THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Nos. 2021-0027 & 2021-0028

Appeal of 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

Appeal of the State Employees' Association of NH, Inc., SEIU Local 1984

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APPEAL BY PETITION FOR REVIEW PURSUANT TO RSA 541:6

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# BRIEF FOR APPELLEE, THE STATE OF NEW HAMPSHIRE

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THE STATE OF NEW HAMPSHIRE

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(Oral Argument Requested)

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## ISSUE PRESENTED

Whether the Public Employees Labor Relations Board correctly interpreted the Public Employee Labor Relations Act, RSA chapter 273-A, when it concluded that a vote of the state legislature adopting a 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[.]" CR[1] 140.

[1] Citations to the record are as follows:
"CR __" refers to the certified record of the proceedings before the Public Employee Labor Relations Board;
"SB__" refers to the brief of appellant, State Employees' Association of New Hampshire, Inc., SEIU Local 1984 and page number;
"TB__" refers to the brief of appellant, New Hampshire Troopers Association & A., and page number.

## STATEMENT OF THE CASE

On August 5, 2020, the State Employees' Association of NH, Inc. SEIU Local 1984 (the "SEA") filed a petition for declaratory ruling with the Public Employee Labor Relations Board (the "PELRB") asking the PELRB "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." CR 138. The SEA asserted that the legislature's vote created a binding contract between itself and the State as to cost items. TB 13. The State maintained that such a vote of the legislature was advisory and only the mutual agreement of the SEA and the State, represented by the governor, could bind the parties to a collective bargaining agreement ("CBA").

On August 19, 2020, 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 (the "Interveners ") moved to join the declaratory action in favor of the SEA's position. CR 40-42. On September 11, 2020, the PELRB granted the motion to intervene. CR 52. The SEA and Interveners are herein referred to collectively as the "appellants."

The PELRB ordered all parties to brief the issue and address the applicability of the PELRB's decision in *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"). The appellants and the State filed briefs with the PELRB on September 18, 2020. CR 53, 119, 125. On November 3, 2020, the PELRB

issued its decision, Decision No. 2020-244. It concluded, "[t]he state legislature's vote adopting the fact finder's report constitutes 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." CR 140.

On December 3, 2020, the SEA and Interveners filed motions for rehearing to which the State objected. CR 145, 150, 156. On December 24, 2020, the PELRB denied the appellants' motions for rehearing. CR 162.

This appeal followed.

## STATEMENT OF FACTS

The Public Employee Labor Relations Act ("PELRA"), codified at RSA 273-A, imposes upon the State, as a public employer, and the state employee unions an obligation to engage in good faith negotiations for a CBA by "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." RSA 273-A:3, I. Pursuant to this obligation, the State and the unions bargain for a new CBA every two years. The issue presented in this appeal arose during negotiations between the State and the unions for the 2019-2021 CBA.

During negotiations, one of the parties may declare that the negotiations are at an impasse. This means that the parties have "exhausted all their arguments, to achieve agreement in the course of good faith bargaining, resulting in a deadlock in negotiations." RSA 273-A:1, VI. Once a party has declared impasse, RSA 273-A:12 provides the parties with additional mechanisms for resolving the impasse. If the impasse is not resolved, the parties must engage a neutral party to serve as fact-finder. RSA 273-A:12, I(b). The fact-finder must then "make and report findings of fact together with recommendations for resolving each of the issues remaining in dispute." RSA 273-A:12, I(b).

The fact-finder's report remains confidential for ten days to allow the parties to consider the findings and continue any further negotiations to reach a CBA. If, after ten days, the parties remain at an impasse, RSA 273-A provides further "impasse procedures" involving the fact-finder's report. First, if either party rejects the fact-finder's report, the report "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 [the fact-finder's] recommendations as is otherwise permitted by law." RSA 273-A:12, II. If, following these votes, the impasse continues, the fact-finder's report is submitted to the legislative body of the public employer. RSA 273-A:12, III(a). Finally, "[i]f the impasse is not resolved following the action of the legislative body, negotiations shall be reopened." RSA 273-A:12, IV.

