV. An employee organization receiving a simple majority of the votes cast shall be certified by the board as the exclusive representative of the bargaining unit. In the absence of a simple majority, a run-off election shall be conducted between the 2 options receiving the most votes.

V. The board shall not certify any employee organization as the exclusive representative of a bargaining unit without an election being held pursuant to this section.

VI. (a) Certification as exclusive representative shall remain valid until the employee organization is dissolved, voluntarily surrenders certification, loses a valid election or is decertified.

(b) The board shall decertify any employee organization which is found in a judicial proceeding to discriminate with regard to membership, or with regard to the conditions thereof, because of age, sex, race, color, creed, marital status or national origin; or has systematically failed to allow its membership equal participation in the affairs of the employee organization.

(c) Any challenge to a certified exclusive bargaining representative, whether in a decertification election or a challenge by another labor organization, shall result in decertification or change in bargaining representation if decertification or the challenging organization is approved by a majority vote of members of the bargaining unit voting.

VII. Two or more bargaining units may with the approval of the public employer affected combine for the purpose of engaging in collective bargaining negotiations with a single public employer and the bargaining unit thus created shall enjoy the same rights and be subject to the same duties as if a single exclusive representative for the combined bargaining unit had been certified by the board.

VIII. [Repealed.]
IX. [Repealed.]

Source. 1975, 490:2. 1979, 374:7. 1983, 149:1. 2007, 368:2, eff. Sept. 15, 2007. 2011, 159:1, II, eff. Aug. 8, 2011.

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NH RSA 273-A:12 Resolution of Disputes. –

I. (a) Whenever the parties request the board's assistance or have bargained to impasse, or if the parties have not reached agreement on a contract within 60 days, or in the case of state employees 90 days, prior to the budget submission date, and if not otherwise governed by ground rules:

(1) The chief negotiator for the bargaining unit may request to make a presentation directly to the board of the public employer. If this request is approved by the board of the public employer, the chief negotiator for the board of the public employer shall in turn have the right to make a presentation directly to the bargaining unit. The cost of the respective presentations shall be borne by the party making the presentation.

(2) The chief negotiator for the board of the public employer may request to make a presentation directly to the bargaining unit. If this request is approved by the bargaining unit, the chief negotiator for the bargaining unit shall in turn have the right to make a presentation directly to the board of the public employer. The cost of the respective presentations shall be borne by the party making the presentation.

(b) If the impasse is not resolved, a neutral party chosen by the parties, or failing agreement, appointed by the board, shall undertake to mediate the issues remaining in dispute. If the parties so choose, or if mediation does not result in agreement within 45 days, or in the case of state employees 75 days, prior to the budget submission date, a neutral party chosen by the parties, or failing agreement, appointed by the board, shall make and report findings of fact together with recommendations for resolving each of the issues remaining in dispute, which findings and recommendations shall not be made public until the negotiating teams shall have considered them for 10 days.

II. If either negotiating team rejects the neutral party's recommendations, his findings and recommendations shall be submitted to the full membership of the employee organization and to the board of the public employer, which shall vote to accept or reject so much of his recommendations as is otherwise permitted by law.

III. (a) If either the full membership of the employee organization or the board of the public employer rejects the neutral party's recommendations, the findings and recommendations shall be submitted to the legislative body of the public employer at the next annual meeting of the legislative body, unless there is an emergency as defined in RSA 31:5 or RSA 197:3, which shall vote to accept or reject so much of the recommendations as otherwise is permitted by law.

(b) If the public employer is a local political subdivision with a city or town council form of government and if either the full membership of the employee organization or the board of the public employer rejects the neutral party's recommendations, the findings and recommendations shall be submitted within 30 days to the city council or aldermen or town council for approval.

Within 30 days of the receipt of the submission, the city council or aldermen or town council shall vote to accept or reject the recommendations as otherwise is permitted by law.
IV. If the impasse is not resolved following the action of the legislative body, negotiations shall be reopened. Mediation may be requested by either party and may, at the mediator's option, involve the board of the public employer. In cases where the board of the public employer also serves as the legislative body of a municipality, the mediator may request no more than one less than a quorum of the legislative body to participate in the mediation.
V. Nothing in this chapter shall be construed to prohibit the parties from providing for such lawful procedures for resolving impasses as the parties may agree upon; providing that no such procedures shall bind the legislative body on matters regarding cost items. The parties shall share equally all fees and costs of such procedures.
VI. The parties shall share equally all fees and costs of mediation and fact-finding required by this chapter.
VII. [Repealed.]

Source. 1975, 490:2. 1979, 374:9. 1998, 205:2; 341:1. 2008, 388:1, eff. July 15, 2008. 2011, 3:1, eff. Mar. 1, 2011. 2012, 161:1, eff. Jan. 1, 2013.

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NH RSA 273-A:14 Appeals. – Any person aggrieved by a final order of the board granting or denying in whole or in part the relief sought may obtain review of such order in the manner prescribed in RSA 541.

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

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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.

OTHER AUTHORITIES

NH Constitution Part 1 Article 37 – Separation of Powers. In the government of this State, the three essential powers thereof, to wit, the Legislative, Executive, and Judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the Constitution in one indissoluble bond of union and amity.

NH Constitution Part II Article 5 – Power to Make Laws, Elect Officers, Define Their Powers and Duties, Impose Fines and Assess Taxes; Prohibited from Authorizing Towns to Aid Certain Corporations. And farther, full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions, either with penalties, or without, so as the same be not repugnant or contrary to this constitution, as they may judge for the benefit and welfare of this state, and for the governing and ordering thereof, and of the subjects of the same, for the necessary support and defense of the government thereof, and to name and settle biennially, or provide by fixed laws for the naming and settling, all civil officers within this state, such officers excepted, the election and appointment of whom are hereafter in this form of government otherwise provided for; and to set forth the several duties, powers, and limits, of the several civil and military officers of this state, and the forms of such oaths or affirmations as shall be respectively administered unto them, for the execution of their several offices and places, so as the same be not repugnant or contrary to this constitution; and also to impose fines, mulcts, imprisonments, and other punishments, and to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and residents within, the said state; and upon all estates within the same; to be issued and disposed of by warrant, under the hand of the governor of this state for the time being, with the advice and consent of the council, for the public service, in the necessary defense and support of the government of this state, and the protection and preservation of the subjects thereof, according to such acts as are, or shall be, in force within the same; provided that the general court shall not authorize any town to loan or give its money or credit directly or indirectly for the benefit of any corporation having for its object a dividend of profits or in any way aid the same by taking its stocks or bonds. For the purpose of encouraging conservation of the forest resources of the state, the general court may provide for special assessments, rates and taxes on growing wood and timber.

STATEMENT OF THE CASE

On August 5, 2020, a Petition for Declaratory Ruling was filed with the Public Employee Labor Relations Board. (hereinafter "PELRB") seeking a declaration that the vote of the collective legislature (House of Representatives and Senate), as authorized by RSA 273-A:9, VI and 273-A:12, created a binding contract between the State and the SEA as to cost items. CR 1. The New Hampshire Troopers Association, New Hampshire Troopers Association-Command Staff, New Hampshire Probation and Parole Officers Association, and New Hampshire Probation and Parole-Command Staff Association (hereinafter "Intervenors") moved in support of the position that the acceptance of the factfinder's report by the legislature creates a binding contract

as to the cost items between the parties. CR 40-42. This intervention was granted by the PELRB on September 11, 2020. CR 52. The PELRB ordered the filing of briefs by the parties and required them to specifically address the applicability of the PELRB's decision in AFSCME Local 3657, Hillsborough County Sheriff's Office v. Hillsborough, Case No. G-0012-20, Decision No. 2016-298 (December 22, 2016) CR. 37.

The Intervenors, the SEA, and the State filed their respective Brief's on September 18, 2020. CR 53-118; CR 119-124; and CR 125-137. On or about November 3, 2020, the PELRB issued Decision No. 2020-244 ("Order") holding that the New Hampshire State Legislature's vote to adopt a factfinder's report consisting of exclusively "cost items" did not create a binding contract between the State of New Hampshire and the Intervenors. CR 144. The Board also held that the State Legislature's role was limited only to the approval of cost items. CR 143.

The Board improperly relied upon the Supreme Court ruling of Appeal Derry Educ. Ass'n., 138 N.H. 69 (1994) as well as its own recent decision in AFSCME Local 3657, Hillsborough County Sherriff's Office v. Hillsborough County, PELRB Decision No. 2016-288. CR 141-142. The Board improperly expanded the holding in Appeal of Derry to "cost items' in violation of this Honorable Court's precedent, the statutory scheme of the public employee labor relations act and exceeded the authority of the PELRB. CR 142. The attempt to expand the holding in Appeal of Derry to "cost items" constituted legal error. The PELRB further determined the right to collectively bargain on behalf of the State is a power reserved to the Governor and that the legislature has an extremely limited role in contravention of the statutory language. CR 144. This ruling constituted legal error by the PELRB.

