THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0248

Appeal of the State of New Hampshire

APPEAL PURSUANT TO RULE 10 FROM A DECISION OF THE PUBLIC EMPLOYEE LABOR RELATIONS BOARD

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

JOHN M. FORMELLA
ATTORNEY GENERAL

and

ANTHONY J. GALDIERI
SOLICITOR GENERAL

Laura E. B. Lombardi, Bar No. 12821
Senior Assistant Attorney General
New Hampshire Department of Justice
Civil Bureau
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3650
laura.e.lombardi@doj.nh.gov

(Fifteen-minute oral argument requested)

TABLE OF CONTENTS

TABLE OF CONTENTS 2
TABLE OF AUTHORITIES 4
ISSUES PRESENTED 7
PROVISIONS OF STATUTES INVOLVED 8
STATEMENT OF THE CASE 12

A. Background 12
B. The Unions' Unfair Labor Practice Complaints Against the State and the PELRB Proceeding 13
C. PELRB Decision 16

STATEMENT OF FACTS 17

A. Findings of Fact By the PELRB 17
B. Additional Facts Supported By the Record 20

1. The fact-finder's report and the Unions' baseless claims of misrepresentation in the Governor's email. 20
2. The Unions' response to the Governor's email 24
3. The established process for placing items on the Governor and Executive Council's agenda 25

SUMMARY OF THE ARGUMENT 26
ARGUMENT 28

I. STANDARD OF REVIEW 28
II. THE PELRB ERRED AS A MATTER OF LAW IN CONCLUDING THAT THE GOVERNOR'S DECEMBER 3, 2019 EMAIL TO STATE EMPLOYEES CONSTITUTED AN UNFAIR LABOR PRACTICE. 29

A. The Governor's Email Did Not Interfere With Union Member's Rights or the Administration of Union Business in Violation of RSA 273-A:5, I(a) and (b). 29
B. The Governor's Email Did Not Constitute Direct Dealing in Violation of RSA 273-A:5, I(e) 33
C. The Governor's Email Did Not Violate RSA 273-A:12, I(a)(2). 38

III. THE PELRB ERRED AS A MATTER OF LAW IN CONCLUDING THAT THE GOVERNOR'S DECISION NOT TO PLACE THE FACT-FINDER'S REPORT ON THE COUNCIL'S AGENDA CONSTITUTED AN UNFAIR LABOR PRACTICE. 42

CONCLUSION 46
CERTIFICATION 46
CERTIFICATE OF COMPLIANCE 47
CERTIFICATE OF SERVICE 48
ADDENDUM TABLE OF CONTENTS 49

TABLE OF AUTHORITIES

Cases

Americare Pine Lodge Nursing & Rehab. Ctr. v. N.L.R.B., 164 F.3d 867 (4th Cir. 1999) 34, 35, 36

Appeal of AFL–CIO Local 298, 121 N.H. 944 (1981) 31, 32

Appeal of City of Portsmouth, Bd. of Fire Comm'rs, 140 N.H. 435 (1995) ..... *passim*

Appeal of Cover, 168 N.H. 614 (2016) 40

Appeal of Franklin Educ. Ass'n, NEA-New Hampshire, 136 N.H. 332 (1992) 34, 36, 37

Appeal of New England Police Benevolent Ass'n, Inc., 171 N.H. 490 (2018) 28

Appeal of Prof'l Fire Fighters of Hudson, 167 N.H. 46 (2014) 28

Appeal of Public Serv. Co. of N.H., 122 N.H. 919 (1982) 41

Appeal of State Employees' Ass'n of New Hampshire, Inc., SEIU, Loc. 1984 (New Hampshire Pub. Emp. Lab. Rels. Bd.), 171 N.H. 391 (2018) 28

Brouillard v. Governor and Council, 114 N.H. 541 (1974) 44

City of Rochester v. Corpening, 153 N.H. 571 (2006) 40

In re Town of Hampton, 154 N.H. 132 (2006) 34, 36

Loc. 79, Serv. Emp. Int'l Union, AFL-CIO, Hosp. Emp. Div. v. Lapeer Cty. Gen. Hosp., 314 N.W.2d 648 (Mich. App.1981) 31

N.L.R.B. v. Pratt & Whitney Air Craft Div., United Techs. Corp., 789 F.2d 121 (2d Cir. 1986) 35

