

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2021-0027 and 2021-0028

APPEAL OF NEW HAMPSHIRE TROOPERS ASSOCIATION & A.,
AND
APPEAL OF STATE EMPLOYEES' ASSOCIATION OF NEW HAMPSHIRE, INC.,
SEIU LOCAL 1984

BRIEF FOR APPELLANT

(State Employees' Association of New Hampshire Inc., SEIU Local 1984
(15 Minute Oral Argument))

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TEXT OF RELEVANT AUTHORITIES

NH RSA 273-A:1 Definitions In this chapter:

I. "Board" means the public employee labor relations board created by RSA 273-A:2.

II. "Board of the public employer" means the executive body of the public employer, such as the city council, board of selectmen, the school board or the county commissioners.

(a) For purposes of this chapter:

(1) The board of the public employer for executive branch state employees means the governor and council.

(2) The board of the public employer for the judiciary means the chief justice of the supreme court with the advice and consent of the judicial branch administrative council appointed pursuant to supreme court rule 54.

(b) In certain political subdivisions of the state the board of the public employer may also be the legislative body.

III. "Budget submission date" means the date by which, under law or practice, the public employer's proposed budget is to be submitted to the legislative or other similar body of the government, or to the city council in the case of a city, for final action. In the case of a town, school district or supervisory union it means February 1 of each year, except in the case of a city school district or city school administrative unit which has a separate budget submission date applied to it by the city.

IV. "Cost item" means any benefit acquired through collective bargaining whose implementation requires an appropriation by the legislative body of the public employer with which negotiations are being conducted.

V. "Grievance" means an alleged violation, misinterpretation or misapplication with respect to one or more public employees, of any provision of an agreement reached under this chapter.

VI. "Impasse" means the failure of the 2 parties, having exhausted all their arguments, to achieve agreement in the course of good faith bargaining, resulting in a deadlock in negotiations.

VII. "Legislative body" means that governmental body having the power to appropriate public money. The legislative body of the state community college system and university system shall be the board of

trustees.

VIII. "Professional employee" means any employee engaged in work predominantly intellectual and varied in character, involving the consistent exercise of discretion and judgment, and requiring knowledge in a discipline customarily acquired in a formal program of advanced study.

IX. "Public employee" means any person employed by a public employer except:

(a) Persons elected by popular vote;

(b) Persons appointed to office by the chief executive or legislative body of the public employer;

(c) Persons whose duties imply a confidential relationship to the public employer; or

(d) Persons in a probationary or temporary status, or employed seasonally, irregularly or on call. For the purposes of this chapter, however, no employee shall be determined to be in a probationary status who shall have been employed for more than 12 months or who has an individual contract with his employer, nor shall any employee be determined to be in a temporary status solely by reason of the source of funding of the position in which he is employed.

X. "Public employer" means the state and any political subdivision thereof, the judicial branch of the state, any quasi-public corporation, council, commission, agency or authority, the state community college system, and the state university system.

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

XII. [Repealed.]

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

NH RSA 273-A:3 (I), (II)(b) 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.

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. 2018, 12:1, eff. June 19, 2018.

NH 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.

NH 273-A:15 Actions by or Against Public Employee Organizations.

Actions by or against the exclusive representative of a bargaining unit may be brought, without respect to the amount of damages, in the superior court of the county in which it is principally located, or where the plaintiff resides or has its principal place of business, if the plaintiff is a resident of this state or is incorporated in this state.

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

NH RSA 541:6 Appeal.

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

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

NH RSA 541:13 Burden of Proof.

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

Source. 1913, 145:18. PL 239:11. 1937, 107:24; 133:85. RL 414:13.

N.H. House Bill

H.B.1386, 2018 Sess. (NH. 2018)

CHAPTER 12
HB 1386 – FINAL VERSION

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Eighteen

AN ACT establishing a joint committee on employee relations.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 New Paragraph; Public Employee Labor Relations Board; Joint Committee on Employee Relations. Amend RSA 273-A:9 by inserting after paragraph V the following new paragraph:

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.

2 Repeal. RSA 273-A:9-b, relative to the legislative oversight committee on employee relations, is repealed.

3 Effective Date. This act shall take effect 60 days after its passage.

Approved: April 20, 2018

Effective Date: June 19, 2018

**N.H. Legislative Labor, Industrial and Rehabilitative Services
Committee**

Labor Committee Rep. H.B. 1386 (Jan. 24, 2018)

HB 1386 - AS INTRODUCED

2018 SESSION

18-2693

04/10

HOUSE BILL 1386

AN ACT establishing a joint committee on employee relations.

SPONSORS: Rep. Weyler, Rock. 13

COMMITTEE: Labor, Industrial and Rehabilitative Services

ANALYSIS

This bill establishes the joint committee on employee relations and repeals the legislative oversight committee on employee relations.

Explanation: Matter added to current law appears in ***bold italics***.