The Intervenors filed a timely Motion for Reconsideration on December 3, 2020. CR 150-154. The PELRB denied this motion on December 24, 2020. CR 162. The Intervenors

sought an Appeal by Petition from the administrative agency on January 25, 2021. The State moved for Summary Affirmance on February 16, 2021. The Intervenors timely objected asserting this was a matter of first impression for this Honorable Court. This Honorable Court accepted this appeal and consolidated Case #2021-0027 and Case #2021-0028 on March 23, 2021. This Brief follows.

STATEMENT OF THE FACTS

On August 5, 2020, the State Employees Association of New Hampshire, SEIU 1984 ("SEA") filed a Petition for Declaratory Ruling seeking a declaration by the PELRB that the vote of the collective legislature (House of Representatives and Senate), as authorized by RSA 273-A:9, VI and 273-A:12, created a binding contract between the State and the SEA as to cost items. CR 1.

The Intervenors commenced negotiations with the State in the fall of 2018, as part of the so called "employee bargaining committee" (see RSA 273-A:9 I and Appeal of New England Benevolent Ass'n., 171 N.H. 490 (2018)) in an attempt to reach a successor collective bargaining agreement for the 2019-2021 biennium. CR 54. The parties were unable to reach an agreement, impasse was declared and the parties commenced the impasse resolution mechanism provided by statute, i.e. RSA 273-A:12, on February 19, 2019 CR 54. The parties were unsuccessful in mediation and proceeded to Factfinding in accordance with RSA 273-A:12. CR 54-55. The parties attended multiple factfinding hearings and presented their arguments. The Factfinder issued her report on November 12, 2019, making recommendations only as to cost items. CR55.

The intervenors' respective bargaining teams accepted the Factfinder's recommendations, but the State's team rejected the same recommendations. The Factfinder's recommendations were submitted to the intervenors respective bodies which accepted the recommendations. CR

55. The Factfinder's recommendations were not submitted to the Board of the Public Employer (RSA 273-A:1, II (a)(1), as Governor Sununu unilaterally decided to reject the recommendations without presenting them to the Council. The PELRB found this lack of submission to be an unfair labor practice and a violation of RSA 273-A12. This violation of statute was found by the PELRB on February 26, 2021. State Employees Association of New Hampshire, SEIU 1984 and NEBPA v. State of New Hampshire (Case # G-0115-9) (Decision No.2021-028) (Dated February 26, 2021)[1]. The factfinder issued recommendations for the Intervenors solely on "cost items". CR 73-87; see also RSA 273-A:1 IV. Thereafter, the Joint Legislative Committee on Employee Relations (RSA 273-A:9) held a public hearing to determine a recommendation to the full House of Representatives and Senate. The Intervenors and SEA provided presentations to the committee and submitted the full factfinder's recommendations for each respective group to the consideration and deliberation of the committee. The Board of the Public Employer did not make a presentation. CR 55 and 127. On or about March 2, 2020, the committee recommended in favor of acceptance of the factfinder's recommendations on cost items to the House of Representatives and full Senate pursuant to RSA 273-A:9, VI. CR 55 and 127.

On June 29 and 30, 2020, the State Senate in a majority vote and the House of Representatives voted in favor of the cost items recommended by the Factfinders report. CR 55, 127 and 139. As an operation of law, the State was now bound to honor their commitment to the intervenors and other organized state classified employees. The Executive Branch refused to implement the cost items approved by the legislature and thwart the will of the citizens of New Hampshire as expressed by their representatives in the House and Senate. The Intervenors joined the SEA in seeking a declaration from the PELRB that the vote of the collective legislature

[1] This decision has been appealed by the State and has been docketed, but not yet accepted. Appeal of State of New Hampshire, Case No. 2021-0248.

(House of Representatives and Senate), as authorized by RSA 273-A:9 VI and 273-A:12, created a binding contract between the State and the SEA as to cost item. CR 40-42.

After the filing of briefs by the Intervenors, SEA and State, the PELRB issued its decision on November 3, 2020 where it found that the vote on the fact finder's report by the legislature did not create binding terms on the State or the parties. CR 144. The PELRB found that the legislature's vote on the fact finder's report was non-binding and that the Governor holds the exclusive right to negotiate the terms and conditions of employment for State employees, even though the legislature has a statutorily mandated duty to resolve the impasse. CR 144.

SUMMARY OF ARGUMENT

This is a case of first impression in which this Honorable Court is being asked to overturn an illegal declaration by the PELRB that the vote of the collective legislature (House of Representatives and Senate), as authorized by RSA 273-A:9 VI and 273-A:12, did not create a binding contract between the State of New Hampshire and the Intervenors as to cost items. The PELRB declared that the states vote to adopt a factfinder's report on cost items was not binding on the Governor and the role of the legislature was limited to approval of cost items. The PELRB improperly relied upon the Supreme Court ruling of Appeal Derry Educ. Assoc., 138 N.H. 69 (1994) as well as its own recent decision in AFSCME Local 3657, Hillsborough County Sherriff's Office v. Hillsborough County, PELRB Decision No. 2016-288. The PELRB improperly expanded the holding in Appeal of Derry to "cost items' in violation of this Honorable Court's precedent, plain language of the statute, and the statutory scheme of the Public Employee Labor Relations Act (PELRA). This Honorable Court held in Appeal of Derry that the legislative body may not bind the parties by a vote on non-cost items. The PELRB erroneously relied on dicta and non-legislative opinion to extrapolate that the lack of authority

that the legislature had on non-cost items also applied to "cost items" despite the holding in Appeal of Derry and the language of RSA 273-A. The clear language of RSA 273-A provides that the legislature has authority over cost items. See, RSA 273-A:1 IV, and VII; 273-A:3 II (b); 273-A:5 I (e); 273-A:9; and 273-A:12 III. The plain language of the impasse resolution requires that the Legislative Body to "…**accept** or reject so much of the recommendation as otherwise permitted by law." RSA 273-A:12 III It is settled case law that the term "as otherwise permitted by law" means cost items. The attempt to expand the holding in Appeal of Derry to "cost items" constituted legal error.

The PELRB ignored that the statutory scheme of the PELRA is to promote harmonious relations between public employees and the State and to protect the public with the uninterrupted services of government. RSA 273-A:9 was re-enacted to reassert the legislature's role in the negotiations process. This was so that one branch of government (or one person) cannot frustrate the entire negotiations process and is in compliance with the ideals of checks and balances afforded by our Constitution. When one person can disregard the will of the people by failing to take any action the system is doomed for failure. The ability of the State Legislature to bind the State as to cost items is complimentary to the statutory scheme, promotes harmony and the interrupted delivery of services, and resolves impasses. The format of the structure of RSA 273-A:9 (VI) and RSA 273-A:12 and the ideals supporting the creation of the PELRA are in concert with and complimentary to the ideals of separation of powers contained within the New Hampshire Constitution

The PELRB further committed legal error when it determined the right to collectively bargain on behalf of the State is a power reserved to the Governor and that the legislature has an extremely limited role. In making this determination, the Board completely ignored the statutory

scheme that allows for the interactive process that is provided to the State legislature, not afforded to political subdivisions, in the negotiations process. See RSA 273-A:9 The State legislature unlike local legislative bodies have an interactive statutory authority to participate in negotiations with classified employees. The ability of the State Legislature to bind the State as to cost items is complimentary to the statutory scheme, promotes harmony and the interrupted delivery of services, and resolves impasse

ARGUMENT

A. The PELRB erroneously relied upon unsupported precedent and illegally expanded Appeal of Derry Education Association

The PELRB held that the State of New Hampshire Legislature's vote to adopt a factfinder's report consisting of exclusively "cost items" did not settle the impasse between the parties and did not create a binding contract between the State and Intervenors. The PELRB provided, "Accordingly, the state legislature's vote to adopt the fact finder's report is not binding on the governor and its vote cannot , without the Governor's agreement, finalize the 2019-2021 collective bargaining agreement".CR 144 In making this determination the PELRB relied heavily on its own precedent which erroneously interpreted RSA 273-A:12. See, Local 3657, Hillsborough County Sherriff's Office v. Hillsborough County, PELRB Decision No. 2016-288. CR 141-142.

Resolution of this issue requires that we interpret the language of the pertinent statutes. See Appeal of Laconia Patrolman Assoc., 164 N.H. 552, 555, 62 A.3d 787 (2013). "Although the PELRB's findings of fact are presumptively lawful and reasonable and will not be disturbed if supported by the record, we are the final arbiters of legislative intent as expressed in the words of a statute considered as a whole and will set aside erroneous rulings of law." Appeal of SEA (N.H. Community College System), 170 N.H. 699, 703 (2018).

The AFSCME case is inapplicable to the case at bar and impermissively expanded the scope of Appeal of Derry Educ. Ass'n, 138 N.H. 69 (1994) (holding that legislative body cannot bind parties on **non-cost** items). AFSCME can be distinguished as it did not analyze the interaction of multiple statutory provisions; the union was opposed to being bound; and the impasse was over both cost and non-cost items. Further, the PELRB exceeded their authority by expanding the holding in Appeal of Derry to "cost items".