NLRB v. Gissel Packing Co., 395 U.S. 575 (1960) 31, 41
Petition of Mone, 143 N.H. 128 (1998) 44
Polonsky v. Town of Bedford, 173 N.H. 226 (2020) 41
Ryan Iron Works, Inc., v. N.L.R.B., 257 F3d 1 (1st Cir. 2001) 36
Sunapee Difference, LLC v. State, 164 N.H. 778 (2013) ..... *passim*

Statutes

RSA 4:40 43
RSA 21:31-a 27, 43, 44
RSA 21-I:14, I 25
RSA 21-I:14, I(b)(4) 25
RSA chapter 273-A ..... *passim*
RSA 273-A:1, II(a)(1) 27, 43, 44
RSA 273-A:1, VI 12
RSA 273-A:2 13
RSA 273-A:3, I 12, 33
RSA 273-A:5 ..... *passim*
RSA 273-A:6, I 13
RSA 273-A:12, I(a) 39, 40, 41
RSA 273-A:12, I(a)(1) 12, 38
RSA 273-A:12, I(a)(2) ..... *passim*
RSA 273-A:12, I(b) 12, 13, 39
RSA 273-A:12, II ..... *passim*
RSA 273-A:12, III(a) 13
RSA 273-A:12, IV 13
RSA 273-A:14 28

RSA 541:13 28
RSA 541-A:24 40
29 U.S.C. § 158(a)(5) 34

Constitutional Provisions

U.S. CONST. amend. I 31
N.H. CONST. pt. I, art. 22 31
N.H. CONST. pt. I, art. 37 ..... 44, 45
N.H. CONST. pt. II, art. 41 45
N.H. CONST. pt. II, art. 60 45
N.H. CONST. pt. II, art. 62 45

ISSUES PRESENTED

I. Whether the Public Employee Labor Relations Board ("PELRB") erred as a matter of law in concluding that the State committed an unfair labor practice under RSA 273-A:5 when Governor Sununu sent an email to state employees discussing the status of ongoing negotiations with the unions on a collective bargaining agreement.

II. Whether the PELRB erred as a matter of law in concluding that the State committed an unfair labor practice under RSA 273-A:5 when Governor Sununu declined to place the fact-finder's report on the Governor and Executive Council agenda.

PROVISIONS OF STATUTES INVOLVED

RSA 21:31-a Governor and Council. –

The phrase "governor and council" shall mean the governor with the advice and consent of the council.

RSA chapter 273-A – Public Employee Labor Relations Act

RSA 273-A:1 Definitions. –

> 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.

RSA 273-A:3 Obligation to Bargain. –

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

273-A:5 Unfair Labor Practices Prohibited. –

I. It shall be a prohibited practice for any public employer:

(a) To restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter;

(b) To dominate or to interfere in the formation or administration of any employee organization;

* * * * *

(e) To refuse to negotiate in good faith with the exclusive representative of a bargaining unit, including the failure to submit to the legislative body any cost item agreed upon in negotiations;

* * * * *

(g) To fail to comply with this chapter or any rule adopted under this chapter;

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.]

STATEMENT OF THE CASE

A. Background

The Public Employees Labor Relations Act ("PELRA"), codified at RSA chapter 273-A, imposes upon the State, as a public employer, and the state employee unions an obligation to bargain, which means to engage in good faith negotiations for a collective bargaining agreement ("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 that statute, the State and the unions engage in bargaining to reach a new CBA every two years. The two issues presented in this appeal arose during negotiations between the State and the unions for the 2020-2021 CBA.

During the course of negotiation, one of the parties may declare that the negotiations are at 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 impasse is declared, RSA 273-A:12 provides the parties additional mechanisms for resolving the impasse, including the option for the negotiator for the employee bargaining unit to make a presentation directly to the board of the public employer, RSA 273-A:12, I(a)(1), or the negotiator for the public employer to make a presentation directly to the bargaining unit, RSA 273-A:12, I(a)(2). If the impasse is not resolved, the parties must engage in mediation, RSA 273-A:12, I(b), and, failing that, the parties must engage a neutral party to serve as a 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. *Id.*

If after ten days the parties continue to remain at impasse, RSA 273-A:12 provides for additional procedures that concern the fact-finder 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 his recommendations as is otherwise permitted by law." RSA 273-A:12, II. If either the full membership of the employee organization or the board of the public employer rejects the fact-finder's report, then the 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.