Matter removed from current law appears [~~in brackets and
struckthrough.~~]

Matter which is either (a) all new or (b) repealed and reenacted appears
in regular type.

I. QUESTIONS PRESENTED FOR REVIEW

1. Did the PELRB err as a matter of law and/or act in an unjust or unreasonable manner when it determined there is no authority within the legislative scheme of the PELRA for the State legislature to bind the parties or the State during collective bargaining impasse procedures, and instead determined that right is exclusively reserved to the Governor? Certified Record at 145-46, 48.¹
2. Did the PELRB err as a matter of law and/or act in an unjust or unreasonable manner when it determined that the vote of the legislature on the fact finder's report did not create a meeting of the minds and/or binding terms between the State and SEA when the SEA had likewise approved the report? CR at 146-147.
3. Whether the PELRB erred as a matter of law or otherwise acted in an unjust or unreasonable manner when it incorrectly extended and/or misinterpreted the reasoning from *Appeal of Derry Educ. Assoc.*, and determined that the State legislature's vote on a fact finder's report regarding cost items is non-binding? CR at 146.

¹ Citations to the Certified Record shall hereafter be abbreviated as "CR".

4. Did the PELRB err as a matter of law and/or act in an unjust or unreasonable manner when it failed to recognize the distinction in bargaining laws for the State of New Hampshire, namely those under RSA 273-A:9, in contrast to the general provisions for other public employees and employers per RSA 273-A? CR at 147-48.

II. STATEMENT OF THE CASE/STATEMENT OF THE FACTS

The SEA and the State of New Hampshire bargained to impasse, went through mediation and fact finding, and received a fact finder's report. CR at 2. The SEA bargaining team and general membership voted to approve the report, while the Governor's team rejected it and then refused to submit the report to the board of the public employer. CR at 2. Per RSA 273-A:9, if the impasse is not resolved following the vote by the union membership and board of the public employer (e.g. the executive council), the State legislature is empowered and required to convene the joint committee on employee relations to hold hearings and issue a recommendation to the State senate and house of representatives on whether to accept the fact finder's report. CR at 2-3.

Per RSA 273-A:12, the legislature must then vote “to accept or reject so much of the recommendations as otherwise is permitted by law”. CR at 2-3. RSA 273-A:3(II)(b) provides the legislature the authority to approve cost items, and thus when the legislature voted to accept the fact finder’s report on June 29 and June 30, 2020, and whereas the SEA had already voted to accept the report, the parties reached agreement and the impasse was resolved in accordance with the process under RSA 273-A, and binding terms were created on the parties. CR at 2-3; RSA 273-A:12.

However, the State refused to comply with the result of the votes by the SEA and legislature and the petition for declaratory ruling followed. CR at 1-3, 129-30. After the filing of briefs by the SEA, NHTA, 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, and that the right to bargain resides exclusively with the governor. CR at 138-44. The SEA timely filed a motion for reconsideration/rehearing on December 3, 2020. CR at 145. The State objected on December 14, 2020, and the PELRB denied the

motion for reconsideration/rehearing on December 24, 2020. CR at 156, 162.

Accordingly, the SEA appealed to this Court and now asserts the PELRB erred as a matter of law and otherwise acted in an unjust and/or unreasonable manner when it concluded 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 once impasse has occurred and agents other than the governor (i.e. the board of the public employer and the legislature) have statutorily mandated duties to resolve the impasse and vote on the fact finder report(s). CR at 140-48.

The authority of the Governor to negotiate collective bargaining agreements is general, not exclusive, as stated in RSA 273-A:9, which provides in relevant part, "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...". CR at 145. (Emphasis added).

Furthermore, the Board of the public employer may resolve impasse proceedings through a majority vote, which can overturn the position of the bargaining agent for the public employer, which in this case would be the Governor. CR at 128-29; *see* RSA 273-A:12. Thus, had the Governor's council voted in favor of the report, it could have bound the State. CR at 131-32; *see* RSA 273-A:12; *see Appeal of Derry Educ. Assoc.*, 138 N.H. 69, 72 (1993). So it is not true, as a matter of law, that the governor's right to bargain the collective bargaining agreement is exclusive. *Id.*

Additionally, the PELRB has erred as a matter of law by erroneously interpreting and extending the incorrect and inaccurate rationale in *AFSCME Local 3657, Hillsborough County Sheriff's Office*. CR at 130, 141-42. In that case, the Board erred in its reasoning and incorrectly expanded upon the ruling in *Appeal of Derry Educ. Assoc.* in determining that "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". CR at 134-35.

