THE STATE OF NEW HAMPSHIRE
SUPREME COURT

NO. 2021-0248

APPEAL OF STATE OF NEW HAMPSHIRE

MEMORANDUM OF LAW OF THE NEW ENGLAND POLICE BENEVOLENT ASSOCIATION LOCALS 40 AND 45 (NEPBA) PURSUANT TO RULE 16(4)(b)

Now comes Appellee NEPBA and files this Memorandum of Law in opposition to the appeal filed by the State of New Hampshire in the above captioned matter.

ARGUMENT

Point One

THE PELRB CORRECTLY RULED THAT THE GOVERNOR COMMITTED AN UNFAIR LABOR PRACTICE BY REFUSING TO SUBMIT THE FACTFINDER'S REPORT TO THE COUNCIL

A. STANDARD OF REVIEW

RSA 541 governs this Court's review of the Decisions of the PELRB. Appeal of Prof'l Fire Fighters of Hudson, 167 N.H. 46, 51 (2014); see RSA 273-A:14 (2010); RSA 541:2 (2007). "Pursuant to RSA 541:13 [the Court] will not set aside the PELRB's order except for errors of law, unless [the Court is] satisfied, by a clear preponderance of the evidence, that it is unjust or unreasonable." Id., 167 N.H. at 51. "The PELRB's findings of fact are presumed prima facie lawful and reasonable." Id.; see also RSA 541:13. "In reviewing the PELRB's findings, [the Court's] task is not to determine whether [it] would have found

differently or to reweigh the evidence, but, rather, to determine whether the findings are supported by competent evidence in the record." Prof'l Fire Fighters of Hudson, 167 N.H. at 51. The Court reviews "the PELRB's rulings on issues of law de novo." Id

B. THE STATUTE PLAINLY REQUIRES THE GOVERNOR - ASSUMING HE OR SHE DOES NOT ACCEPT THE FINDINGS - TO SUBMIT THE FACT-FINDER'S REPORT TO THE GOVERNOR'S COUNCIL

The Report Must Be Submitted to the Council

This Court has summarized RSA 273-A:12 ("Section 12") - the public collective bargaining statute's dispute resolution provision - as follows:

> RSA 273-A:12, which applies to all public bargaining units and public employers, sets forth detailed procedures designed to assist parties who are at an impasse in negotiations reach a resolution to their dispute. When the parties reach an impasse, RSA 273-A:12, I(b) requires the parties to engage in mediation with a neutral third party. The statute further provides that, if the parties so choose, or if mediation does not resolve the dispute, a neutral party chosen by the parties or appointed by the PELRB shall make and report findings of fact and recommendations. RSA 273-A:12, I(b). If one or both parties reject the recommendations, the statute sets forth additional steps to resolve the dispute. See RSA 273-A:12, II (submission of the neutral party's findings of fact and recommendations to the union's full membership and employer's board for a vote), III (submission of the neutral party's findings of fact and recommendations to the legislative board), IV (reopening negotiations if the parties still have not reached an agreement).

Appeal of New England Police Benevolent Assoc., Inc., 171 N.H.

490, 494-95 (2018).

The record reveals that the parties began negotiations in December of 2018. They eventually reached an impasse in bargaining and mutually began the dispute resolution framework contemplated by Section 12. After mediation failed, the parties proceeded to fact-finding in August of 2019. The fact-finder issued her report and recommendations on November 12, 2019. Though the report recommended difficult compromises from various bargaining positions, the NEPBA, having participated in the process, accepted the report of the factfinder. The State, acting through the Governor, rejected the report and its recommendations. At that point, in November 2019, the process came within the purview of RSA 273-A:12(II) which provides:

> 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.

Id. For purposes of State employee bargaining, at this stage of the Section 12 process, the Governor's Council serves as the "board of the public employer." RSA 273-A:1, II(a)(1); State Employees Assoc., SEIU, Local 1984 and State of New Hampshire, New Hampshire Hospital, PELRB Decision No. 2000-097 (September 15, 2000).