RSA 273-A:5 defines what constitutes an unfair labor practice, and RSA 273-A:2 establishes a public employee labor relations board ("PELRB"), which has primary jurisdiction of all violations of RSA 273-A:5, *see* RSA 273-A:6, I.

B. The Union's Unfair Labor Practice Complaints Against the State and the PELRB Proceeding

On December 6, 2019, the State Employees' Association of New Hampshire, SEIU Local 1984 ("SEA") filed an unfair labor practice

complaint against the State. CR3-8.[1] The SEA filed an amended complaint on December 30, 2019. CR28-34. On February 3, 2020, NEPBA Locals 40 and 45 ("NEPBA")—the certified bargaining representative for certain employees of the Department of Fish and Game—also filed an unfair labor practice complaint against the State. CR71-75. The PELRB consolidated the two cases. CR82.

Both complaints alleged that on December 3, 2019, when bargaining impasse procedures were underway, the State violated its bargaining obligations and engaged in improper direct dealing with bargaining unit employees when the Governor emailed state employees and discussed State bargaining proposals and a fact-finder's report rejected by the State. The SEA and the NEPBA (collectively, the "Unions") also alleged that the State failed to follow the impasse procedures of RSA 273-A:12 when the Governor refused to submit the fact-finder's report to the Executive Council. The NEPBA further contended that this refusal impaired the Unions' ability to have the fact-finder's report reviewed by the legislature, the next step in the impasse process.

Based on their allegations, the Unions claimed that the State violated RSA 273-A:5, I (a) ("[t]o restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter"); (b) ("[t]o dominate or to interfere in the formation or administration of any employee organization"); (e) ("[t]o refuse to negotiate in good faith with the exclusive representative of a bargaining unit, including the failure to

[1] References to the record are as follows: "CR" refers to the certified record of the proceedings before the PELRB; "A" refers to the appendix filed with this brief; and "Add" refers to the addendum to this brief.

submit to the legislative body any cost item agreed upon in negotiations"); and (g) ("[t]o fail to comply with this chapter or any rule adopted under this chapter").

The State answered the complaints, asserting that the Governor's December 3, 2019 email did not constitute improper direct dealing or interfere with the rights of the bargaining units where the email lawfully and appropriately explained the status of collective bargaining negotiations, the State's most recent proposal to the Unions, and the reasons for the proposal. CR43-47, 87-90. With respect to the Governor's decision not to place the fact-finder's report on the Governor and Executive Council agenda, the State asserted that, consistent with New Hampshire Supreme Court precedent and the Governor's constitutional powers as supreme executive magistrate, RSA 273-A:12, II did not require the Governor to put before the Council a fact-finder report that the Governor did not approve. *Id.*; *see also Sunapee Difference, LLC v. State*, 164 N.H. 778 (2013).

The presiding officer for the PELRB held a prehearing conference on February 25, 2020, and determined that the matter could be submitted to the PELRB on stipulations, briefs, and affidavits. CR98-99. The parties filed a joint statement of facts, CR135-40, and five joint exhibits, CR141-243. The joint exhibits included the fact-finder's report, CR201-240, and the Governor's December 3, 2019 email to state employees, CR241-42. The parties also each submitted their own additional exhibits, CR244-57, and the Unions submitted three affidavits, CR128-34. The parties presented their respective legal arguments through briefs filed on August 19, 2020, CR258-99, and reply briefs filed on August 31, 2020, CR300-28. The State attached to its reply brief as an additional exhibit the Department

of Administrative Services' Manual of Procedure 105, which governs the procedural operations of the Governor and Executive Council, including the process for placing items on the agenda. CR314-28.

C. PELRB Decision

On February 26, 2021, the PELRB issued Decision No. 2021-028, determining that the State committed unfair labor practices in violation of RSA 273-A:5, I(a), (b), (e), and (g). A3-19. Specifically, with respect to the Governor's December 3, 2019 email, the PELRB concluded that the email constituted direct dealing in violation of RSA 273-A:5, I(e), and interfered with union member's rights and the administration of union business in violation of RSA 273-A:5, I (a) and (b). A14-15. In addition, the PELRB concluded that the Governor's email violated RSA 273-A:12, I(a)(2), and, therefore, constituted a unfair labor practice in violation of RSA 273-A:5, I(g). A15.