However, the Court in *Appeal of Derry Educ. Assoc.* had not

reached that conclusion. CR at 134-35. Rather, the actual statement by the court in *Appeal of Derry* was “[h]ad the legislature intended that the vote of the legislative body be binding on all issues, it could have so stated”. CR at 134-35. (Emphasis Added). The rationale relied upon in *Appeal of Derry Educ. Assoc.* is quite different than the transformed language applied in *AFSCME Local 3657*, *Hillsborough County Sherriff’s Office*, and that of the rationale that was extended to the Board’s decision in the present case. CR at 135, 142. In the former, the rationale implies that the legislature’s vote is binding on some, but not necessarily all subjects in a fact finder’s report (namely cost-items), while the latter two holding by this Board seem to indicate that the vote is not binding under any circumstances. CR at 135, 142. This direct contradiction of the Court’s rationale is an error as a matter of law, and was improperly applied to the present case, especially since the fact finder’s report in the present case contained cost items including wages. CR at 135, 142-43, 146.

It is further worth noting that there were additional and material factual distinctions between the present case and *AFSCME Local*

3657, Hillsborough County Sherriff's Office. CR at 147-48. In *AFSCME Local 3657, Hillsborough County Sherriff's Office*, the union voted against the fact finder's report and the PELRB thus determined that even if the legislature voted in favor of the fact finder's report, there was no meeting of the minds which is the *sine qua non* of collective bargaining agreements, and so there could not be a binding contract based on the legislature's vote. CR at 147-48.

Here, however, the PELRB erred as a matter of law because the union had voted in favor of the report, and so when the legislature voted to accept the report, it created the meeting of the minds between the parties necessary for a contract, which did not exist in *AFSCME Local 3657, Hillsborough County Sherriff's Office*. CR at 147.

Additionally, the PELRB erroneously found that the fact this case deals with the Governor and the State legislature, as opposed to the county commission and delegation, was a "distinction without a difference". CR at 147-48. However, RSA 273-A includes several material differences with how the State negotiates with unions and how political subdivisions of the State negotiate with unions. CR at

147-48. These differences, per RSA 273-A:9, plainly make the legislature part of the bargaining process in State negotiations, but not for the legislative bodies in political subdivisions. CR at 147-48.

Under RSA 273-A:9(VI), there is a joint legislative committee called the joint committee on employee relations. CR at 147-48. Its duties include being active in negotiations at multiple steps including to help to set bargaining priorities through meetings with the State's negotiating committee, holding hearings on all collective bargaining agreements and all fact finder reports, and submitting recommendations on such agreements or reports to the senate and house of representatives. CR at 147-48. As recent as 2018, the legislature amended RSA 273-A:9(VI) to further increase the role of this committee to define the committee's composition for the purpose to "execute best practices in the appointment" of the committee members "to better serve the State of New Hampshire, the governing body, and the New Hampshire employees"). CR at 109, 147-48.

These duties and obligations of the legislature and legislative committee show distinct differences regarding the role of the

legislature in State negotiations compared to that of political subdivisions of the State, which are not involved in setting bargaining priorities and have no such enhanced role for the legislative body when in impasse or when considering a collective bargaining agreement. CR at 133-34, 147-48. Because the legislature has additional duties and responsibilities throughout the bargaining process in comparison to political subdivisions, it is plain the legislature intended to empower the State legislature in the bargaining process, which means that its approval of the report created binding terms on the parties, or at least bound the State by its vote. CR at 133-34, 147-48.

Additionally, the collective bargaining agreement is between the SEA and the State, not the SEA and the Governor as the Board has interpreted. 133-34, 143-44, 148. The Governor is just one agent of the State, not the only agent of the State, and not the exclusive agent for bargaining. 133-34, 143-44, 148. The legislature is empowered to bind the State, especially with regard to cost items, in accordance with RSA 273-A:1, RSA 273-A:3, RSA 273-A:9, and RSA 273-A:12 through the impasse process, and when the SEA and

State legislature both voted to accept the fact finder's recommendations, the parties reached and created binding terms. CR at 133-34, 148.

Contrary to the decision of the board, the binding nature of the legislature's vote on cost items is consistent with the decision of this court in *Appeal of Derry Educ. Assoc.* CR at 134-35, 143-44, 148. In that case, the court determined that because the legislature's authority under RSA 273-A was limited to cost items, its vote for a fact finding report on non-cost items was non-binding. CR at 130. However, in the present case the fact finder's report concerns several cost items including wages. CR at 130, 148. Thus, per *Appeal of Derry Educ. Assoc.*, the legislature had authority to bind at least the State when it voted on the fact finder's report which contained cost items, which in turn created binding terms on the parties because the SEA likewise approved the fact finder's report. CR at 148.

This appeal now follows and for all of the reasons stated herein, the PELRB erred as a matter of a law and acted in an unreasonable and/or otherwise unjust manner.

III. SUMMARY OF ARGUMENT

The PELRB erred as a matter of law when it determined that the vote of the legislative body on a fact finder's recommendation was not binding on the State, the parties, or on cost items. RSA 273-A:9 and 12 establish that while the governor generally has the authority to bargain with unions regarding collective bargaining agreements, this power is not absolute. The legislative body, in the case of the state legislature, is empowered to participate in bargaining, not just in impasse proceedings, but also in setting bargaining priorities and objectives. The legislature is also empowered to appropriate funds and approve cost items, and is required and empowered to accept or reject a fact finder's recommendations as is permissible by law.