After a year of bargaining and months after entering the

Section 12 process at great expense to both the taxpayers and the Unions, the Governor unilaterally withdrew from the Section 12 process. He refused to comply with the plain language of the statute and declined to submit the matter to the Governor's Council. His representatives informed the Union that, given the Governor's position, any course of action would take months and the Union should just accept the State's position as the "best deal they would ever recieve." (State's Appendix at 6).

As the PELRB concluded, the Governor's refusal to submit the fact-finders report to the Council is a per se violation of Section 12. This action represents a failure to bargain in good faith and a violation of RSA 273-A:5, I(e) and (g). As the Board noted, this exact issue was expressly resolved by the Board years earlier. See State Employees Assoc., PELRB Decision No. 2000-097 (refusal to present fact-finders report to the Council is an unfair labor practice and bad faith bargaining). As the Board correctly observed more than twenty years ago:

> For the State to refuse to submit the fact[-]finder's report to the Executive Council, acting as the "board of the public employer," is not conduct anticipated nor countenanced by the legislature as expressed in RSA 273-A:12, II. Indeed, to do so would void the subsequent mandatory submission called for in RSA 273-A:12, III. Appeal of Derry Education Association, 138 N.Y. 69, 71 (1993). Good faith bargaining extends to the parties' actions throughout the negotiations process, a process that includes fact[-]finding as required by RSA 273-A:3, I. Again under our statutory scheme governing labor relations that does not require binding arbitration nor allow public employee strikes,

> the obligation of good faith continues ad infinitum until a collective bargaining agreement is achieved. The PELRB need not wait that long to make its decision. The State has, through its continued refusal to present the fact-finder's report, failed to bargain in good faith and therefore has committed an unfair labor practice pursuant to RSA 273-A:5, I(e) and (g).

State Employees Assoc., SEIU, Local 1984 and State of New Hampshire, New Hampshire Hospital, PELRB Decision No. 2000-097 at 3 (September 15, 2000).

Sunapee Difference, LLC Does Not Control This Case

The Board also correctly rejected the State's reliance on Sunapee Difference, LLC v. State, 164 N.H. 778 (2013)("Sunapee"). In Sunapee, the Court considered, inter alia, whether Governor Lynch was required to submit a proposed lease amendment regarding the Sunapee ski area to the Governor's Council. Id. at 789-90 The lease agreement required the approval of the "Governor and Executive Council" in order to effectuate amendment. Id. at 790. The Court presumed that the parties intended the provision to comply with RSA 4:40 governing the disposal of state-owned real estate. Id. Given the implied application of RSA 4:40 the Court concluded that, pursuant to RSA 21:31-a the term "Governor and Executive Council" in the lease meant "governor with the advice and consent of the council." Id. at 791. Because "nothing could ever be gained," by Council review, the Court concluded that "RSA 4:40 would not

require the Governor to put before the Executive Council a proposed lease of state lands that the Governor does not approve." Id. at 792(citing In re Opinion of the Justices, 78 N.E. 311, 312 (1906)). The dispute at bar rests on an entirely different statutory basis and the Council's review serves a unique purpose.

Consideration of the fact-finder's report by the Council is necessitated not by the Council's power to withhold consent for a Governor's proposed action, but rather from its designation by the Legislature as another public body in the dispute resolution process that should have the opportunity to consider the course of bargaining and the fact-finder's report. The purpose of the Council's review - as stated succinctly by this Court - is to "heighten public scrutiny of the negotiations." Appeal of Derry Educ. Ass'n, NEA-New Hampshire, 138 N.H. 69, 73 (1993). That scrutiny, and the expression of the Council's position "may increase the pressure on the parties to reach agreement." Id. The failure to submit the report to the Council was not a meaningless gesture - instead it served only to frustrate and subvert the express intent of the legislature to facilitate the resolution of the impasse. In these circumstances, the PELRB correctly found that the Governor's intentional violation of Section 12 constituted a failure to bargain in good faith and a

violation of RSA 273-A:5, I(e) and (g).[1]