In AFSCME, the AFSCME Local 3657, Hillsborough County Sheriff's Office (Union) filed an unfair labor practice charge against the employer, County of Hillsborough, for unilaterally implementing "cost items" after a vote of the legislative body. The PELRB found in favor of the Union and held that the County did commit an unfair labor practice and ordered a cease and desist order. This decision was not appealed by the parties. The PELRB found, "The impasse resolution portion of the PELRA does not expressly grant to the County delegation, as the local legislative body, any power beyond what is enumerated elsewhere in the PELRA, which is appropriation of funding cost items." AFSCME at 7; Addendum at 52. The parties had negotiated to impasse and attempted mediation which proved ineffective. Id. at 48. The parties proceeded to factfinding. The factfinder's recommendations contained both cost and non-cost items. The Union rejected the factfinders recommendations and notified the County of such rejection. Id. at 49. The County accepted the factfinders report and submitted it to the legislative body which accepted the report. Id. The Union continued to reject the factfinders report and sought to commence negotiations on the expired contract. The County unilaterally implemented the factfinders recommendation. The case at bar is factually and legally distinct.

The process at the State level is significantly different than at a local level based on the interjection of RSA 273-A:9 in the present matter. As discussed above, only the State has a provision for the legislative body to be interactive in the negotiating process See RSA 273-A:9, VI (c). In addition, the Joint Committee on Employee Relations holds public hearings on factfinders reports and makes recommendations to the full House and Senate. RSA 273-A:9, VI (d). The full House and Senate then vote on the recommendation. Id. See RSA 273-A:12, III. The plain and unambiguous language then commands the legislature to vote on cost items, "….vote to accept or reject so much of the recommendations as otherwise is permitted by law" (meaning cost items) RSA 273-A:12 (III). Further, it is the legislatures prerogative to fix salaries of public employees. See, NH Constitution Article II, Section 5.

Further, the subsequent paragraph reads, "**If** impasse is not resolved following the action of the legislative body, negotiations shall be reopened…." RSA 273-A:12, IV (emphasis supplied). Thus, the clear and unambiguous language contemplates that the vote of the legislative body CAN resolve impasse. The PELRB's reliance on Michael Fontaine's Memorandum to Chairman of the New Hampshire Public Employee Labor Relations Board provides no refuge as the advisory nature of the legislature's vote on non-cost items is inapposite here. The language of the statutes dictate that the legislature may bind the public employer on "cost items". The otherwise "permitted by law" language in RSA 273-A:12, II means cost items. See Appeal of Derry at 71-72.

In addition, RSA 273-A:3, II (b) provides, "Only cost items shall be submitted to the legislative body of the public employer for approval at the next annual meeting of the legislative body, unless there is an emergency as defined in RSA 31:5 or RSA 197:3. If the legislative body rejects the submission, or while accepting the submission takes any action which would result in

a modification of the terms of the cost item submitted to it, either party may reopen negotiations on the entire agreement. No cost item agreed to by the public employer and the employee organization shall be modified by the legislative body of such public employer." This provision provides the legislative body with exclusive authority to approve cost items, but the legislative body may not modify those cost items whether presented as an agreement by the parties or a factfinders report. As to non-cost items or factfinders reports that have non-cost items the legislatives bodies actions are only advisory. The Intervenors contract is with the people of the State of New Hampshire (RSA 273-A:273-A:1, X), who is represented by the executive branch. RSA 273-A:9, I. The additional processes added for the State is based on their unique constitutional balance between the executive branch and the legislative branch.

In the present appeal, the Intervenor ACCEPTED the factfinders report and advocated for its acceptance in the impasse resolution process. This is an important distinction because the law does not contemplate that Good Faith bargaining requires one party to concede to the other parties' demands RSA 273-A:3, I. However, requiring the Union to accept a factfinders report is different than requiring the employer to accept a factfinders report after a legislative vote as cost items. The public employer can be bound by the acts of the legislature under both RSA 273-A:12, III and common law. For example, at a local level, the law is clear that in all Town Meetings, the voters are the sovereign and that when their will is expressed, it is supreme law of the land. Moulton v. Beals, 98 N.H. 461, 464 (1954). The Board of Selectmen, although will have a general authority pursuant to their "prudential affairs" powers, they do not have the right to contravene the legislature. The people are sovereign over the government and when the people speak either directly or through the legislature it is the will of the people that control the operation of government. The acceptance of the factfinders recommendation as to cost items by

the legislature is the checks and balances between the executive branch and legislative branch necessary to allow the orderly and uninterrupted functioning of government. In AFSCME, had the Union supported the factfinder's recommendation there would have been no unfair labor practice and there would have been a binding contract as to cost items.

In AFSCME, the factfinder's recommendation included both cost and no-cost items. The intervenor unions, in this case, seek only to enforce the cost items. The Court has instructed us that the terminology in RSA 273-A:12, III, "as allowed by law" is in reference to cost items. Appeal of Derry at 71. Cost items are, "…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." RSA 273-A:1, IV. The Factfinders report only recommended wages and health insurance provisions. See CR 70 and 73-87. It is undisputed that wages and health insurance are cost items and mandatory subjects of bargaining. Appeal of Berlin Education Ass'n, 125 NH 779 (1984); Appeal of North Hampton, 166 NH 225 (2014). The legislature can bind the parties as to cost items Thus, this is an important distinction that creates, in this matter, resolution to the impasse.

Lastly, the PELRB erred, as a legal matter. In AFSCME, when it expanded the holding in Appeal of Derry to non-cost items. The PELRB does not have the authority to supersede the Supreme Court. In the early years of the evolution of the PELRA, the Court greatly deferred to the PELRB's expertise in making both findings of fact and rulings of law. See, e.g., Appeal of Bow School District, 134 N.H. 64, 67, 588 A.2d 366, 368-69 (1991) (deferring to "the PELRB's ... reasonable interpretation" of statute). The Court had stated that, "the legislature has vested the PELRB with authority initially to define the terms of the collective bargaining statute and with the discretion to interpret 'managerial policy within the exclusive prerogative of the public

employer." Appeal of State Employees' Ass'n., 120 N.H. 690, 694, 422 A.2d 1301, 1304 (1980). Unusual as it was, the Court's deference to a lower tribunal on statutory interpretation was, for a time, justified by the experimental atmosphere surrounding the act's passage. Almost twenty years later, however, the Court found that the decisional experience with RSA chapter 273-A no longer made this kind of deference necessary or desirable. The Court abandoned the policy of deferring to the PELRB on issues of law and adopted a strict adherence to the standard of review set forth in RSA 541:13. Appeal of State of N.H., 138 N.H. 716, 720 (1994).

The Court is the final arbiter of the meaning of the statute and utilizes well defined maxims of construction in their interpretation of statutes. "We are the final arbiter of the meaning of a statute as expressed by the words of the statute itself. We look to the plain and ordinary meaning of the words used in the statute and will not examine legislative history unless the statutory language is ambiguous, consider what the legislature might have said, or add words not included in the statute. We interpret a statute to lead to a reasonable result and review a particular provision, not in isolation, but together with all associated sections. The legislature will not be presumed to pass an act leading to an absurd result and nullifying, to an appreciable extent, the purpose of the statute." Weare Land Use Assoc. v. Town of Weare, 153 N.H. 510, 511-12, 899 A.2d 255 (2006) (citations omitted). "Our 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." Town of Hinsdale v. Town of Chesterfield, 153 N.H. 70, 73, 889 A.2d 32 (2005) (quotation omitted). The plain language of RSA 273-A:12, III provides that the legislature can bind the public employer as to "cost items".

"If either the full membership of the employee organization or the board of the public employer rejects the neutral party's recommendations, the findings and recommendations shall

be submitted to the legislative body of the public employer at the next annual meeting of the legislative body, unless there is an emergency as defined in RSA 31:5 or RSA 197:3, **which shall vote to accept or reject so much of the recommendations as otherwise is permitted by law**" RSA 273-A:12 (III) (a) (emphasis provided). This Court has instructed us that "as otherwise permitted by law" is defined as approving cost items. Appeal of Derry at 71.

In addition, the statute by the plain language assumes that the legislature can resolve the impasse. RSA 273-A:12, IV provides, "If the impasse is not resolved following the action of the legislative body, negotiations shall be reopened. Mediation may be requested by either party and may, at the mediator's option, involve the board of the public employer. In cases where the board of the public employer also serves as the legislative body of a municipality, the mediator may request no more than one less than a quorum of the legislative body to participate in the mediation". The legislature provided "if impasse" is not resolved which dictates that the legislature may resolve the impasse, but only as to cost items.