Not only is the statutory scheme clear, the case law further supports the conclusion that the legislature's vote was binding. *Appeal of Derry Educ. Assoc.* established that while there may be limitations on the binding nature of the legislature's vote on a fact finder's recommendations when they pertain to non-cost items, the Court implied that because the legislature is empowered to appropriate funds

and approve cost items in a collective bargaining agreement, its vote on fact finding recommendations pertaining to cost items is binding on the parties. The PELRB, in this case and past precedent has misinterpreted that rationale in *Appeal of Derry Educ. Assoc.*, finding that the case determined the vote of the legislative body is merely advisory for all bargaining issues (cost items and non-cost items), but said conclusion is not supported by the what the court in *Appeal of Derry Educ. Assoc.* actually said. Thus, the Court should overturn the Board's decisions and adopt a ruling consistent with *Appeal of Derry Educ. Assoc.* where the legislative body's vote on cost items is binding.

It is further worth noting that not only did the legislature vote to approve the fact finder's recommendations, the SEA members likewise voted in favor of the recommendations, and thus because both sides approved the recommendations, there is a meeting of the minds sufficient to form binding contractual terms. This element has been missing from other precedent such as relied upon by the PELRB such as the case of *AFSCME Local 3657, Hillsborough County Sherriff's Office v. Hillsborough County* where the union had rejected the recommendations, and so there was no meeting of the minds. For all

of the above reasons, the PELRB erred as a matter of law, and this Honorable Court should overturn its decision.

Past case law is further distinguishable from the present case because those cases dealt with political subdivisions of the State, rather than the State itself. The role of the legislature under RSA 273-A:9 is substantively different from role of legislative bodies for political subdivisions of the state as provided for by RSA 273-A generally. A subcommittee of the State legislature plays an active role in setting bargaining priorities and objectives, and provides recommendations on tentative agreements and fact finding recommendations prior to any legislative vote to fund a contract. These duties set the State legislature aside from the limited roles of the legislative bodies of other political subdivisions of the State, and therefore establish greater bargaining authority for the legislature that the PELRB had not previously contemplated in past decisions.

IV. STANDARD OF REVIEW

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

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

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

This court has further held, “[a]n interpretation which preserves rights or benefits enjoyed under the common law is favored where the result avoids absurdity, retroactivity, unconstitutionality, is in keeping with good policy, is consistent with

the purpose of the legislation, or is evident from a consideration of the statute read as a whole and conjunction with other statutes. *State v. Etienne*, 163 N.H. 57, 77 (2011).

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

V. ARGUMENT

The PELRB erred as a matter of law and otherwise issued an order that is both unjust and unreasonable when it concluded that the legislature's vote on the fact finder's report did not result in a binding agreement, especially pertaining to cost items, between the SEA and the State of New Hampshire. Given the facts, the act of the legislature to approve the fact finder's report, coupled with the fact that the SEA bargaining team and general membership voted for approval of the fact finder's report created binding terms on the parties. The case here is one of first impression. While there have been some cases with similar, but distinguishable elements of this case, the current scenario is without controlling precedent. However, the statutory scheme, the legislative history, and the limited available case law all support the conclusion that binding terms were created when the legislature voted in favor of the fact finder's report.

I. The PELRB erred as a matter of law or otherwise acted unreasonably when it determined the statutory right to bargain under RSA 273-A resides exclusively with the governor.

The overall statutory scheme of RSA 273-A shows that the parties can resolve impasse through the legislature's acceptance of the fact finder's report, and the governor's right to bargain is not exclusive. RSA 273-A:3 establishes that public employers and employee organizations are obligated to bargain in good faith. *See* N.H. Rev. Stat. Ann. 273-A:3(I). Generally, RSA 273-A:9 authorizes the governor to negotiate terms and conditions of employment with the union(s), and RSA 273-A:3(II)(b) empowers the legislative body to approve cost items. *See* RSA 273-A:9; *see* RSA 273-A:3(II)(b). If negotiations fail and result in impasse, then RSA 273-A:9 and 12 provide for impasse procedures. RSA 273-A:9; RSA 273-A:12. Said procedures entail mediation followed by fact finding. *See* RSA 273-A:12(I). Following receipt of the fact finder's report, if the bargaining teams are unable to reach agreement, the fact finder's report is then sent to the board of the public employer (in this case the executive council) and to the membership of the union to be voted on. RSA 273-A:12(II).