POINT 2

THE PELRB CORRECTLY RULED THAT THE GOVERNOR'S DECEMBER 3, 2019 EMAIL TO STATE EMPLOYEES WAS UNLAWFUL DIRECT DEALING AND INTERFERENCE

Unions have the right to "represent employees in collective bargaining negotiations" and the right to "represent the bargaining unit exclusively." See RSA 273-A:11. Pursuant to RSA 273-A:5, I(e) "[i]t shall be a prohibited practice for any public employer ... [t]o refuse to negotiate in good faith with the exclusive representative of a bargaining unit ...." As this Court has held, "dealing directly with employees is generally forbidden." Appeal of Franklin Educ. Ass'n, NEA-New Hampshire, 136 N.H. 332, 335-36 (1992)("If an employer can negotiate directly with its employees, then the statute's purpose of requiring

[1] Further buttressing this conclusion is the timing of the Governor's decision to exit the Section 12 framework. Here, the record provides clearly that the Governor had participated in the Section 12 process for months prior to deciding that he did not have to follow the law. The parties both entered into mediation and a lengthy hearing before a mutually selected fact-finder. The Governor continued the process by formally rejecting the factfinder's report. It was only then, after having entered the Section 12 framework, participating for months and complying with all its provisions, that the Governor decided to stop his adherence to the law. Having participated in the Section 12 process, the State could not - in good faith - suddenly decide that it did not want to comply with parts of the statute it found unhelpful to its cause at the time.

collective bargaining is thwarted."); see NEPBA Local 123 v. City of Rochester PELRB Dec. No. 2010-139.

Importantly, RSA 273-A includes a concomitant prohibition on interference with rights it provides. RSA 273-A:5, I (a). An employer interferes with the Union's rights within the meaning of RSA 273-A:5, I(a) when it communicates with employees in a manner manifesting "intimidation, coercion or misrepresentation." Appeal of City of Portsmouth, 140 N.H. 435, 437-38 (1995).

In pertinent part, the Governor's December 3rd email stated:

> As you know, the State has been in negotiations with union leadership for several months to find agreement on a new state employee contract.
>
> Last week, the negotiations reached a new phase when both parties received a report from an independent fact-finder who worked to help us reach a compromise. Upon receiving that report, I instructed State negotiators to put forward a proposal that was nearly identical to the fact-finder's conclusions and heavily favored the union leadership's requests.
>
> Our proposal provides you with higher wages and better benefits, almost double the $6 million authorized by the Legislature in the state budget. I believe that the fact-finder's report is fair and shares my appreciation for your hard work and commitment to our state.
>
> We have proposed nearly all the fact-finder's recommendations, with the exception of a single recommendation to re-open an old contract that had previously been agreed upon in good faith by all parties. Our proposal includes the following items totaling $11 million in enhanced benefits:
>
> 1.16% wage increase in 2020 and another 1.16% wage increase in 2021

> An average of 6.4% increased costs associated with health care benefits and 2.5% increase in dental plan rates absorbed by the State with no increase to employees
>
> Increase hazardous duty pay by 20% (from $25 to $30)
>
> Double direct care pay ($5 to $10) for those working in 24 hour facilities
>
> Increase longevity payments 17% by $50 from $300 to a new amount of $350
>
> Expand insurance coverage to cover developmental disorders for children
>
> Expand employee discounts at State recreational areas to allow a discount for one guest.
>
> So far, I am pleased to announce that we have reached an agreement based upon the fact-finder's recommendations with the Teamsters and the Liquor Investigators that reflects that the needs of our state employees are a top priority.