During the negotiations for the CBA for the 2019-2021 biennium, the parties bargained to impasse and followed impasse procedures mandated by RSA 273-A:12. The parties engaged in unsuccessful mediation and proceeded to fact-finding. The fact-finder issued her report on November 12, 2019, but the parties remained at impasse after the issuance of the fact-finder's report. The fact-finder's report was then submitted to the legislative body of the public employer pursuant to RSA 273-A:12, III(a). On June 29 and 30, 2020, the State Legislature, as the legislative body of the public employer, voted to accept the fact-finder's report.

Following this vote, the appellants took the position that the vote had created "a binding contract between the State and the SEA as to cost item[s]." TB 17. The State disagreed, arguing that the legislature's vote was merely advisory. The parties submitted this dispute to the PELRB for adjudication.

After the parties briefed the issue, the PELRB issued its November 3, 2020 decision finding in favor of the State and concluding that the legislature's vote on the fact-finder's report was advisory and non-binding

and that governor, as the State's bargaining representative, holds the exclusive authority to negotiate the terms and conditions of employment for state employees. CR 140. In reaching this decision, the PELRB relied on this Court's decision in *Appeal of Derry Education Association*, 138 N.H. 69, 71-72 (1994) ("*Appeal of Derry*"), as well as its own prior decision in *AFSCME Local* 3657. CR 141-44. The PELRB reasoned:

> [E]ven 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 PELRA does not expressly grant to . . . the local legislative body, any power beyond what is enumerated elsewhere in the PELRA, which is the appropriation of funding for cost items.

CR 142 (quoting *AFSCME Local 3657*) . The PELRB noted that a vote of the legislative body is advisory, and such a vote "creates pressure which will hopefully help the parties move away from impasse and toward an agreement[.]" CR 142. It also gives 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." CR 142 (quoting *AFSCME Local 3657*). The PELRB found that "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." CR 143. It further noted that "[t]here 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." CR 143. The PELRB contrasted this limited role with the governor's detailed

"authority and obligation to negotiate state collective bargaining agreements" which the PELRA establishes under RSA 273-A:9. CR 143.

The PELRB concluded its decision by observing that legitimizing a CBA "reached on the basis of the state legislature's vote adopting the fact finder's report . . . 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." CR 144. Finally, it noted, "[t]here 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." CR 144.

## SUMMARY OF THE ARGUMENT

The PELRB correctly interpreted RSA 273-A:12 when it concluded that a vote of the state legislature adopting a 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[.]" CR 140.

First, the plain language of RSA 273-A:12 supports this interpretation. RSA 273-A:12 permits the legislature to "vote to accept or reject so much of the [fact-finder's] recommendations as otherwise is permitted by law," and the PELRA elsewhere limits the legislature's role in collective bargaining negotiations to "appropriate[ing] public money." RSA 273-A:1, VII. A vote of the legislature under RSA 273-A:12 is, therefore, advisory and intended to move the parties toward agreement.

The overall statutory scheme of RSA 273-A and this Court's prior decisions interpreting it support the PELRB's interpretation of RSA 273-A:12. RSA 273-A specifically vests the executive, represented by the governor, with the exclusive authority to bargain for CBAs with executive Branch employees. RSA 273-A:9, I. The statute also furnishes the legislature with an intentionally limited advisory role in the bargaining process. RSA 273-A:3, II; RSA 273-A:9, VI. The appellants' interpretation of RSA 273-A:12 would vastly expand this role and generate inconsistencies within the PELRA. The PELRB's interpretation preserves the negotiating authority of the executive and the limited advisory role of the legislature that the statute intended.

The appellants' interpretation would also lead to absurd results. Chief among these, their interpretation of RSA 273-A:12 would abrogate the requirement of mutual assent of the parties necessary to form a valid contract. The appellants' interpretation would allow a non-party, the legislature, to bind a party, the executive, to a contract to which the latter has not assented to be bound. This Court should decline to interpret the PELRA in a way that produces the absurd result of eliminating one of the fundamental requirements of contract formation.

Finally, the appellants' interpretation of RSA 273-A:12 violates the separation of powers mandated under the State Constitution. The executive, not the legislature, holds the authority to expend State revenue. If this Court were to interpret RSA 273-A:12 as the appellants request, it would grant the legislature the authority to enter into contracts on behalf of the executive. This contractual authority, which this Court has described as "characteristically an executive function under the plain language of the constitution," *In re Opinion of the Justs*., 129 N.H. 714, 717 (1987), would constitute an unconstitutional encroachment upon the authority of the executive by the legislature. The PELRB's interpretation of the statute produces no such constitutional strains and is, therefore, preferable.