In the Appeal of Derry, the Derry Education Association (union) and the Derry school Board ("Board") reached impasse in their attempt to negotiate a successor collective bargaining agreement. They submitted the factfinders recommendations to the legislative body pursuant to RSA 273-A:12, III. The factfinders recommendation ONLY consisted of non-cost items. The Court held, "Accordingly, we hold that RSA 273-A:12, III requires the fact-finders report to be submitted in its entirety to the legislative body for review, but that the legislative body may note bind the parties by a vote on **non-cost** items." Appeal of Derry at 71 (emphasis supplied). The PELRB erroneously relied on dicta and non-legislative history opinion to extrapolate that the lack of authority that the legislature had on non-cost items also applied to "cost items". This is despite the holding in Derry and the language of RSA 273-A. The clear language of RSA 273-A

provides the legislature authority over cost items. See, RSA 273-A:1 IV, and VII; 273-A:3 II (b); 273-A:5 I (e); 273-A:9; and 273-A:12 III. The attempt to expand the holding in Appeal of Derry to "cost items" constituted legal error

The PELRB has illegally expanded the holding of Appeal of Derry which provides that the legislature may not bind the parties as to non-cost items to "cost items" which the Intervenors respectfully submit requires that the PELRB decision be overturned and reversed.

B. The plain meaning and intent of the statutory language provides the vote of the legislative body resolved the impasse

The PELRB provided that, "The role of the state legislature in the bargaining process for state employees is no different than the role of the county delegation in the process for County employees." CR 143 The PELRB has misread the plain and unambiguous language of the interplay between RSA 273-A:9, VI (Bargaining by State Employees) and 273-A:12 (Resolution of Disputes). This is a matter of first impression in which the Board is requested to declare that the interplay of the impasse resolution mechanism of RSA 273-A:12 and the specific rules of negotiations for state employees (RSA 273-A:9) allow for impasse to be resolved through the vote of the legislature. The relevant statutes read as follows:

> **273-A:12 Resolution of Disputes.–**
>
> I. (a) Whenever the parties request the board's assistance or have bargained to impasse, or if the parties have not reached agreement on a contract within 60 days, or in the case of state employees 90 days, prior to the budget submission date, and if not otherwise governed by ground rules:
> (1) The chief negotiator for the bargaining unit may request to make a presentation directly to the board of the public employer. If this request is approved by the board of the public employer, the chief negotiator for the board of the public employer shall in turn have the right to make a presentation directly to the bargaining unit. The cost of the respective presentations shall be borne by the party making the presentation.
> (2) The chief negotiator for the board of the public employer may request

to make a presentation directly to the bargaining unit. If this request is approved by the bargaining unit, the chief negotiator for the bargaining unit shall in turn have the right to make a presentation directly to the board of the public employer. The cost of the respective presentations shall be borne by the party making the presentation.

(b) If the impasse is not resolved, a neutral party chosen by the parties, or failing agreement, appointed by the board, shall undertake to mediate the issues remaining in dispute. If the parties so choose, or if mediation does not result in agreement within 45 days, or in the case of state employees 75 days, prior to the budget submission date, a neutral party chosen by the parties, or failing agreement, appointed by the board, shall make and report findings of fact together with recommendations for resolving each of the issues remaining in dispute, which findings and recommendations shall not be made public until the negotiating teams shall have considered them for 10 days.

II. If either negotiating team rejects the neutral party's recommendations, his findings and recommendations shall be submitted to the full membership of the employee organization and to the board of the public employer, which shall vote to accept or reject so much of his recommendations as is otherwise permitted by law.

III. (a) If either the full membership of the employee organization or the board of the public employer rejects the neutral party's recommendations, the findings and recommendations shall be submitted to the legislative body of the public employer at the next annual meeting of the legislative body, unless there is an emergency as defined in RSA 31:5 or RSA 197:3, which shall vote to accept or reject so much of the recommendations as otherwise is permitted by law.

(b) If the public employer is a local political subdivision with a city or town council form of government and if either the full membership of the employee organization or the board of the public employer rejects the neutral party's recommendations, the findings and recommendations shall be submitted within 30 days to the city council or aldermen or town council for approval. Within 30 days of the receipt of the submission, the city council or aldermen or town council shall vote to accept or reject the recommendations as otherwise is permitted by law.

IV. If the impasse is not resolved following the action of the legislative body, negotiations shall be reopened. Mediation may be requested by either party and may, at the mediator's option, involve the board of the public employer. In cases where the board of the public employer also serves as the legislative body of a municipality, the mediator may request no more than one less than a quorum of the legislative body to participate in the mediation.

V. Nothing in this chapter shall be construed to prohibit the parties from

providing for such lawful procedures for resolving impasses as the parties may agree upon; providing that no such procedures shall bind the legislative body on matters regarding cost items. The parties shall share equally all fees and costs of such procedures.
VI. The parties shall share equally all fees and costs of mediation and fact-finding required by this chapter.
VII. [Repealed.]

RSA 273-A:9 VI provides:

VI. There shall be a joint legislative committee known as the joint committee on employee relations.
(a) The joint committee on employee relations shall include the following members:
(1) The president of the senate.
(2) The speaker of the house of representatives.
(3) The majority leader of the senate.
(4) The majority leader of the house of representatives.
(5) The minority leader of the senate.
(6) The minority leader of the house of representatives.
(7) The chairperson of the senate finance committee.
(8) The chairperson of the senate capital budget committee.
(9) The chairperson of the house of representatives finance committee.
(10) The chairperson of the senate ways and means committee.
(11) The vice chairperson of the house of representatives finance committee.
(12) The chairperson of the house of representatives public works and highways committee.
(13) The chairperson of the house of representatives labor, industrial and rehabilitative services committee.
(14) The ranking minority member of the house of representatives labor, industrial and rehabilitative services committee.
(15) The chairperson of the senate commerce committee.
(16) The vice chairperson of the senate commerce committee.
(b) Members of the committee shall receive mileage at the legislative rate. The chair of the committee shall rotate biennially between the president of the senate or designee and the speaker of the house of representatives or designee, provided that the speaker of the house of representatives shall serve as the first chairperson under the provisions of this subparagraph. In the event that the presiding officer or designee serving as chairperson resigns or for any reason is unable to serve, the other presiding officer or designee shall become chairperson, provided that such substitution shall

not change the rotation provided for in this subparagraph.
(c) The joint committee on employee relations shall meet with the state negotiating committee after the first Wednesday in December in the even-numbered years as necessary, to discuss the state's objectives in the bargaining process. The meeting shall be at the call of the chairperson of the joint committee on employee relations.
(d) The joint committee on employee relations shall hold hearings on all collective bargaining agreements with state employees and on all fact-finders' reports relative to the collective bargaining process with state employees and shall submit any recommendation on such agreements or reports to the members of the senate and the house of representatives.

When examining the statutory language, "we ascribe the plain and ordinary meaning to the words used." Laconia Patrolman Assoc., 164 N.H. 552, 555 (2013). "We do not consider words and phrases in isolation, but rather within the context of the statute as a whole," id., and "construe all parts of a statute together to effectuate its overall purpose and to avoid an absurd or unjust result," Appeal of Exeter Police Assoc., 154 N.H. 61, 65, 904 A.2d 614 (2006). "We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Laconia Patrolman Assoc., 164 N.H. at 555. "We do not look beyond the language of a statute to determine legislative intent if the language is clear and unambiguous." Appeal of Town of Deerfield, 162 N.H. 601, 603, 34 A.3d 734 (2011).

RSA Chapter 273-A, New Hampshire's Public Employee Labor Relations Act, recognizes the right of public employees to create unions, see RSA 273-A:10 (Supp. 2017), :11, and sets forth rules governing negotiations between public employees and employers. See, *e.g.*, RSA 273-A:3, II(a) (2010) (explaining when and how the parties must commence negotiations), :12 (setting forth impasse resolution procedures). RSA 273-A:3, I, sets forth a general rule that requires all parties "to negotiate in good faith." "'Good faith' negotiation involves meeting at reasonable times and places in an effort to reach agreement on the terms of employment, and [cooperating] in

mediation and fact-finding required by this chapter." RSA 273-A:3, I; see also RSA 273-A:5, I(g) (prohibiting any public employer from "refus[ing] to negotiate in good faith with the exclusive representative of a bargaining unit"). In this way, "good faith" negotiation encompasses all parts of the negotiating process. Appeal of New England Police Benevolent Association, 171 N.H. 490, 494 (2018).

In this matter, we look to the plain language of the statute. The statute provides in relevant part, "If either the full membership of the employee organization or the board of the public employer rejects the neutral party's recommendations, the findings and recommendations shall be submitted to the legislative body of the public employer at the next annual meeting of the legislative body, unless there is an emergency as defined in RSA 31:5 or RSA 197:3, which shall vote to accept or reject so much of the recommendations as otherwise is permitted by law" RSA 273-A:12, III(a). It is undisputed that the intervenors accepted the recommendations and the Governor rejected the recommendations. Therefore, it was appropriate for the presentation to the legislature. However, since the intervenors are classified state employees they also had to satisfy RSA 273-A:9, VI and submit the factfinders report to the Joint Committee on Employee Relations. "The joint committee on employee relations shall hold hearings on all collective bargaining agreements with state employees and on all fact-finders' reports relative to the collective bargaining process with state employees and shall submit any recommendation on such agreements or reports to the members of the senate and the house of representatives" RSA 273-A:9, VI (d). The parties submitted the factfinders recommendations to the committee who voted to support the recommendations as to cost items to the full House and Senate.