The communication constitutes unlawful direct dealing and interference. As the Board held, the State had, but failed to use, a statutory vehicle providing a possible avenue to make a negotiating presentation to the union membership. See RSA 273-A:12 I (a)(2). Instead, at perhaps the most crucial time in the Section 12 process, the Governor made a direct bargaining pitch to the employees, touting, inter alia, a wage proposal that had been rejected by the certified representative. See also Tecnocap, LLC v. NLRB, 1 F.4th 304, 317 (4th Cir. 2021) ("[D]irect dealing occurs when there's evidence that the employer decided to deal with the union through the employees,

rather than with the employees through the union."). The purpose was to undercut the unions and attempt to gain terms and conditions that it could not achieve by negotiation with the certified representatives by bargaining directly with the employees. Permanente Medical Group, 332 NLRB 1143, 1144 (2000)(establish criteria for finding of direct dealing are "(1) that the [employer] was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining; and (3) such communication was made to the exclusion of the Union.")

The email incorrectly implies that the State had agreed to the fact-finder's recommendations including representations regarding wages. Particularly problematic are statements such as (1) "I instructed State negotiators to put forward a proposal that was nearly identical to the fact-finder's conclusions and heavily favored the union leadership's requests."; (2) "I believe that the fact-finder's report is fair and shares my appreciation for your hard work and commitment to our state."; and (3) "We have proposed nearly all the fact-finder's recommendations, with the exception of a single recommendation to re-open an old contract that had previously been agreed upon in good faith by all parties." Whatever the Governor's intent or beliefs, these statements are

misleading in context and do not meet the standard of good faith bargaining.

The factfinder recommended a 2.86% increase for year 1 and 1.16% for year 2. The State did not agree to this central and material provision in the report. Instead, the State's offer was for a general wage increase of 1.16% for both years. As the Board noted:

> It is difficult to reconcile [the Governor's] characterization with the fact that the fact finder recommended a wage increase of 2.86% in year 1 and 1.16% in year 2 whereas the proposal outlined in the Governor's email offers 1.16% in year 1 and 1.16 in year 2.

(State's Appendix at 14). In addition, the Governor improperly suggested that the State was absorbing all health care cost increases. This is plainly incorrect because the fact-finder expressly reduced her recommended wage increase in order to allow employees to take on a "share" of increased health care costs. C.R. at 212 (the "State will be 'credited' with the equivalent of a .5% wage increase for the employees' "share" of increased healthcare costs").

The Governor's representations, occurring at the crucial time period during the impasse resolution process, were material and a calculated attempt to coerce the union membership to agree to the State's proposal and plainly interfered in the union's exercise of its rights under Section 12. The Governor's comments regarding

the negotiations were not idle or inconsequential statements especially given the pendency of the contractual process but instead dealt with the central issue in the bargaining - wages. See Rochester Communications Union, NEPBA Local 123 and City of Rochester, PELRB Dec. No. 2010-139. The process contemplated by RSA 273-A:12 is the only manner by which bargaining unit employees can achieve changes in working conditions. Id. The Governor's misleading comments, at the same time he was promising to abandon and stop the statutorily-mandated dispute resolution process (by not submitting the report to the Governor's Council) are evidence of bad-faith bargaining and interference with the union's and employees' rights. On this record, there is ample support for the PELRB's findings that the State violated RSA 273-A:1, XI; RSA 273-A:3, I; and RSA 273-A:5 I(a),(b),(e) and (g).

Notwithstanding the State's contentions, the Governor's communication is not a "perfect example of the type of 'free flow of information from both union and employer' that this Court has recognized as healthy in public employment bargaining." State's Brief at 32. Indeed, the State devotes approximately three pages of its brief to explain all of the reasons why it believes the communication was technically not a misrepresentation. State's Brief at 21-24. Of course, the Governor's original communication was directed at employees who were not necessarily familiar with the details of the negotiations and did not have the benefit of

the State's three-page explanation.