Should the parties agree at this step, the terms then become binding. *See* RSA 273-A:12(III); *see Appeal of Derry Educ. Assoc.*, 138 N.H. 69, 72 (1993) (Indicating that the vote of the membership and the board of the public employer is binding and ends impasse

processes if neither side rejects it). If either side rejects the report, it is next sent to the legislature. *Id.* In accordance with RSA 273- A:9, before the full legislature votes, “[t]he joint committee on employee relations shall hold hearings [...] on all fact-finders' reports relative to the collective bargaining process with state employees and shall submit any recommendation on such [...] reports to the members of the senate and the house of representatives.” RSA 273-A:9(VI)(d). The legislature then votes on the fact finder’s report “to accept or reject so much of the recommendations as otherwise is permitted by law.” RSA 273-A:12(III).

If impasse is not resolved following the action of the legislature, then “negotiations shall be reopened”. RSA 273-A:12(IV). In looking at the statutory scheme as a whole, RSA 273-A provides multiple levels of oversight to settle an impasse, and empowers those other than the original bargaining entities to reach agreement. *See* RSA 273-A:12(II) and (III). It escalates from the power residing with the bargaining teams; then goes to the board of the employer and union members, respectively; and then ultimately rises to the legislative body. *See* RSA 273-A:12. Each of these steps represents a check on the previous step. *See id.*

In the present case, the parties proceeded all of the way through the impasse proceedings, and in the end resolved the impasse by the mutual agreement of the SEA membership and the State legislature. CR at 2-3. The SEA’s bargaining team and membership approved the report, and the State likewise adopted the

report when the joint committee on employee relations recommended the report to the legislature, which then in turn voted to accept the report. CR at 2-3. This situation results in binding terms because the legislature had the power and authority to bind the State to the fact finder's report, at least with regard to the cost items therein, and the union already agreed to the terms by way of vote by the full membership. *See* RSA 273-A:3(II)(b); *see* RSA 273-A:12; CR at 2-3; *see Appeal of Derry Educ. Assoc.*, 138 N.H. at 72.

RSA 273-A:3(II)(b) clearly establishes that the legislature has the authority to approve cost items. RSA 273-A:3(II)(b). RSA 273-A:12(III) provides that once either the Union membership or Board of the employer rejects the fact finder's report, the legislature "shall vote to accept or reject so much of the recommendations as otherwise is permitted by law." RSA 273-A:12(III). Thus because the legislature is permitted by law to approve cost items, and because it is authorized and in fact required to vote on a fact finder's report under the current circumstances, a favorable vote on a fact finder's report must create binding terms on the parties pertaining to cost items because that "is permitted by law". *Id*; *see also Appeal of Derry Educ. Assoc.*, 138 N.H. at 72. (Indicating that the vote of the legislative body is binding on cost items, but not necessarily non-cost items).

To conclude that the vote is not binding, at least regarding cost items, would also render the phrase "as otherwise is permitted by law" superfluous and meaningless. This Court has repeatedly upheld

the rationale that “we will not interpret a rule in such a way as to render a significant portion of it meaningless. *Appeal of Murdock*, 156 N.H. 732 (2008). In *Appeal of Derry Educ. Assoc.*, the court clearly establishes the legislature’s vote on a fact finder’s report is required on all items, even though its vote on non-cost items may be merely advisory because the legislature is generally empowered only to appropriate funds for cost items, but not to make decisions on non-cost items. *See Appeal of Derry Educ. Assoc.*, 138 N.H. at 72.

If the legislature is required to vote on all issues in a fact finding report, and the vote is non-binding regardless of being a cost item or non-cost item, then it raises the question of what the meaning of “as otherwise permitted by law” is. *See Id.* Given the context, and seeing as the legislature is expressly granted authority regarding cost items, “as otherwise permitted by law” must refer to the financial role of the legislature, and its authority regarding cost items, so that the legislature is permitted to bind the parties with regard to said cost items, but not necessarily non-cost items. *See id.* Because the law permits the legislature to render decisions on cost items, the binding effect is permissible by law, and to find otherwise would render a portion of the statute meaningless, as there is no other context for the phrase “as otherwise permitted by law”. *See id.*

In addition to *Appeal of Derry Educ. Assoc.*, the case of *AFSCME Local 3657, Hillsborough County Sherriff’s Office v. Hillsborough County* further supports the conclusion that the legislature’s vote was binding on the State. These cases show that

the vote of the legislature on a fact finder's report is at least binding on the State and with at least regard to cost items, and thus shows that the present situation has resulted in binding terms. *See Id; see AFSCME Local 3657, Hillsborough County Sherriff's Office v. Hillsborough County*, Case No. G-0012-20, Decision No. 2016-298 at 4-5* (December 22, 2016). In *Appeal of Derry Educ. Assoc.*, as mentioned above, while the court determined that the vote by the town legislature on the fact finder's report did not bind the parties with regard to non-cost items, it did not make the same conclusion regarding cost items. *See Appeal of Derry Educ. Assoc.*, 138 N.H. at 71-73. In its rationale, the Court determined that because the legislature's power is limited to approving cost items under RSA 273-A:3, the legislature was limited in binding the parties regarding non-cost items within the fact finder's report. *Id.* at 71.