The Court has instructed us that, "as otherwise is permitted by law" is defined as approving cost items. Appeal of Derry Educ. Asso'n138 N.H. 69, 73 (1994). Throughout RSA

chapter 273-A the legislature described the responsibilities of legislative bodies only with respect to cost items for local and county governments. The chapter defines legislative bodies as the bodies "having the power to appropriate public money," RSA 273-A:1, VII (1987), and cost items as benefits requiring such an appropriation, RSA 273-A:1, IV (1987). In the context of impasse resolution, RSA 273-A:12, V (1987) permits the parties to adopt various "lawful procedures . . . as the parties may agree upon; providing that no such procedures shall bind the legislative body on matters regarding cost items." Further, the chapter also provides: "Only cost items shall be submitted to the legislative body of the public employer for approval. If the legislative body rejects any part of the submission, or while accepting the submission takes any action which would result in a modification of the terms of the cost item submitted to it, either party may reopen negotiations on all or part of the entire agreement." RSA 273-A:3, II(b) These sections also apply to the State legislature.

However, the State legislature unlike local legislative bodies have an interactive statutory authority to participate in negotiations with classified employees. The public employer is the "State" not the Governor. See, RSA 273-A:1 (X). The clear language of the statute makes the governor only the representative for the State itself. RSA 273-A:9, I provides, "All cost items and terms and conditions of employment affecting state employees in the classified system generally shall be negotiated by the state, **represented** by the governor as chief executive…." The joint committee on employee relations is statutorily authorized to meet with State's negotiating committee to "discuss the state's objectives in the bargaining process" See, RSA 273-A:9, IV(c). The committee is comprised of a cross mix of both the House of Representatives and the Senate. RSA 273-A:9, VI (a). Further, the joint committee on employee relations is empowered to get public input through hearings and make recommendations to the full House

and Senate. See, 273-A:9, VI (d). This is very different than the limited responsibility for legislative bodies for political subdivision. See, City of Portsmouth v Portsmouth Teachers, 134 N.H. 642, 649-650 (1991).

It is clear that the plain language provides the State legislature with a pronounced different role that local legislative bodies. As a result, the plain language of the two statutes directs a finding of a binding contract as to cost items.

C. The statutory scheme favors a finding of a binding commitment on cost items

The statutory scheme is silent as to the proper course of action under these circumstances. Arguably, such silence may create an ambiguity. See, In re Juvenile 2005-212, 154 N.H. 763, 766, 917 A.2d 703 (2007). Because the legislative history is silent on this issue, it also provides no guidance to resolve any ambiguity. We look, therefore, to the structure of the statutory scheme as a whole to discern the legislature's objectives. When we examine the pertinent statutes in the context of the entire statutory scheme, rather than in isolation, we conclude that the legislature intended unions negotiating on behalf of state employees to continue negotiating with the State as a bargaining committee under the circumstances in this case when the item causing impasse with one or more unions is common to all. See, Exeter Police Assoc., 154 N.H. at 65; Appeal of NEBPA at 495-496.

In 1975, the legislature enacted RSA chapter 273-A, the Public Employees Labor Relations Act ("PELRA"), a comprehensive scheme designed "to foster harmonious and cooperative relations between public employers and their employees and to protect the public by encouraging the orderly and uninterrupted operation of government." Laws 1975, Ch. 490:1. The statutory scheme set forth in RSA 273-A:12 in conjunction with the powers granted to the State legislature (as discussed above) provides that there needs to be a mechanism in place to

resolve impasse between negotiating teams. RSA 273-A:12 is entitled "Resolution of Disputes" not the "Imperial Power of the Governor". The statutory scheme provides checks and balances to allow for the creation of a binding contract between the State and the public employee groups. The requirement that the legislature have a more interactive role can be seen by reviewing the legislative history of RSA 273-A:9 VI. The uninterrupted operation of government is more important than ever during this pandemic. The citizens of New Hampshire cannot afford to allow one of three equal branches of government (see NH Constitution Part 1 Article 37) to frustrate the will of the people as articulated by their chosen representatives. The State is not the Executive Branch, the people are sovereign. State v. LaFrance 124 NH 171, 174-175 (1983). The statutory framework of the PELRA allows the legislature to bind the State as to cost items RSA 273-A:12 (III) (a) in order to resolve an impasse created by one branch of government. The legislative history while not directly instructive does demonstrate the legislatures important role in not only approving cost items but involvement in the negotiations process.

We generally assume that when the legislature enacts a provision, it has in mind previously enacted statutes relating to the same subject matter. State Employees Assoc. of N.H. v. N.H. Div. of Personnel, 158 N.H. 338, 345, 965 A.2d 1116 (2009). Thus, when interpreting two statutes that deal with a similar subject matter, we construe them so that they do not contradict each other and so that they will lead to reasonable results and effectuate the legislative purpose of the statutes. Grand China, 156 N.H. at 431. When a conflict exists between two statutes, however, the later statute will control, particularly when the later statute deals with a subject in a specific way and the earlier enactment treats that subject in a general fashion. Board of Selectmen v. Planning Bd., 118 N.H. 150, 152, 383 A.2d 1122 (1978); 2B N. Singer & J.D. Singer, Statutes and Statutory Construction § 51:5, at 282-83 (7th ed. 2008).

RSA 273-A:9, VI was originally in the Public Employee Labor Relations Act under RSA 273-A:9, V. The language was the same as it exists today under RSA 273-A:9, VI. However, in 2009 the Joint Committee on Employee Relations was dissolved and RSA 273-A:9, V was repealed. It was replaced by RSA 273-A:9-b which was known as the Legislative Oversight Committee on Employee Relations in 2015. This committee was comprised of five (5) members from the House and five (5) members form the Senate. In 2018, the legislature deemed it appropriate to reconstitute the Joint Committee on Employee Relations because the Oversight Committee had proven unworkable. The reconstitution of the Joint Committee on Employee Relations was through HB 1386 in which the majority committee report of the Labor, Industrial and Rehabilitative Services provides, "…the intent is to execute best practices in the appointment process to better serve the state of New Hampshire, the governing body and New Hampshire employees." (Legislative history at CR 111). The Senate Executive Department and Administrative Committee in considering HB 1386 heard testimony from Representative Weyler where the lack of involvement by the legislature in the negotiations process after 2009 was deemed unacceptable especially as to cost items. (referencing cost items). CR 99. The legislature by enacting RSA 273-A:9 (VI) was reasserting their role in the negotiation process, a role they had been deprived of between 2009 through 2018.

The format of the structure of RSA 273-A:9, VI and RSA 273-A:12 and the ideals supporting the creation of PERLA are in concert and complimentary to the ideals of separation of powers contained within the NH Constitution. Part I Article 37 which provides, "[Art.] 37. [Separation of Powers.] In the government of this State, the three essential powers thereof, to wit, the Legislative, Executive, and Judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of

connection that binds the whole fabric of the Constitution in one indissoluble bond of union and amity." RSA 273-A allows the Executive branch to primarily negotiate, with the assistance and advice of the legislature, the contract between the public employees and the State. However, in the concept of harmonious relations if the parties reach impasse the legislature can bind the State as to cost items. If the negotiation process becomes frustrated then impasse can be resolved as to cost items by the legislature. RSA 273-A:12 (III) and RSA 273-A (VI)(d). The reading of RSA 273-A to allow the Executive Branch to control not only the negotiation process but also the impasse resolution process would offend the notion of separation of powers.

The separation of powers prevents one branch of government from usurping the control of government and acts as a checks and balance to prevent the tyranny of one branch over another. State v. LaFrance, 124 N.H. 171 (1983). The concept of separation of powers does not require an absolute division of powers, but a cooperative accommodation among branches of government and contemplates overlapping as a matter of practicality and efficiency. McKay v. New Hampshire Compensation Appeals Bd., 143 N.H. 722 (1999). The authority to bind the State concerning cost items through the impasse resolution process is consistent with the legislature constitutional authority to set and fix the salaries of public employees and officials. See, NH Constitution Art II, Part 5 and Opinion of the Justices, 110 N.H. 359, 363-364 (1970). Thus, the statutory and constitutional framework dictate that the legislature of the State of New Hampshire can create a binding contract as to cost items between the people of New Hampshire and their employees.

CONCLUSION

For the reasons set forth above, the Appellant respectfully requests that this Honorable Court reverse and remand the decision of the PELRB and declare that the State legislative body's vote resolved impasse between the Intervenors and the State of New Hampshire as to cost items pursuant to RSA 273-A:12.

Respectfully submitted,

New Hampshire Troopers Association,
New Hampshire Troopers Association-Command Staff,
New Hampshire Probation and Parole, and
New Hampshire Probation and Parole-Command Staff

By and through their attorneys,
MILNER & KRUPSKI, PLLC

August 10, 2021

By: */s/ John S. Krupski*

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CERTIFICATE OF COMPLIANCE

In accordance with New Hampshire Supreme Court Rule 16(3), the undersigned hereby certifies that a copy of the Trial Court's Decision has been included in the Addendum attached to this Brief, which has been uploaded to the Supreme Court electronic filing system on this 10th day of August, 2021.