Also notable is the State's treatment of the reality that the fact-finder's recommended wage increase for 2021 was 2.86% and not the 1.16% offered in the "nearly identical" proposal from the Governor. Perplexingly, the State continues to assert on appeal that "[t]his proposal is 'nearly identical' to the fact-finder's recommendation, with the exception of an additional increase recommended by the fact-finder to account for cost of living increases ...." (State's Brief at 21)(emphasis added). That the fact-finder explained and justified the basis for her recommendation (of 2.86%), does not then provide the State with the right to pick an intermediate point in her analysis (1.16%) and represent to the employees that her report is "nearly identical" to its proposal.

Moreover, the peculiarly nuanced language used by the Governor - to assert that the State had proposed "nearly all the fact-finder's recommendations, with the exception of a single recommendation to re-open an old contract that had previously been agreed upon in good faith by all parties" - buttresses the Board's ultimate findings. That sentence - cryptic and untethered to the issue of wages - obscured the clear, material difference between the Governor's proposal and the report. Against this backdrop, the PELRB's finding that the communication was "made in an effort to convince employees to pressure the unions to accept the State's

bargaining proposal, reject the fact finder's report, and reject any contrary recommendations from the unions" is well supported by the record. Ultimately, the State simply did not meet the standard of good faith bargaining.

The State's reliance on Appeal of the City of Portsmouth Bd. of Fire Comm'rs, 140 N.H. 435 (1995) and the State's largely undeveloped claim of alleged First Amendment protections, do not, on the record in this case, compel a contrary result. Appeal of the City of Portsmouth involved public comments made by a fire commissioner outside the time of negotiations criticizing the leadership of the local Fire union after the union leadership provided the press with sensitive medical information regarding a union member. Id. at 435-36. This Court reversed a PERLB finding of unlawful interference. Acknowledging the need to be "cognizant" of State and Federal Constitutional provisions, the Court indicated that "interference" pursuant to RSA 273-A:5, I(a) and (b) could not be established "absent intimidation, coercion, or misrepresentation." Id. at 438-39 (quoting Local 79, Serv. Emp. v. Lapeer Cty. Gen. Hosp., 314 N.W.2d 648, 651 (Mich.Ct.App.1981)). In examining the comments of the Commissioner, the Court found that they did not contain elements of "intimidation, coercion or misrepresentation" and determined that there was, accordingly, no interference. Id. at 439.

Here, as discussed above, the Governor's communication was

made specifically and directly to employees, during active contract bargaining and recited (albeit inaccurately) the specific current bargaining positions of the parties. C.f. In re Town of Hampton, 154 N.H. 132, 135 (2006)(no direct dealing where "letter pertained not to ongoing or future negotiations between the town and the union, but, rather, to failed past negotiations."); SEIU, Local 509 v. Labor Relations Comm'n, 431 Mass. 710 (2000)(employee surveys conducted by employer during bargaining constituted direct dealing). The Governor's communication was a direct attempt to undermine the bargaining position of the union and sway the employees to accept a position different from the union's. Most importantly, as set forth herein, the communication contained elements of both coercion and misrepresentation. C.f. Appeal of the City of Portsmouth Bd. of Fire Comm'rs, 140 N.H. at 439. Accordingly, the State's contentions should be rejected.

CONCLUSION

For the foregoing reasons, the NEPBA respectfully requests that the Court AFFIRM the Decision of the PELRB.

Respectfully submitted,
The NEPBA,
By its lawyer,

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February 11, 2022

Request for Oral Argument

The NEPBA believes that oral argument will assist the Court.

/s/ Peter J. Perroni

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2022, I provided a true copy of the foregoing by email and via the Court's electronic filing system on all counsel of record listed in the filing system.

/s/*Peter J. Perroni* 2/11/22

STATEMENT OF COMPLIANCE

I hereby certify that to the best of my knowledge, information and belief this memorandum of law complies with Supreme Court Rule 16(4)(b) and that the memorandum contains approximately 3,618 words according to MS Word. I also certify to the best of my knowledge, information and belief, pursuant to Supreme Court rule 26(7) that this memorandum complies with Supreme Court Rules 26(2)-(4).

/s/*Peter J. Perroni* 2/11/22