With respect to the Governor's decision not to place the fact-finder's report on the Executive Council's agenda, the PELRB concluded that the State failed to comply with RSA 273-A:12, II, and, as a result, failed to bargain in good faith and committed an unfair labor practice in violation of RSA 273-A:5, I(e) and (g). A18.

Finally, the PELRB rejected the Unions' argument that the State interfered with the legislature's review and vote on the fact-finder's report. A18.

The State filed a motion for reconsideration, CR378-84, which the PELRB denied, A20-21. The State filed this appeal.

STATEMENT OF FACTS

A. Findings of Fact By the PELRB

The PELRB made the following findings of fact, *see* A5-9, summarized below, which the State does not challenge on appeal:

On December 6, 2018, the parties began negotiations for the 2020-2021 CBA. After reaching an impasse in bargaining, the parties proceeded to mediation and then to fact-finding beginning on August 1, 2019. On November 12, 2019, the fact-finder issued a report with recommendations. The report included a recommendation for a 2.86% wage increase in year 1 and a 1.16% wage increase in year 2.

On November 21, 2019, the parties met to continue negotiations. The State offered wage increases of 1.16% in year 1 and 1.16% in year 2. The Unions rejected the State's wage proposal and countered with written proposals based on the fact-finder's wage recommendations.

On November 22, 2019, the SEA negotiator advised the State that the SEA would be proceeding with a membership vote on the fact-finder's report. Between November 22 and December 3, 2019, the SEA sent three emails to members providing bargaining updates and information on the fact-finder's report. The SEA explained that the next step would be a member vote on the fact-finder's report, and notified members of a 6:00 p.m. informational meeting at the Department of Environmental Services auditorium on December 3, during which the bargaining team would explain the fact-finder's report to members.

On December 3, 2019, at 4:32 p.m., the Governor sent an email to all state employees, including SEA and NEPBA bargaining unit members, which stated as follows:

> Subject: Message from the Governor
>
> Dear fellow state employee:
>
> As you know, 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 or one guest.

So far, I am pleased to announce that we have reached an agreement based upon the factfinder's recommendations with the Teamsters and the Liquor Investigators that reflects that the needs of our state employees are a top priority.

It is my hope that the remaining unions will reconsider the many valuable benefits that the state's proposal offers to state employees. It is my hope that we can deliver a new contract soon based upon our proposal that reflects our state's priorities and the hard work of our state employees.

As noted above, our proposal is estimated to cost $11 million in FY20 and FY21—55 million more than had been allocated by the state budget. I was happy to roll up my sleeves and find the additional funding within state government because I understand that our state employees are the backbone of our state and I value your hard work.

This holiday season is a time we can all be grateful to live and work in the greatest state in the country; where we get things done for the benefit of those we serve. Thank you for all you do.

Sincerely,
Chris Sununu
Governor

By December 5, the Governor had posted a link to his December 3 email on the NH First web portal regularly accessed by state employees.

By December 4, the SEA and SEA chapter leaders were hearing from members asking about the Governor's email. Callers were angry and confused since the Governor's statements conflicted with information the

SEA was presenting about the impasse and the pending member vote on the fact-finder's report. Many believed the Governor tried to mislead them to get them to vote against the fact-finder's report. The situation created additional work for SEA chapter leaders, who had to address the member confusion caused by the Governor's email.

At the December 18, 2019 Executive Council meeting, the Governor stated he would not bring the fact-finder's report before the council for consideration.

In January 2020, NEPBA Local 40 and 45 and the SEA voted to accept the fact-finder's report. The SEA reported that less than 1% had voted "no" on the report.

B. Additional Facts Supported By The Record

Exhibits submitted by the parties in the proceeding before the PELRB establish the following additional facts.

1. The fact-finder's report and the Unions' baseless claims of misrepresentation in the Governor's email

In the proceedings before the PELRB, the Unions claimed that the Governor misrepresented the State's most recent proposal to the Unions by stating in his December 3, 2019 email that the State's proposal was "nearly identical to the fact-finder's conclusions" and included "nearly all the fact-finder's recommendations, with the exception of a single recommendation to re-open an old contract." Add50. Specifically, the Unions identified three items that they alleged the Governor misrepresented in his email: (1) the State's most recent wage proposal as compared to the fact-finder's recommendation on wages; (2) the Governor's statement that the State

would absorb the increased costs associated with healthcare benefits; and (3) the Governor's statement that the State would expand employee discounts at State recreational areas to allow a discount or one guest. CR268-69, 277-78. The record does not support any of the Unions' claims of misrepresentation.[2] As explained below, the State's proposal to the Unions was, in fact, "nearly identical" to the fact-finder's recommendations, with the exception of a recommendation that the wage adjustments previously agreed upon by all parties in negotiating the prior CBA be reopened and taken into account in adjusting wages under the current CBA. *See* CR213.