In accordance with New Hampshire Supreme Court Rule 16(7), the undersigned hereby certifies that an original Brief of the Appellant has been uploaded to the Supreme Court electronic filing system on this 10th day of August, 2021.

In accordance with New Hampshire Supreme Court Rule 16(10), the undersigned hereby certifies that counsel of record, Marc G. Beaudoin, Esq.; Gary J. Snyder, Esq.; Jill A. Perlow Esq.; and Zachary Lee Higham, Esq., have been copied via the Supreme Court filing system.

In accordance with New Hampshire Supreme Court Rule 16(10), the undersigned hereby requests that this matter be heard on oral argument and, further, the John S. Krupski, Esq. be designated as the attorney to argue its merits on behalf of the Appellants. Counsel respectfully requests fifteen (15) minutes for argument.

In accordance with New Hampshire Supreme Court Rule 16(11), the undersigned hereby certifies that the brief does not exceed 9,500 words, exclusive of pages containing the table of contents, table of citations, and any other addendums.

Date: August 10, 2021

/s/ John S. Krupski
John S. Krupski, Esq.

ADDENDUM

State of New Hampshire

Public Employee Labor Relations Board

State Employees' Association of New Hampshire SEIU Local 1984 and State of New Hampshire and Interveners New Hampshire Troopers Association, New Hampshire Troopers Association-Command Staff, New Hampshire Probation & Parole, New Hampshire Probation & Parole-Command Staff.

Case No. G-0115-11
Decision No. 2020-244

Appearances: Gary Snyder, Esq., SEA of NH Inc., SEIU Local 1984
Concord, New Hampshire for the Petitioner

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

Marc G. Beaudoin, Esq., Milner & Krupski, PLLC
Concord, New Hampshire for the Interveners

Background:

This is a decision on a petition for declaratory ruling filed on August 5, 2020 by the State Employees' Association of New Hampshire, SEIU Local 1984 (SEA). In substance, the SEA's petition asks the board to issue a ruling as to the effect, under RSA 273-A:12, III and IV, of the state legislature's recent vote to adopt a fact finder's report. These two RSA 273-A:12 sub-sections provide that:

> III. (a) If either the full membership of the employee organization or the board of the public employer rejects the neutral party's recommendations, the findings and recommendations shall be submitted to the legislative body of the public employer at the next annual meeting of the legislative body, unless there is an emergency as defined in RSA 31:5 or RSA 197:3, which shall vote to accept or reject so much of the recommendations as otherwise is permitted by law.

> IV. If the impasse is not resolved following the action of the legislative body, negotiations shall be reopened. Mediation may be requested by either party and may, at the mediator's option, involve the board of the public employer. In cases where the board of the public employer also serves as the legislative body of a municipality, the mediator may request no more than one less than a quorum of the legislative body to participate in the mediation.

After the petition was filed the board notified the parties that it would issue a decision on the petition. See PELRB Decision No. 2020-177 (August 18, 2020). The New Hampshire Troopers Association, New Hampshire Troopers Association-Command Staff, New Hampshire Probation & Parole, New Hampshire Probation & Parole-Command Staff motion to intervene was granted. The parties filed briefs by the September 18, 2020 deadline, and the facts giving rise to the SEA's petition are set forth in the findings of fact.

Findings of Fact

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

2. The State Employees' Association of New Hampshire, SEIU Local 1984 (SEA) is the RSA 273-A certified exclusive representative of state employees in numerous state bargaining units.[1] The interveners represent certain employees of the Department of Safety and Department of Corrections.

3. In the fall of 2018 the parties began negotiating a collective bargaining agreement for the period covering July 1, 2019 to June 30, 2021 (2019-21 term). After they reached impasse the parties proceeded to impasse mediation and fact finding per RSA 273-A:12.

4. The fact finder's report issued on November 12, 2019.

5. The SEA and interveners accepted the fact finder's report but the Governor did not. The Governor subsequently declined to submit the fact finder's report to the Executive Council.

6. On June 29 and 30, 2020 the state legislature voted to adopt the fact finder's report.

[1] For a current inventory of State bargaining units represented by the SEA see www.nh.gov/pelrb/certifications/cert_s_z.htm.

7. The SEA and the interveners take the position that the fact finder's report should be implemented given the legislature's vote.

8. The State takes the position that the legislature's action is not binding, but merely advisory.

Decision and Order

Decision Summary:

The state legislature's vote adopting the fact finder's report constitutes an approval of the cost items in the report but is not binding on the Governor, who has exclusive authority to negotiate the terms and conditions of employment for state employees pursuant to RSA 273-A:9.

Jurisdiction:

The board issues declaratory rulings pursuant N.H. Admin. Rule Pub 206, which provides as follows:

> **Pub 206.01 Petition for Declaratory Ruling.**
>
> (a) Any public employer, any public employee or any employee organization may petition the board under RSA 541-A for a ruling regarding the specific applicability of any statute within the jurisdiction of the board to enforce, or any rule or order of the board, by filing with the board a petition for declaratory ruling setting out:
>
> (1) The specific statute, rule or order whose applicability is in question; and
>
> (2) A clear and concise statement of the facts giving rise to the petition.
>
> (b) The board shall determine within 30 days of filing whether it shall dismiss such a petition or issue a ruling, and it shall subsequently give a ruling on all such petitions properly before it as expeditiously as possible.
>
> (c) The board shall dismiss any such petition whose subject matter:
>
> (1) Is substantially the same as that of a petition for declaratory ruling previously dismissed; or

(2) Was the subject of a previous ruling on the merits, absent a showing that the circumstances attending the previous ruling or dismissal have changed substantially in the intervening period.

(d) The board shall determine whether briefs will assist in issuing a ruling on a declaratory ruling petition and in the event briefs will be received shall establish a schedule for their submission.

Discussion:

We recently determined that a local legislative body vote (county delegation) "accepting" a fact finder's report was not binding on a union which had rejected the report. See *AFSCME Local 3657, Hillsborough County Sheriff's Office v. Hillsborough County*, Case No. G-0012-20, PELRB Decision No. 2016-298 (December 22, 2016)(*AFSCME Local 3657). AFSCME Local 3657* was an unfair labor practice case and involved the same sub-sections of RSA 273-A:12 at issue in this declaratory ruling proceeding. The union filed an unfair labor practice complaint after the county implemented cost items in the fact finder's report based on the county delegation's approval. The board concluded that the county had 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 board's decision included the following discussion of the issue:

> There is no question that collective bargaining can be a prolonged and difficult process which sometimes results in a stalemate. To address this, the PELRA includes a multi-tier process, set forth in RSA 273-A:12, designed to help the parties break the impasse and reach agreement. In general, the process consists of third party mediation and fact-finding. If the impasse persists, the local legislative body becomes involved by voting "to accept or reject so much of the (fact finder's) recommendations as otherwise is permitted by law." The "permitted by law" phrase refers to the legislative body's exclusive authority to

approve cost items[2] set forth in RSA 273-A:3, II (b). See *Appeal of Derry Education Association*, 138 N.H. 69, 71-72 (1994)(noting that under RSA 273-A legislative bodies do not have authority to negotiate and enter into collective bargaining agreements but do have power to appropriate public money to fund cost items).

.....

We conclude that even in the event of impasse, mutual agreement on the terms and conditions of employment remains the *sine qua non* of a collective bargaining agreement formed under the PELRA. The impasse resolution portion of the PELRA does not expressly grant to the County Delegation, as the local legislative body, any power beyond what is enumerated elsewhere in the PELRA, which is the appropriation of funding for cost items. As the court stated in *Appeal of Derry Education Association,* "had the legislature intended that the (County Delegation) vote be binding" on any portion of the fact finder's recommendation, including cost and/or non-cost items, "it could have so stated." *Id.* at 72. In other words, sub-section IV could have been written to provide for "impasses to be resolved *by* rather than *following* action of the legislative body." *Id.* (Emphasis added). This observation is as germane in this case as it was in *Appeal of Derry Education Association.*

The local legislative body's vote on a fact finder's recommendations creates pressure which will hopefully help the parties move away from impasse and toward an agreement:

> *[A]ccording to a memorandum to the PELRB from the attorney assigned from the speaker's staff to assist the conference committee in negotiating and drafting RSA chapter 273-A:12, part of its purpose is "to broaden participation in impasse negotiations" and to make the parties vulnerable to "the publicity that will no doubt attend an impasse." Michael LaFontaine, Memorandum to Chairman of New Hampshire Public Employee Labor Relations Board (November 25, 1975) (unpublished Page 468 memorandum, on file under legislative history with the PELRB). Submission of the fact-finder's report to the legislative body will likely heighten public scrutiny of the negotiations, and the expression of the legislative body's position on the report may increase the pressure on the parties to reach agreement. One of the legislative goals will thus be achieved.*

Id. at 73. In this case, the County Delegation's vote gives the parties advance notice of a cost approval which could potentially serve as the basis for a subsequent, mutually agreed, and fully ratified collective bargaining agreement. Of course, if there is no such mutual agreement, then bargaining resumes, with mediation involving the board of the public employer if the mediator so directs as outlined in sub-section IV of RSA 273-A:12.