## ARGUMENT

### A. STANDARD OF REVIEW

The PELRB is "vested with the authority to initially define and interpret the terms of RSA chapter 273-A[.]" *Appeal of Derry*, 138 N.H. at 70-71. Therefore, this Court "will reverse the findings of the PELRB only where they are erroneous as a matter of law, unjust or unreasonable." *Id*. This case requires the Court to engage in statutory interpretation. "In matters of statutory interpretation, [this Court is] the final arbiter[] of the legislature's intent as expressed in the words of the statute considered as a whole." *State v. Formella*, 158 N.H. 114, 116 (2008).

### B. A VOTE OF THE STATE LEGISLATURE ADOPTING A FACT-FINDER'S REPORT CONSTITUTES AN APPROVAL OF THE COST ITEMS IN THE REPORT BUT IS NOT BINDING ON THE GOVERNOR.

This Court will first "examine the statutory language, and, where possible, ascribe the plain and ordinary meanings to the words used." *State v. Kardonsky*, 169 N.H. 150, 153 (2016) (citing *State v. Maxfield*, 167 N.H. 677, 679 (2015)). This Court "interpret[s] 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." *Id*. "Where reasonably possible, statutes should be construed as consistent with each other." *Appeal of Derry*, 138 N.H. 71.

#### 1. The plain language of RSA 273-A:12 and this Court's prior decisional law support the PELRB's interpretation.

RSA 273-A:12 governs the "[r]esolution of [d]isputes" in the event of an impasse. Section I provides a mechanism for the bargaining unit to make a presentation to the board of the public employer, and for the public employer to make a presentation directly to the bargaining unit. If impasse persists after those presentations, Section I then mandates that the parties engage in fact-finding. After the fact-finding, sections II, III, and IV provide the following procedures for the parties:

> 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.
>
> [. . .]
>
> 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.

The plain language of Sections III and IV require the fact-finder's report to be submitted to the state legislature, which serves as the "legislative body" for the State.

The same plain language then requires the legislature to "vote to accept or reject so much of the recommendations as otherwise is permitted by law." RSA 273-A:12. The term "as otherwise is permitted by law" is not defined RSA 273-A. This Court, however, has previously interpreted the phrase in *Appeal of Derry* as follows:

> We read 'as otherwise is permitted by law' to limit the legislative body's authority consistent with the remainder of RSA chapter 273–A. [Public employers], not legislative bodies, have authority to negotiate and enter into collective bargaining agreements. Throughout RSA chapter 273–A the legislature described the responsibilities of legislative bodies only with respect to cost items. The chapter defines legislative bodies as the bodies 'having the power to appropriate public money[.]'

138 N.H. at 71-72 (internal citations omitted). Under this Court's decisional law, therefore, the authority of the legislative body in negotiations is limited to "the power to appropriate public money," and a vote of the legislative body on a fact-finder's report allows that legislative body "authority only to review cost items in agreements reached through impasse resolution." *Id*. (citing *City of Portsmouth v. Ass'n of Portsmouth Tchrs., NEA-New Hampshire*, 134 N.H. 642, 650 (1991) ("*City of Portsmouth*").

Although the fact-finder's report in *Appeal of Derry* dealt exclusively with non-cost items, the Court's reasoning in that case applies with equal force here. *Appeal of Derry* focused on the language of RSA 273-A:12, IV, quoted above, and noted that the statute provides that "[i]f the impasse is not resolved following the action of the legislative body, negotiations shall be reopened." This Court reasoned that if the legislature had intended for a vote by the legislative body to bind the parties, "it could

have provided for impasses to be resolved *by* rather than *following* action of the legislative body." *Id*. at 72 (emphasis in original). This observation is as germane to this case as it was to *Appeal of Derry*.

Indeed, the legislature used this mechanism of resolution in Sections II and III of RSA 273-A:12 when it mandated the next steps following either party's rejection of the neutral party's recommendations. As the *Appeal of Derry* Court observed, "[h]ad the legislature intended that the legislative body's vote bind the parties, it could have used the same language in paragraph IV, thus requiring that the negotiations be reopened only if the legislative body also rejected the fact-finder's report. The legislature, however, chose not to do so." *Id*.