However, this finding did not preclude the binding nature of issues involving cost items within a fact finder's report. *See id.* at 72. The Court stated that “[h]ad the legislature intended that the vote of the legislative body be binding on all issues, it could have so stated”, indicating that the vote is binding on some, but not all issues. *See id.* (Emphasis added). The present case is one such situation where the result of the vote is binding because the vote entailed a vote on cost items. *See id.* Additionally, the union membership also ratified the agreement, thus creating a meeting of the minds by each party, which meets the requirements of a contract. *See Appeal of Sanborn Regional School Bd.*, 133 N.H. 513, 518 (1990); CR at 2. Therefore,

the PELRB erred as a matter of law when it determined the governor has the exclusive right to negotiate collective bargaining agreements on behalf of the State, and that the legislative body, in this case the State legislature, lacked the statutory authority to resolve the impasse through a vote on the fact finder's recommendations. *See* RSA 273-A:3; *see* RSA 273-A:9; *see* RSA 273-A:12; *see Appeal of Derry Educ. Assoc.*, 138 N.H. at 72; CR at 140-43.

II. The PELRB erred as a matter of law or otherwise acted unreasonably when it determined that the vote of the legislature did not create a meeting of the minds, which created a binding contractual agreement.

The case of *AFSCME Local 3657, Hillsborough County Sherriff's Office v. Hillsborough County* is distinguishable from the present case because the parties in that case did not have a meeting of the minds, but do here. *See AFSCME Local 3657, Hillsborough County Sherriff's Office v. Hillsborough County*, Case No. G-0012-20, Decision No. 2016-298 at 7*; CR at 2-3. Said case offers insight into the meaning and authority of the legislature's vote during impasse proceedings, although this case is ultimately distinguishable from the present circumstances. In *AFSCME Local 3657, Hillsborough County Sherriff's Office*, the parties went to impasse, and the union bargaining team and the members voted against the fact finder's report. *AFSCME Local 3657, Hillsborough County Sherriff's Office v. Hillsborough County*, Case No. G-0012-20,

Decision No. 2016-298 at 4-5* (December 22, 2016). The county, however, voted to approve the report and after the legislature voted in favor of the report, the County implemented the terms of the report, including changes to wages. *Id.* The PELRB determined that such act was an unfair labor practice because the parties lacked mutual agreement and “mutual agreement on the terms and conditions of employment remain the *sine qua non* of a collective bargaining agreement formed under the PELRA.” *Id.* at 7*.

The Board stated that without mutual agreement, the legislature is not empowered by RSA 273-A to resolve impasse on its own, and instead creates pressure on the parties to resolve the impasse. *Id.* at 8*. Last, the Board rejected the argument that the employer could unilaterally impose conditions, similar to under the NLRA, finding that the PELRA contains no such similar provision. *Id.* In the present case, the PELRB erroneously reasoned that the parties do not have a meeting of the minds because it determined the legislative body does not have the authority to establish terms and conditions of employment through negotiations. CR at 143. However, when looking at the legislative scheme as a whole, it is apparent the legislature does have the statutory authority to bind the parties. *See* RSA 273-A.

In the present case, the PELRB erred when it failed to recognize the authority of the legislature to participate in bargaining and resolve impasse. *See* CR at 143-44. Here, the SEA and the legislature established a mutual agreement between the parties on the

terms and conditions of employment because the SEA and the State both voted to ratify the fact finder's report. CR at 2-3. The SEA membership voted in favor of the report shortly after it was issued near the end of 2019, and on June 29 and June 30, 2020, both the State Senate and State House of Representatives, respectively, voted in favor of the fact finder's report. CR at 2-3. The legislature is empowered by statute to fund or not fund a contract, and thus has the unilateral power, absent the governor, to as a practical matter, create or prevent an enforceable agreement. *See* RSA 273-A:1; *see* RSA 273-A:3.

Further, during the impasse process, the legislature is empowered to "accept or reject so much of the recommendations as otherwise is permitted by law". RSA 273-A:12(III). Thus, both parties have agreed to the terms of the fact finder's report, and so the legislature is not unilaterally imposing terms onto the employees like in *AFSCME Local 3657, Hillsborough County Sherriff's Office*, but instead is acting in its statutory capacity to resolve impasse through its abilities to accept fact finder recommendations and bind the State, at least with regard to cost-items. *See AFSCME Local 3657, Hillsborough County Sherriff's Office*, Decision No. 2016-298 at 4-5, 7*.

Further, the legislature's vote is binding under these circumstances because the legislature is acting as an agent of the State, and is empowered to take such action under the law, and in fact must take such action in accordance with RSA 273-A:12(III).

See RSA 273-A:9; *see* RSA 273- A:12. The legislature is one branch of State government. These negotiations are held between the union and the State of New Hampshire, not the union and the governor or the executive branch of New Hampshire. *See Id.* RSA 273-A creates a pathway for impasse proceedings, which escalates the power of the decision maker from the governor alone, to governor and council (the Board of the employer), and then ultimately to the legislature. *See* RSA 273-A.