See *AFSCME Local 3657* at 6-8. Unlike *AFSCME Local 3657,* this case involves the role of the Governor and the state legislature in the collective bargaining process. However, for purposes of

[2] Under RSA 273-A:1, IV a 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."

this proceeding this is a distinction without a difference. The role of the state legislature in the bargaining process for state employees is no different than the role of the county delegation in the bargaining process for county employees. The function of both is the approval of cost items pursuant to RSA 273-A:3, II. In terms of fact finding, both constitute the "legislative body" referenced in RSA 273-A:12, III and IV,[3] and in the fact finding process their role is limited to voting "to accept or reject so much of the (fact finder's) recommendations as otherwise is permitted by law" as discussed in *AFSCME Local 3657.* As to what is "permitted by law," nothing in RSA 273-A:12 expands the role of the "legislative body" during the fact finding phase beyond the approval of cost items as stated in RSA 273-A:3, II. There are no provisions in the PELRA which confer upon a legislative body any authority to establish, unilaterally or otherwise, the terms and conditions of employment for bargaining unit employees through negotiations or by a vote on a fact finder's report. In contrast, the PELRA sets out in detail the authority and obligation of the Governor to negotiate state collective bargaining agreements:[4]

> I. All cost items and terms and conditions of employment affecting state employees in the classified system generally *shall be negotiated by the state, represented by the governor as chief executive*, with a single employee bargaining committee comprised of exclusive representatives of all interested bargaining units. Negotiations regarding terms and conditions of employment unique to individual bargaining units *shall be negotiated individually with the representatives of those units by the governor.* (Emphasis added).
>
> II. To assist in the conduct of such negotiations the governor may designate an official state negotiator who shall serve at the pleasure of the governor.
>
> III. The governor shall also appoint an advisory committee to assist in the negotiating process. The manager of employee relations appointed under RSA 21-I:44, II shall be a member of this committee.

See RSA 273-A:9, titled "Bargaining by State Employees."

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[3] RSA 273-A:1, 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.

[4] The bargaining process for "Judicial Employees" is addressed in RSA 273-A:9-a and is separate from the bargaining process for "State Employees" discussed in RSA 273-A:9.

In summary, recognizing that a collective bargaining agreement has been reached on the basis of the state legislature's vote adopting the fact finder's report and the SEA's (or interveners) acceptance of the report, but without the Governor's agreement, would mean that the state legislature, and not the Governor, has negotiated the terms and conditions of employment for state employees. This is contrary to the PELRA's division of responsibility between the Governor and the state legislature in the collective bargaining process, both before and during impasse proceedings. RSA 273-A:9 provides, without exception, that the Governor "shall" negotiate the terms and conditions of employment for state employees. The role of the state legislature, on the other hand, is limited, pursuant to RSA 273-A:3, II (b) and 273-A:12, III and IV, to the approval of cost items. There is no authority in the PELRA for the proposition that the state legislature, instead of the Governor, has the power to negotiate the terms and conditions of employment on behalf of the public employer at any point in the process, up to and including impasse fact finding. Accordingly, the state legislature's vote to adopt the fact finder's report is not binding on the Governor[5] and its vote cannot, without the Governor's agreement, finalize a 2019-21 collective bargaining agreement.

So ordered.

November 3, 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.
Marc G. Beaudoin, Esq.

[5] It is also not binding on the SEA and the interveners.

STATE OF NEW HAMPSHIRE
Public Employee Labor Relations Board

AFSCME Local 3657, Hillsborough County Sheriff's Office

v.

Hillsborough County

Case No. G-0012-20
Decision No. 2016-298

Appearances:

Meghan Ventrella, Esq.,
AFSCME Council 93
Boston, Massachusetts for the Complainant

Carolyn M. Kirby, Esq.,
Hillsborough County Legal Counsel
Goffstown, New Hampshire for the Respondent

Background:

On July 14, 2016, the AFSCME Local 3657, Hillsborough County Sheriff's Office (Union) filed an unfair labor practice complaint under the Public Employee Labor Relations Act (PELRA). The Union maintains that the County's unilateral implementation of cost items contained in a fact finder's report, rejected by the Union but accepted by the County Delegation, violated 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); (b)(to dominate or to interfere in the formation or administration of any employee organization); (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); (g)(to fail to comply with this chapter or any

rule adopted under this chapter); and (h)(to breach a collective bargaining agreement). The Union requests that the PELRB order the County to cease and desist from interfering with the employees in the exercise of their rights under RSA 273-A, to bargain in good faith, to post the PELRB's decision, and to make the Union whole for all costs and expenses incurred in the filing and prosecution of this unfair labor practice charge.[1]

The County denies the charges. The County maintains that its actions are consistent with a private sector employer's right to implement its last best offer in the event of an impasse in negotiations under the National Labor Relations Act. The County also argues that it had the right to implement the disputed wage increase following the county delegation's acceptance of the fact finder's report given the provisions of RSA 273-A:12, III and IV. The County requests that the PELRB dismiss the charges or, in the event the PELRB "orders the County to cease implementation of cost items approved by the legislative body pursuant to RSA 273-A:12, require the bargaining union members to repay any and all increases associated with the fact-finder's report."

The parties appeared for hearing on August 29, 2016. However, after marking exhibits and addressing preliminary matters the parties elected to submit this case for decision on exhibits,[2] stipulations, and briefs. All briefs were filed by the October 3, 2016 deadline, and the decision in this case is as follows.

Findings of Fact

1. The County is a public employer within the meaning of RSA 273-A.

[1] The Union also filed a motion for a cease and desist order pending the issuance of the board's decision which is now moot.

[2] Joint Exhibit 1, County Exhibits A-H, and Union Exhibits 1-8 (the County's objections to Union Exhibits 1, 2 and 7 are overruled).

2. The Union is the exclusive representative of and bargaining agent for certain employees of the Hillsborough County Sheriff's Department. Joe Maccarone is the AFSCME Council 93 representative who conducts and coordinates negotiations on behalf of the Union.

3. The County Board of Commissioners is the board of the public employer responsible for negotiating collective bargaining agreements with the Union. Gregory Wenger is the County Administrator and the County representative responsible for coordinating and carrying out negotiations with the Union on behalf of and in conjunction with the Board of Commissioners.

4. The County Delegation is the County's local legislative body.

5. The parties' most recent collective bargaining agreement expired on June 30, 2015. On February 18, 2015 the parties signed ground rules governing the negotiations for a successor contract which remained "in force until impasse is declared or until May 9, 2015, whichever occurs first." See County Exhibit E.

6. After a period of negotiations, the parties reached impasse and then attempted to resolve the impasse by mediation under RSA 273-A:12, with Nancy E. Peace serving as the mediator.

7. When mediation was unsuccessful, the parties proceeded to fact finding on December 15, 2015. Nancy E. Peace served as the fact finder and she issued a fact finder's report dated February 12, 2016.

8. Among other things, the fact finder's report recommended the elimination of Hazard Duty Pay and, for those employees previously eligible for Hazard Duty Pay, a base wage adjustment of $0.925 (applicable to bargaining unit certified full-time and part-time Deputy Sheriffs and Special Duty Sheriffs). The report also recommended a base wage adjustment for non-certified bargaining unit employees of $0.065 (i.e. those employees who were not previously

eligible for Hazard Duty Pay). The fact finder's report also recommended language providing for a merit increase of 1.25% for employees receiving a satisfactory evaluation for the prior year.

9. By email dated March 3, 2016 the Union notified the County that it had rejected the fact finder's recommendations.

10. By April 20, 2016 the County Board of Commissioners had accepted the fact finder's report and asked the Chairman of the County Executive Committee to have the County Delegation consider the report pursuant to RSA 273-A:12, III (a) with the Board's recommendation that the "Delegation vote to accept and fund the cost items included in the recommendation." See County Exhibit B.

11. At its April 22, 2016 meeting, the County Executive Committee "voted to recommend approval of the funding of the Fact-Finder's Report for the Sheriff's unit" and also agreed that "a Delegation meeting would be called for Monday, May 23rd." See County Exhibit G. At the May 23, 2016 meeting, the County Delegation adopted a motion "to accept the Factfinder's report dated February 12, 2016 (cost items only) between Sheriff of Hillsborough County and Local 2715." (sic)(parenthetical in original). See County Exhibit D.

12. The Union still refused to accept the fact finder's recommendations and on April 26, 2016 Mr. Maccarone asked Mr. Wenger for dates when the County was available to resume negotiations. See County Exhibit H ("Sir at your convenience could you provide some dates and times to begin anew Joe"). Moreover, the Union never agreed that the fact finder's report was the equivalent of a collective bargaining agreement, effective through June 30, 2016, once the County Delegation approved the cost items contained in the fact finder's report.