The reasoning of *Appeal of Derry* is equally applicable to this case. Had the legislature intended the vote of the legislative body to bind the parties to an agreement in the first instance, regardless of whether that agreement related to cost items or non-cost items, it could have written the statute to reflect this intention. It did not draft the statute in this way, and this Court should not add language that alters the legislature's intent.

As this Court observed, such a reading would radically alter the distribution of authority and responsibility between the legislature and the executive in the collective bargaining process. Or, as this Court wrote when it reaffirmed its *Appeal of Derry* holding in *Appeal of Alton School District*, 140 N.H. 303, 311 (1995), "[w]ere we to interpret RSA 273-A:1, IV otherwise, legislative bodies could determine in the first instance some of the most significant terms of . . employment. This would frustrate the entire collective bargaining process set forth in RSA chapter 273-A."

Notably, the State does not argue that a vote of the legislature can never bind the parties. To the contrary, when the legislature votes to ratify cost items to which the parties have mutually assented, the parties are bound to those terms. *See Appeal of Alton Sch. Dist.*, 140 N.H. at 311. However, the legislative body cannot bind the parties to terms to which they have not mutually assented in the first instance. The PELRB's conclusion, that the legislative body's vote is advisory, maintains the correct balance of negotiating responsibility that the legislature struck when it drafted the PELRA, as reflected in RSA 273-A:12 and this Court's decisional law. For this reason, this Court should affirm the PELRB's decision.

**2. The PELRB's interpretation promotes consistency and harmony within the PELRA and is consistent with this Court's PELRA jurisprudence.**

When interpreting statutes, this Court "construe[s] all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result." *Petition of Carrier,* 165 N.H. 719, 721 (2013). It does not "consider words and phrases in isolation, but rather within the context of the statute as a whole. *Id*. "This enables [the Court] to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme." *Id*.

The appellants argue, "when looking at the legislative scheme as a whole, it is apparent the legislature does have the authority to bind the parties." SB 39. They additionally argue that the language of RSA 273-A:9 grants the governor only a "general right" to bargain "rather than an

exclusive one" and that the public employer is "the State not the governor." SB 44; TB 31. These arguments directly contradict the language of the PELRA and this Court's related precedents.

First, the text of the PELRA does not support the appellants' understanding of the respective roles of the governor and legislature. Under RSA 273-A:9, "[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***," (emphasis added). Through this provision, RSA 273-A "vests the executive branch with substantive control over the collective bargaining process with State employees." *Appeal of House Legislative Facilities Subcomm*., 141 N.H. 443, 447 (1996). "In effect, the Governor has sole authority to direct the negotiation process." *Id*. at 446. Put more succinctly, "we construe 'state,' as used in RSA chapter 273–A, as signifying the executive branch only." *Id*. at 446. For purposes of the PELRA, therefore, the state and the executive are the same.

Furthermore, in order for the appellants' argument regarding the "general" right of the governor to negotiate under RSA 273-A:9 to have any merit, the statute would have to read: "[a]ll cost items and terms and conditions of employment affecting state employees in the classified system shall be negotiated by the state, ***generally*** represented by the governor as chief executive…" The statute does not say that. It says: "[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…" The term "generally" does not modify the governor's role in negotiations, it identifies

the State's general right and obligation to negotiate with employees in the classified system. But the governor's role in this statutory scheme is mandatory and exclusive and the appellants cannot rely on this provision to support their erroneous reading of the statute.

The appellants also raise a number of interrelated arguments, all of which contend, in essence, that the PELRA envisions the legislature's role in negotiations to be broader than that of other local legislative bodies. SB 43-46; TB 32-35. Even if this Court assumes, *arguendo*, that the legislature's role in the negotiating process is generally broader than other local legislative bodies, the appellants provide no basis in law for the assertion that a broader role in negotiations translates to authority to bind the parties.

However, contrary to the appellants' assertions, "the legislature's role in the bargaining process is markedly limited." *Id*. Specifically, the PELRA establishes a joint legislative committee, the functions of which "are advisory, and not part of the negotiations." *Id*. at 447. The legislature also maintains the authority to approve or reject cost items in a CBA negotiated by the parties. *Id*. It would be internally inconsistent to interpret 273-A:9 as vesting the executive branch with the exclusive power to negotiate with state employees, while also interpreting 273-A:12, IV as stripping that power away from the executive – as to cost items only – in the event of impasse. Such a holding would make the legislature a *de facto* public employer with the power to enter into CBAs for the executive. This outcome would functionally overturn this Court's holding in *Appeal of House Legislative Facilities Subcommittee,* and abrogate the reasoning underlying this Court's decision in *Appeal of Derry*.