It thus logically follows that at each step, the agent involved is empowered to reach an agreement, as otherwise permitted by law, and further creates an incentive to reach a deal at the lower steps so that each side will want to reach a deal on its terms rather than entrust an overseeing group. *See id.* Therefore, again, the vote by the legislature was binding on the State as it was acting as an agent thereof with authority from statute, and it reached agreement with the SEA, creating a contract. *See id;* CR at 2-3.

III. The PELRB erred as a matter of law or otherwise acted in an unjust or unreasonable manner when it incorrectly extended and/or misinterpreted the reasoning from Appeal of Derry Educ. Assoc., and determined that the State legislature's vote on a fact finder's report is non-binding, even with regard to cost items.

The rationale in *AFSCME Local 3657, Hillsborough County Sherriff's Office v. Hillsborough County* was flawed, in violation of Supreme Court precedent, and the PELRB erred by further

extending its flawed rationale to the present case. *See Appeal of Derry Educ. Assoc.*, 138 N.H. at 72; *see AFSCME Local 3657, Hillsborough County Sherriff's Office*, Decision No. 2016-298 at 7-8*; *see CR* at 142. In its decision in *AFSCME Local 3657, Hillsborough County Sherriff's Office*, the PELRB erred in its reasoning and incorrectly expanded upon the ruling in *Appeal of Derry Educ. Assoc.* in determining that “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”. *AFSCME Local 3657, Hillsborough County Sherriff's Office*, Decision No. 2016-298 at 7-8*. That is not what the Court in *Appeal of Derry Educ. Assoc.* determined to be the case. *See Appeal of Derry Educ. Assoc.*, 138 N.H. at 72.

Rather, as illustrated previously, the actual statement by the court in *Appeal of Derry* was “[h]ad the legislature intended that the vote of the legislative body be binding on all issues, it could have so stated”. *Appeal of Derry Educ. Assoc.*, 138 N.H. at 72. The rationale relied upon in *Appeal of Derry Educ. Assoc.* is quite different than the rationale applied in *AFSCME Local 3657, Hillsborough County Sherriff's Office*, and has a very different meaning than the language adopted by this Board and applied in this case. *See id*; *see AFSCME Local 3657, Hillsborough County Sherriff's Office*, Decision No. 2016-298 at 7-8*; *see CR* at 142.

In the former, the rationale implies that the legislature’s vote is binding on some, but not necessarily all subjects in a fact finder’s

report (namely cost-items), while the latter seems to indicate that the vote is not binding under any circumstances. *See id.* This direct contradiction of the Court's rationale is erroneous, and the PELRB erred as a matter of law or otherwise acted unreasonably when it extended the flawed reasoning to this case, which further violates Supreme Court precedent. *See id.* For these reasons, the PELRB erred as a matter of law when it concluded the legislature's vote on fact finding recommendations pertaining to cost items was not binding, as such reasoning is contrary to the Court's reasoning in *Appeal of Derry Educ. Assoc.*, which indicated the opposite. *See id.*

IV. The PELRB erred as a matter of law and/or acted in an unjust or unreasonable manner when it failed to recognize the distinction in bargaining laws for the State of New Hampshire, namely those under RSA 273-A:9, in contrast to the general provisions for other public employees and employers per RSA 273-A.

The case of *AFSCME Local 3657, Hillsborough County Sherriff's Office v. Hillsborough County* is distinguishable from the present case because the bargaining rules for the State are different from that of a county, and the PELRB erred as a matter of law when it failed to recognize the distinction in the present case. *See* RSA 273-A; CR at 142-43. The State of New Hampshire has different rules for collective bargaining in comparison to towns, cities, municipalities and counties. *See* RSA 273-A:9. In fact, RSA 273-

A:9 provides specific rules just for the negotiation of State bargaining units, and provides a greater role for the legislature. *Id.* This is important because in both *Appeal of Derry Educ. Assoc.* and *AFSCME Local 3657, Hillsborough County Sherriff's Office*, the rationale is predicated, at least in large part, on the limited powers of the legislature as enumerated by RSA 273-A. *See Appeal of Derry Educ. Assoc.*, 138 N.H. at 72; *see also AFSCME Local 3657, Hillsborough County Sherriff's Office*, Decision No. 2016-298 at 7-8*.