First, the Governor's email accurately describes the State's wage proposal as "1.16% wage increase in 2020 and another 1.16% wage increase in 2021." Add50. This 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 during the prior CBA period. Add50. "1.16% for each of two years" is precisely the number the fact-finder reached in calculating an appropriate wage adjustment based on the actual cost of living and then adjusting for the employees' share of increased healthcare costs. CR213. However, the fact-finder went on to recommend that the 1.16% wage adjustment be increased by an additional 1.7% in the first year of the contract to take into

[2] The SEA also claimed that the first sentence of the email misrepresented the status of bargaining and implied that the parties had reached a compromise on the contract. CR277. A reading of the email as a whole dispels this notion. Later in the email, the Governor clearly states that the State only had reached an agreement with the Teamsters and the Liquor Investigators, and that the Governor remained hopeful that the remaining unions would reconsider the State's proposal. Add50.

account the fact that the wage adjustments under the prior agreed-upon CBA had been 1.7% less than recommended by the previous fact-finder in those prior negotiations. *See* CR213. The Unions acknowledge that the current fact-finder's wage recommendation "included a percentage that was previously recommended from a 2018-2019 fact-finder's report." CR277. The State agreed with the fact-finder's recommendation to increase wages by "1.16% for each of two years," but disagreed with the recommendation that an additional 1.7% be added in year one of the 2020-2021 CBA to adjust for cost of living increases during the 2018-2019 contract period. The 2018-2019 CBA is the "old contract" referenced in the Governor's email that the State did not believe should be re-opened because it "had previously been agreed upon in good faith by all parties." Add50. The Governor's email accurately describes the State's wage proposal as compared to the fact-finder's recommendation on wages.

Second, the Governor's email accurately describes the State's proposal with respect to the increased costs associated with healthcare benefits and dental plan rates. The Unions claimed in their briefs to the PELRB that the Governor's email "misleadingly suggested that the State was absorbing all health care cost increases." CR269; *see also* CR278. Specifically, the Unions take issue with the Governor's statement that the State's proposal included, "[a]n 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." Add50. There is nothing misleading about this statement. The Unions acknowledge that under the State's proposal, "there would be no increase in health premium cost sharing," and they do not challenge the representation that the State would

be absorbing 6.4% and 2.5% of increased costs. CR269, 278. Nevertheless, the Unions claim that the Governor's statement is misleading because the fact-finder reduced the wage adjustment by .5% to account for the employees' share of increased healthcare costs; therefore, the wage adjustment would have been higher if the State had absorbed all of the increased healthcare costs. CR278. The Governor's email does not say that the State is absorbing all of the increased healthcare costs; it states the amount of costs the State would be absorbing, and states that there would be no increase in health premium cost sharing to employees. Add50. The fact that employees would also be absorbing a percentage of the increased costs through the wage adjustment calculations is a separate issue and does not render false the Governor's statement about the amount of costs absorbed by the State.

Finally, the Governor's email accurately states that the State's proposal would "[e]xpand employee discounts at State recreational areas to allow a discount or one guest." Add50. This is consistent with the fact-finder's report. CR237-38. The report indicates that the State had previously proposed to "eliminate[] employee discounts at state campgrounds on Friday and Saturday nights and add[] a discount for one guest pass at recreational areas." CR237. The Unions opposed the proposal, and the fact-finder agreed with the Unions. CR237-38. The State accepted the fact-finder's recommendation, and, in its new proposal, offered instead to "expand employee discounts at State recreational areas to allow a discount or one guest." Add50.

Nothing in the record demonstrates that anything in the Governor's December 3, 2019 email was false. To the extent the Unions believed that

the email was somehow confusing or misleading, they were free to communicate themselves with their members about the fact-finder's report and the State's most recent proposal, which they did.