In addition to this Court's holdings that have noted a limited role for the legislature in these negotiations, the provisions of RSA 273-A:3, II(b) demonstrate the point as well. That provision reads:

> (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.

When read in conjunction with RSA 273-A:12, III, this section mandates that a legislative body cannot alter the terms negotiated by the parties. The legislative body is restricted to a simple approve/reject vote and has no authority to modify cost items or non-cost items. This restriction undercuts the appellants' argument that the statute imbues the legislature with "interactive statutory authority to participate in negotiations with classified employees." TB 19.

To the contrary, where the statute invites the legislature to participate at all, it first restricts that invitation to bar any participation that might resemble negotiating. If the drafters of the PELRA intended the legislature to act "as an agent of the State" or wanted to "empower [it] to take such action under the law" to bind parties (SB 40), it would not have also limited the legislature's authority in such a specific way.

Because of the stark inconsistencies that the appellants' interpretation creates, this Court should reject their interpretation of RSA

273-A:12, III. Instead, in order to construe 273-A:9, 273-A:12, III, and this Court's own prior decisions consistently, it should affirm the PELRB's interpretation. That interpretation harmonizes the various sections of the PELRA by affirming the governor's exclusive authority to negotiate with state employees. In doing so, it also preserves the advisory role of the legislature, without subjecting the provisions of the PELRA to needless internal contradictions or inflating the legislature's role beyond what the statute contemplates.

The PELRB's interpretation also advances one of the legislative goals of the statute. Part of the purpose of RSA 273-A:12 is to expose parties to "the publicity that will no doubt attend an impasse." CR 142 (quoting *AFSCME Local 3657*). As this Court noted in *Appeal of Derry*, "[s]ubmission 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." *Appeal of Derry*, 138 N.H. at 73. Or as the PELRB observed in its decision in this case, "[t]he 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[.]" CR 142 (quoting *AFSCME Local 3657*).

As this Court recognized in *Appeal of House Legislative Facilities Subcommittee*, the PELRA vests a high degree of control in the executive branch. This is by design. Legislative oversight for cost items is necessary to effectuate the legislature's power over appropriations. *See*, *e.g., N.H. Health Care Ass'n v. Governor*, 161 N.H. 378, 387 (2011) ("The New Hampshire Constitution specifically charges the legislative branch with

appropriating and the executive branch with spending state revenue."). But the executive branch is ultimately responsible for its own employees and internal affairs. The PELRB's interpretation of the statute recognizes and respects that balance and this Court, therefore, should be affirmed.

### 3. The PELRB's interpretation avoids the absurd results that flow from the appellants' interpretation.

The appellants' argue (SB 38-39) that votes of the legislature and the full membership of the bargaining unit can constitute a meeting of the minds. This argument is meritless because it produces absurd results. As the PELRB has repeatedly noted, "mutual agreement on the terms and conditions of employment remains the *sine qua non* of a collective bargaining agreement formed under the PELRA." CR 142. More fundamental still is the basic tenet of contract law that "[t]here must be a meeting of the minds on all essential terms in order to form a valid contract." *Syncom Indus., Inc. v. Wood*, 155 N.H. 73, 82 (2007). A meeting of the minds is present when ***the parties*** assent to the same terms." *Id*. (emphasis added).

Only "the parties" can form the requisite mutual assent to create a valid contract. In the case of collective bargaining under the PELRA, "the parties" are the employee bargaining units and the public employer. *See* RSA 273-A:3. "[T]he New Hampshire General Court is not a public employer for purposes of RSA chapter 273–A." *Appeal of House Legislative Facilities Subcomm*., 141 N.H. at 449. Indeed, this Court has specifically held that "the terms 'public employer' and 'public employee' refer to the executive, and not to the legislative branch of State

government." *Id*. at 448. Again, "this Court construe[s] 'state,' as used in RSA chapter 273–A, as signifying the executive branch only." *Id*. at 446. If the executive, not the legislature, is the public employer, then the executive, not the legislature, is the party to the CBA.