13. On June 20, 2016 the parties met and signed negotiation ground rules relative to bargaining over a successor agreement. See County Exhibit F. These ground rules were the same as the prior, expired version and stated "[i]t is agreed that these negotiation (sic) will be

solely for the purpose of bargaining a successor agreement to the collective bargaining agreement between the parties in full force through June 30, 2016."[3]

14. Thereafter, over the Union's objection, the County proceeded to implement the cost items contained in the fact finder's report, including, for example, "a wage adjustment of 1.25% for those employees who qualified for a merit increase between July 1, 2015 and June 30, 2016." This specific wage increase was included in paychecks issued at the end of June/beginning of July of 2016. The Union objected to the County's actions, and on June 28, 2016 Mr. Maccarone asked Mr. Wenger to provide legal authority for the County's decision to proceed with unilateral implementation of cost items contained in the fact finder's report.

Decision and Order

Decision Summary:

The County Delegation vote on the fact finder's report is not binding on the Union, did not settle ongoing bargaining disagreements over cost items, and did not provide the County with the right to make the disputed unilateral changes in wages. The County has committed an unfair labor practice in violation of RSA 273-A:5, I (a), (e), and (g). The Union's request for a cease and desist order is granted. The County shall immediately suspend the disputed changes, including to bargaining unit employee wages, and return unit employees to the status quo in effect prior to implementation of the disputed changes. In addition, within 45 days the parties shall meet and confer in order to reach agreement on how to address the disputed wages paid to date and shall file a joint report documenting their agreement with the PELRB within 60 days. A further order shall then issue as appropriate and necessary. The County shall post this decision in the workplace for 30 days.

[3] The June 30, 2016 date reference is unclear and presumably a scribner's error since the parties never agreed on a collective bargaining agreement through that date.

Jurisdiction:

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

Discussion:

The claims in this case relate to the fundamental obligation public employers have under the PELRA to establish the terms and conditions of employment through negotiation, and not by unilateral action, as well as the statutory scheme to address bargaining impasse.

> It is the obligation of the public employer and the employee organization certified by the board as the exclusive representative of the bargaining unit to negotiate in good faith. "Good faith" negotiation involves meeting at reasonable times and places in an effort to reach agreement on the terms of employment, and to cooperate in mediation and fact-finding required by this chapter, but the obligation to negotiate in good faith shall not compel either party to agree to a proposal or to make a concession.

See RSA 273-A:3, I. This obligation includes bargaining over wages, as provided in RSA 273-A:1, XI ("[t]erms and conditions of employment" means wages...), which are a mandatory subject of bargaining. *Appeal of State*, 138 N.H. 716, 721 (1994); *Appeal of Berlin Education Association, NHEA/NEA*, 125 N.H. 779, 784 (1984).

There is no question that collective bargaining can be a prolonged and difficult process which sometimes results in a stalemate. To address this, the PELRA includes a multi-tier process, set forth in RSA 273-A:12, designed to help the parties break the impasse and reach agreement. In general, the process consists of third party mediation and fact-finding. If the impasse persists, the local legislative body becomes involved by voting "to accept or reject so much of the (fact finder's) recommendations as otherwise is permitted by law." The "permitted by law" phrase refers to the legislative body's exclusive authority to approve cost items[4] set forth

[4] Under RSA 273-A:1, IV a 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."

in RSA 273-A:3, II (b). See *Appeal of Derry Education Association*, 138 N.H. 69, 71-72 (1994)(noting that under RSA 273-A legislative bodies do not have authority to negotiate and enter into collective bargaining agreements but do have power to appropriate public money to fund cost items).

The specific sub-sections of RSA 273-A:12 in dispute in this case provide as follows:

> III. (a) If either the full membership of the employee organization or the board of the public employer rejects the neutral party's recommendations, the findings and recommendations shall be submitted to the legislative body of the public employer at the next annual meeting of the legislative body, unless there is an emergency as defined in RSA 31:5 or RSA 197:3, *which shall vote to accept or reject so much of the recommendations as otherwise is permitted by law.*
>
> IV. *If the impasse is not resolved following the action of the legislative body, negotiations shall be reopened.* Mediation may be requested by either party and may, at the mediator's option, involve the board of the public employer. In cases where the board of the public employer also serves as the legislative body of a municipality, the mediator may request no more than one less than a quorum of the legislative body to participate in the mediation.

(Emphasis added). Our understanding of these two sub-sections is based upon the principle that legislative intent should be ascertained based upon "the plain language of the provision, considered in the context of the statute as a whole. Where reasonably possible, statutes should be construed as consistent with each other." *Appeal of Derry Education Association*, supra, 138 N.H. at 71 (citations omitted).

We conclude that even in the event of impasse, mutual agreement on the terms and conditions of employment remains the *sine qua non* of a collective bargaining agreement formed under the PELRA. The impasse resolution portion of the PELRA does not expressly grant to the County Delegation, as the local legislative body, any power beyond what is enumerated elsewhere in the PELRA, which is the appropriation of funding for cost items. As the court stated in *Appeal of Derry Education Association*, "had the legislature intended that the (County Delegation) vote be binding" on any portion of the fact finder's recommendation, including cost

and/or non-cost items, "it could have so stated." *Id.* at 72. In other words, sub-section IV could have been written to provide for "impasses to be resolved *by* rather than *following* action of the legislative body." *Id.* (Emphasis added). This observation is as germane in this case as it was in *Appeal of Derry Education Association.*

The local legislative body's vote on a fact finder's recommendations creates pressure which will hopefully help the parties move away from impasse and toward an agreement:

> [A]ccording to a memorandum to the PELRB from the attorney assigned from the speaker's staff to assist the conference committee in negotiating and drafting RSA chapter 273-A:12, part of its purpose is "to broaden participation in impasse negotiations" and to make the parties vulnerable to "the publicity that will no doubt attend an impasse." Michael LaFontaine, Memorandum to Chairman of New Hampshire Public Employee Labor Relations Board (November 25, 1975) (unpublished Page 468 memorandum, on file under legislative history with the PELRB). Submission of the fact-finder's report to the legislative body will likely heighten public scrutiny of the negotiations, and the expression of the legislative body's position on the report may increase the pressure on the parties to reach agreement. One of the legislative goals will thus be achieved.

Id. at 73. In this case, the County Delegation's vote gives the parties advance notice of a cost approval which could potentially serve as the basis for a subsequent, mutually agreed, and fully ratified collective bargaining agreement. Of course, if there is no such mutual agreement, then bargaining resumes, with mediation involving the board of the public employer if the mediator so directs as outlined in sub-section IV of RSA 273-A:12.

We also reject the County's reliance on the National Labor Relations Act (NLRA). The County argues, in substance, that if its actions would not violate the NLRA then they should be deemed acceptable under the PELRA. However, the County overlooks important and substantive differences between these laws. First, as already discussed, RSA 273-A:12 provides a comprehensive process which the parties must follow when at impasse. There is nothing in any provision of RSA 273-A:12, or elsewhere in the PELRA, which grants to a public employer a right to establish or change the terms and conditions of employment, which are mandatory

subjects of bargaining, through unilateral action instead of by mutual agreement. The other difference worth citing is the fact that under the NLRA private sector employees have strike rights. In contrast, RSA 273-A:13 provides that "strikes and other forms of job action by public employees are unlawful." This section of the PELRA ensures the "orderly and uninterrupted operation of government" in this state. Legislative Statement of Policy, 1975 Laws, Ch. 490, eff. 12-21-1975. See also *City of Manchester v. Manchester Firefighters Association,* 120 N.H. 230 (1980). Job actions like a strike can serve as a powerful and effective tool which helps to maintain a level playing field during the negotiation process, and they can temper an employer's inclination to abandon the bargaining table and resort to unilateral action. In short, the fact that strikes are illegal under the PELRA is a crucial difference between the two laws, and we conclude the County's reliance on the NLRA is misplaced in this case.

In accordance with the foregoing, we find that the County 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). All other claims are dismissed.

The County is ordered to immediately cease and desist from providing to bargaining unit employees wages and other benefits which have not been fully negotiated and duly ratified by both parties and to return unit employees to the status quo in effect prior to the County implementation of the disputed changes. Additionally, within 45 days, the parties shall meet and confer for the purpose of reaching agreement about the treatment of the non-negotiated wages and other benefits provided to bargaining unit employees through the date of the County's compliance with this cease and desist order. Within 60 days, the parties shall file a joint report

with this board summarizing the outcome of these discussions. The board is retaining jurisdiction in this case for the purpose of receiving and reviewing the referenced joint report and taking action thereon, including the issuance of further orders, as appropriate and necessary. Finally, the County shall post a copy of this decision in locations and areas where bargaining unit employees work for 30 days.

So ordered.

December 22, 2016

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

By unanimous vote of Alternate Chair Andrew Eills, Esq., Board Member Carol M. Granfield, and Board Member Richard J. Laughton, Jr.

Distribution: Meghan Ventrella, Esq.
Carolyn Kirby, Esq.