2. The Union's response to the Governor's email

The day after the Governor sent the email, SEA President Richard Gulla released a video message addressing the Governor's email and encouraging SEA members to vote yes on the fact-finder's report. CR248-49. The SEA sent the video to all members through email, along with a link to its website where the SEA had posted slides from its presentation on December 3, 2019, and a summary handout. *Id.* In the email, the SEA explained that "the fact-finder recommended increasing wages more than 4% over a span of two years, with 2.86% for fiscal year 2020 and 1.16% for fiscal year 2021." CR249.

The following day, the SEA sent another email explaining that members would be voting on the fact-finder's report, not the State's proposal discussed in the Governor's email, and stating that "[t]he Fact Finder Report is FAIR AND FAVORABLE TO ALL OF US AS STATE EMPLOYEES." CR250 (emphasis in original). Attached to the email was an outline summarizing the fact-finder's report, as well as the full fact-finder's report. CR250-53. The full fact-finder's report was also available on the SEA website. CR253.

Ultimately, Union members voted almost unanimously in favor of the fact-finder's report. CR256-57; A9.

3. The established process for placing items on the governor and executive council's agenda

Pursuant to RSA 21-I:14, I, the Governor and Executive Council has approved a Manual of Procedures ("MOP"), adopted by the commissioner of administrative services, which provides a comprehensive and uniform system of state financial management, including setting procedures for, among other items, Governor and Council actions. RSA 21-I:14, I(b)(4). Section 150 of the MOP describes the general operations for items that require action by Governor and Council as follows:

> The Council may approve or reject an agenda item, or table the item for action at a later time. The Governor does not vote on the agenda items but rather exercises his or her authority through control of the meeting agenda and retains a negative over agenda items.

CR315.

It has been the long-standing practice of the Governor and Council, as reflected in Section 150 of the MOP and consistent with the Governor's constitutional authority as the supreme executive authority of the State, for the Governor to decide which items to bring the Council for advice and consent. *See, e.g., Sunapee Difference, LLC v. State*, 164 N.H. 778 (2013) (involving Governor Lynch's decision not to submit to council for consideration a proposed lease amendment that the governor did not approve). Governor Sununu acted consistently with this longstanding practice when he elected not to place the fact-finder's report on the Executive Council's agenda.

SUMMARY OF THE ARGUMENT

I. This Court has recognized that the purposes of RSA chapter 273-A are best served by permitting the free flow of information from both union and employer. Allowing an employer to communicate with its employees during ongoing contract negotiations does more than affirm its right to freedom of speech; it also aids the workers by allowing them to make informed decisions. Thus, an employer may freely communicate with its employees about a wide range of issues, including the status of negotiations and outstanding offers. The PELRB erred as a matter of law in concluding that the Unions had an exclusive "right and prerogative to evaluate and assess for employees the fact-finder's report and State's proposal." A15. Because the Governor's December 3, 2019 email did not seek to negotiate with employees outside of the collective bargaining process—but rather inform them about the status of negotiations and the State's most recent proposal to the Unions—the PELRB erred in determining that the State (1) interfered with union member's rights and the administration of Union business in violation of RSA 273-A:5, I(a) and (b), and (2) engaged in direct dealing in violation of RSA 273-A:5, I(e).

The PELRB also erred in interpreting RSA 273-A:12, I(a)(2) as prohibiting a public employer from communicating with its employees about outstanding proposals to the union during the dispute resolution process. The plain language of the statute does not support the PELRB's broad construction, which would raise significant constitutional concerns. The statute unambiguously provides that the parties to collective bargaining "may" elect to participate in the direct presentation procedures if they have

bargained to impasse. The statutory language is straightforward; the decision whether to engage in the direct presentation process lies within each party's discretion. Here, neither the State nor the Unions elected to participate in the direct presentation option; therefore, the parties were not required to follow the procedures set forth in RSA 273-A:12, I(a)(2), and the PELRB erred as a matter of law in concluding that the State violated the statute. To the extent the PELRB interpreted the statute as creating a new prohibition against employers communicating with their employees during ongoing negotiations, such a construction is entirely unsupported by the language of the statute. If the legislature had intended to create a new category of unfair labor practice, it would have stated as much, and would have placed that prohibition in RSA 273-A:5, not RSA 273-A:12.