However, RSA 273-A:9 shows that the ability to negotiate is not reserved exclusively to the governor. *See* RSA 273-A:9; *see* RSA 273-A:12. The statute provides, in relevant part that “[a]ll 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...” RSA 273-A:9(I). (Emphasis Added). The legislature chose to make the governor’s right to bargain a “general” right, rather than an exclusive one, which when interpreted along with the powers and obligations of the legislature in RSA 273-A:9(VI) and RSA 273-A:12, illustrates that the legislature plays a role in actively bargaining and may bind the State in bargaining impasse procedures. *See id.*

In *Appeal of Derry Educ. Assoc.*, the Court stated that “[t]hroughout RSA Chapter 273-A the legislature described the responsibilities of the legislative bodies only with respect to cost items.” *Appeal of Derry Educ. Assoc.*, 138 N.H. at 72. While that

may be true with regard to political subdivisions of the State, it is not true about the State itself. *See* RSA 273-A:9. RSA 273-A:9(XI) creates a mandatory committee, comprised of members of the legislature to specifically study and make recommendations to the legislature as a whole on all fact finding reports. *Id.* It even meets prior to the commencement of collective bargaining to “discuss the State’s objectives in the bargaining process”. RSA 273-A:9(VI)(c). This shows the legislature intended the committee and State legislature be more involved in the negotiation and impasse process than the same processes involving local legislative bodies, especially with regard to its role in voting on the fact finder’s report. *See id.*

In fact, in 2018 the legislature increased the role of the legislature further with regard to fact finding by enlarging the size of the committee. *See* H.B.1386, 2018 Sess. (NH. 2018); *see also* Labor Committee Rep. H.B. 1386 (Jan. 24, 2018) *see also* CR 90-92, 109 (Stating the intent is to “execute best practices in the appointment” of the committee members “to better serve the State of New Hampshire, the governing body, and the New Hampshire employees”). Thus, because of the legislature’s expanded role in State negotiation and impasse processes, the limitations on legislative votes for fact finder reports determined in the aforementioned case law should not be applied to the present case, and this Court should determine that the PELRB erred as a matter of law and that the State legislature is authorized to bind the State and

resolve this impasse in accordance with its authority under RSA 273-A. *See* RSA 273-A.

V. Were the legislature's vote not binding on the State, it will lead to an absurd result.

RSA 273-A was designed so that no one person can obstruct the process. *See* RSA 273- A:9; *see* RSA 273-A:12. Negotiation teams are subject to the oversight of the board of the public employer and the members of the union both for impasse and ratification purposes. *See id.* However, the Governor has refused to submit the fact finder's report to the board of the public employer, and now refuses to abide by the vote of the legislature.² CR at 2-3. If the State's position were to be accepted, then the Governor may single handedly prevent negotiations and subsequent impasse proceedings from resulting in a contract, despite what the board of the public employer, the legislature, and the union are able to agree

² Since the filing of this appeal, the PELRB determined in the case of *State Employees' Association of New Hampshire, SELU Local 1984, NEPBA Local 40, NH Fish & Game Conservation Officers, And NEPBA Local 45, NH Fish & Game Supervisory Officers V. State of New Hampshire*, Case No: G-0115-9, Decision No. 2021-028 (2021), which determined in relevant part the Governor committed an unfair labor practice when he refused to submit the fact finder recommendations to the executive council. The State has appealed said decision, and it is docketed with this court as No: 2021-0248.

to. This was plainly not the intention of RSA 273- A, and it should not be allowed to stand here. *See* RSA 273-A.

VI. CONCLUSION

For the reasons set forth above, the Appellant requests this Honorable Court reverse the decision of the NH Public Employee Labor Relations Board, and/or in the alternative remand for further proceedings.

VII. CERTIFICATE OF COMPLIANCE

In accordance with New Hampshire Supreme Court Rule 21, the undersigned hereby certifies that this brief has been electronically filed with the Supreme Court on this 10th day of August, 2021.

In accordance with New Hampshire Supreme Court Rule 21, the undersigned hereby certifies a copy of this brief has been electronically submitted to Marc Beaudoin, Esq.; and John Krupski, Esq.; and opposing counsels Zachary Higham, and Jill Perlow, Esq.

In accordance with New Hampshire Supreme Court Rule 16

(10), the undersigned hereby requests that this matter be heard on oral argument and, further, that Gary Snyder, Esq. be designated as the attorney to argue its merits on behalf of the State Employees' Association of New Hampshire, SEIU Local 1984. Counsel respectfully requests fifteen (15) minutes for argument.

In accordance with New Hampshire Supreme Court Rule 16 (3), the undersigned hereby certifies that the decision being appealed is in writing and is attached to this brief.

Dated: August 10, 2021

Gary Snyder
Gary Snyder, General Counsel



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 subsections 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 items² 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."

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 Governor⁵ 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

**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. 2020-298**

Order on Motion for Rehearing

The SEA and the Interveners filed a motion for rehearing of PELRB Decision No. 2020-244 (November 3, 2020) on December 3, 2020. The State filed an objection on December 14, 2020. The SEA and Interveners' motions are being processed as motions for rehearing, which are governed by RSA 541:3 and Pub 205.02. Sub-section (a) of Pub 205.02 provides as follows:

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

Upon review, the motions are denied.

So ordered.

Date: 12/24/2020

/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.

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