The appellants cite no legal authority to support the notion that a non-party can bind a party to a contract without the latter's assent. Instead, they rely on their unsupported claim that "the State" is a single, monolithic entity in which one branch may bind another with impunity. SB 40-41. This argument ignores the role of the governor mandated under RSA 273-A:9, as well as this Court's prior decisions, which have explicitly held that that "the State," as that term is used in RSA 273-A, refers to the executive branch.

The legislature, therefore, cannot enter into valid CBAs on behalf of the executive branch and its employees. It can only appropriate public funds to meet the obligations of the terms, once the actual parties – the bargaining unit and the executive branch – have mutually assented. By arguing to the contrary, the appellants interpret the PELRA in a way that abrogates one of the foundational requirements of a valid contract, the mutual assent of the parties. This is an absurd result that the legislature cannot have intended when it passed the PELRA.

Nor is this the only absurd result that follows from the appellants' interpretation of RSA 273-A:12. As the appellants concede, *Appeal of Derry* stands for the proposition that "the legislative body may not bind the parties by a vote on non-cost items." TB 17; *see also* SB 36. If this Court were to hold that such a vote could bind the parties as to cost items, and a fact-finder's report contained recommendations related to both cost items and non-cost items, the legislative body's vote would bind the parties as to

the cost items, but require them to reopen negotiations regarding non-cost items.

However, the vote would also seriously undercut the public employer's negotiating power when the parties returned to the negotiating table. The effect of this hybrid negotiation would be to discourage the parties from negotiating in good faith on cost items because the bargaining unit could simply bypass the public employer if it believed it would find a more sympathetic negotiating partner in the legislative body. This would frustrate the intended purpose of the PELRA that the parties negotiate in good faith. RSA 273-A:9. The legislature cannot have intended such an absurd result when it vested the executive with exclusive authority to negotiate with state employees.

Moreover, such negotiations would result in piecemeal, Frankenstein agreements, in which the governor negotiates non-cost items and the legislature effectively negotiates cost items. The executive branch would then be responsible for enforcing both parts of these contracts, to which it only partially agreed. Here, too, the legislature cannot have intended the absurd result of forcing the executive branch uphold and enforce contracts to which it did not agree.

Finally, the PELRB's interpretation avoids straining the constitutionally mandated separation of powers of the state government. The constitutionality of a statute is a question of law, which this Court reviews *de novo*. *Akins v. Sec'y of State*, 154 N.H. 67, 70 (2006). "In reviewing a legislative act, [this Court] presume[s] it to be constitutional and will not declare it invalid except upon inescapable grounds." *Baines v. N.H. Senate President*, 152 N.H. 124, 133 (2005) (quotation omitted).

Part I, art. 37 of the State Constitution mandates the separation of powers between the three branches of state government. The Separation of Powers clause is violated "when one branch usurps an essential power of another." *N.H. Health Care Ass'n,* 161 N.H. at 386. "While some overlapping is permitted, the legislature may not encroach upon the exercise by the executive branch of clearly executive powers." *In re Opinion of the Justs*., 129 N.H. 714, 717 (1987).

Under Part II, Articles 2 and 56, "[t]he New Hampshire Constitution specifically charges the legislative branch with appropriating and the executive branch with spending state revenue." N*ew Hampshire Health Care Ass'n,* 161 N.H. at 387. More specifically, "the power to make contracts for the expenditure of the State's funds is characteristically an executive function under the plain language of the constitution[.]" *In re Opinion of the Justs*., 129 N.H. at 717. The PELRB's interpretation of RSA 273-A:12 preserves and reinforces this constitutionally mandated separation of powers by vesting the executive with the exclusive authority to enter into CBAs, while permitting the legislature to maintain oversight of its appropriations through the approval of cost items. This Court should, therefore, affirm the PELRB's interpretation of RSA 273-A:12.

## CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment of the trial court.

The State request oral argument.

Respectfully Submitted,

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October 12, 2021

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## CERTIFICATE OF COMPLIANCE

I, Zachary L. Higham, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 5,441 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

October 12, 2021

/s/ *Zachary L. Higham*
Zachary Higham

**CERTIFICATE OF SERVICE**

I, Zachary L. Higham, hereby certify that a copy of the State's brief shall be served on Gary Snyder, Esquire, and John Krupski, Esquire, counsel for the appellants, through the New Hampshire Supreme Court's electronic filing system.

October 12, 2021 /s/ *Zachary L. Higham*
Zachary Higham