II. The PELRB erred in concluding that the State violated RSA 273-A:12, II when the Governor opted not to place the fact-finder's report on the Executive Council's agenda. Pursuant to RSA 21:31-a, the phrase "governor and council" in RSA 273-A:1, II(a)(1) means "governor with the advice and consent of council." In *Sunapee Difference*, this Court interpreted that phrase to mean that the governor and council act independently, with the power to act residing with the governor; therefore, the governor need not put before the executive council a matter that the governor rejects. 164 N.H. at 791-92. Because RSA 273-A:12, II does not require the Governor to put before the Executive Council a fact-finder report that the Governor rejects, the PELRB erred in determining that the State committed an unfair labor practice in violation of RSA 273-A:5, I(e) and (g).

ARGUMENT

I. STANDARD OF REVIEW

RSA chapter 541 governs this Court's review of PELRB decisions. *Appeal of State Employees' Ass'n of New Hampshire, Inc., SEIU, Loc. 1984 (New Hampshire Pub. Emp. Lab. Rels. Bd.)*, 171 N.H. 391, 394 (2018); *see* RSA 273-A:14. Pursuant to RSA 541:13, this Court "will not set aside the PELRB's order except for errors of law, unless [it is] satisfied, by a clear preponderance of the evidence, that it is unjust or unreasonable." *Appeal of State Employees' Ass'n.*, 171 N.H. at 394 (quoting *Appeal of Prof'l Fire Fighters of Hudson*, 167 N.H. 46, 51 (2014)). "The PELRB's findings of fact are presumed *prima facie* lawful and reasonable." *Id*. (citation omitted); *see* RSA 541:13. In reviewing the PELRB's findings, this 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." *Appeal of State Employees' Ass'n.*, 171 N.H. at 394 (citation omitted). This Court reviews the PELRB's rulings on issues of law *de novo*. *Id*. (citation omitted).

Resolution of the issues raised in this appeal requires that this Court interpret the language of the pertinent statutes. "Although the PELRB's findings of fact are presumptively lawful and reasonable and will not be disturbed if supported by the record, [this Court is] the final arbiter[] of legislative intent as expressed in the words of a statute considered as a whole and will set aside erroneous rulings of law." *Appeal of New England Police Benevolent Ass'n, Inc.*, 171 N.H. 490, 493 (2018) (citation omitted). When examining the statutory language, this Court "ascribe[s] the plain and

ordinary meaning to the words used." *Id.* (citation omitted). The Court does "not consider words and phrases in isolation, but rather within the context of the statute as a whole, and construe[s] all parts of a statute together to effectuate its overall purpose and to avoid an absurd or unjust result." *Id.* (citation omitted). The 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.* (citation omitted). It does "not look beyond the language of a statute to determine legislative intent if the language is clear and unambiguous." *Id.*at 493-94 (citation omitted).

II. THE PELRB ERRED AS A MATTER OF LAW IN CONCLUDING THAT THE GOVERNOR'S DECEMBER 3, 2019 EMAIL TO STATE EMPLOYEES CONSTITUTED AN UNFAIR LABOR PRACTICE.

The facts relevant to the Union's claims that the Governor's December 3, 2019 email constituted an unfair labor practice are undisputed. As discussed below, the PELRB erred as a matter of law in determining that by sending the December 3, 2019 email, the State (1) interfered with union member's rights and the administration of Union business, (2) engaged in direct dealing, and (3) violated RSA 273-A:12, I(a)(2).

A. The Governor's Email Did Not Interfere With Union Member's Rights or the Administration of Union Business in Violation of RSA 273-A:5, I(a) and (b).

The PELRB concluded that the Governor's email amounted to an unfair labor practice under RSA 273-A:5, I(a) and (b) because it interfered with "the right of employees to be represented by the bargaining unit's

exclusive representative in negotiations" and the "right and prerogative [of the Unions] to evaluate and assess for employees the fact-finder's report and the State's proposal." A15. The PELRB's ruling conflicts with this Court's interpretation of RSA 273-A:5, I(a) and (b), and, therefore, constitutes an error of law requiring reversal.

RSA 273-A:5, I, provides in pertinent part:

> I. It shall be a prohibited practice for any public employer:
>
> (a) To restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter;
>
> (b) To dominate or to interfere in the formation or administration of any employee organization[.]

In *Appeal of City of Portsmouth, Bd. of Fire Comm'rs*, 140 N.H. 435 (1995), this Court directly addressed the issue of "what speech constitutes 'interference' within the meaning of RSA chapter 273-A." *Id.* at 438. In establishing the contours of "interference" under RSA 273-A:5, I(a) and (b), the Court "recognize[d] that the first amendment is a significant factor in our construction of the statute." *Id.* The Court found that the federal counterpart to RSA chapter 273–A—the National Labor Relations Act ("NLRA")—provided a useful backdrop for the Court's interpretation of the New Hampshire statute. *Id.* The Court observed that the "federal statute requires that in order for the views, argument, or opinion of a public employer to constitute an unfair labor practice, those views, argument, or opinion must contain 'threat of reprisal or force or promise of benefit.'" *Id.* at 438-39 (quoting 29 U.S.C. § 158(c)). Although the Court declined to impute the requirements of section 8(c) of the NLRA into RSA chapter

273-A, the Court noted that it had relied on the language of that statute for guidance in the past and had recognized the "need to 'be cognizant of the constitutional provisions that raise the freedom to communicate one's views to the highest level of protection that can be provided.'" *Id.* at 439 (quoting *Appeal of AFL–CIO Local 298,* 121 N.H. 944, 946 (1981), and citing U.S. CONST. amend. I; N.H. CONST. pt. I, art. 22).

An employer's right to communicate with its employees falls under the protections of the First Amendment. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1960); *see also Loc. 79, Serv. Emp. Int'l Union, AFL-CIO, Hosp. Emp. Div. v. Lapeer Cty. Gen. Hosp.*, 314 N.W.2d 648, 651 (Mich. App.1981) ("[W]e entertain grave doubts about the constitutionality of a statute forbidding the expression of views on union representation by a public employer. Clearly, private employers have a First Amendment right to express such views."). This Court found the Michigan Court of Appeal's decision in *Local 79* helpful in establishing the contours of "interference" under RSA 273-A:5, I(a) and (b), and noted that the purposes of a statute addressing the organizational rights of public employees is "best served by permitting the free flow of information from both union and employer." *Appeal of City of Portsmouth, Bd. of Fire Com'rs*, 140 N.H. at 439.

In this case, the PELRB found that the Governor's December 3, 2019 email "had an immediate and discernible impact on employees as it caused avoidable confusion and anger about the status of negotiations and related matters among bargaining unit employees which the unions were required to address." A14 (citing PELRB Finding of Fact 15). This Court has stated that "[p]roof of disruptive effect, whether intended or not and whether justified or not, does not amount to, or rise to the level of,

interference." *Appeal of City of Portsmouth, Bd. of Fire Com'rs*, 140 N.H. at 439 (quotation marks omitted). The Unions addressed the confusion through their own emails and presentations addressing the Governor's email and encouraging members to vote in favor of the fact-finder's report. Ultimately, Union members voted almost unanimously in favor of the fact-finder's report. The facts of this case provide 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 and consistent with First Amendment rights.

Finally, the PELRB makes much about the timing of the Governor's email. *See* A13 (observing that the December 3, 2019 email was sent "in the midst of ongoing negotiations" and "hours before an employee informational meeting on the fact-finder's recommendations at the Department of Environmental Services auditorium . . . ."). In *Appeal of AFL–CIO Local 298,* this Court rejected a similar argument, holding that a public employer's mailing of a letter to employees three days before a scheduled representation election did not render the communication an unfair labor practice, even though the union claimed that it did not have sufficient time to respond to the letter. 121 N.H. at 946. In reaching that decision, the Court noted that RSA 273-A:5 does not provide for any "time, place and manner limitations" on speech. *Id.*

The PELRB's conclusion that the Unions had an exclusive "right and prerogative to evaluate and assess for employees the fact-finder's report and State's proposal[,]" A15, directly contradicts this Court's prior precedent interpreting RSA 273-A:5, I(a) and (b). Accordingly, this Court should reverse the PELRB's finding that the Governor's December 3, 2019

email amounted to "interference" within the meaning of RSA 273-A:5, I(a) and (b).

B. The Governor's Email Did Not Constitute Direct Dealing In Violation of RSA 273-A:5, I(e).

The PELRB concluded that the State engaged direct dealing based on a finding that the Governor's December 3, 2019 email constituted "a direct presentation of the State bargaining position to the bargaining unit made in an effort to convince employees to pressure the unions to accept the State's bargaining proposal." A14-15. As discussed below, such conduct, as a matter of law, does not constitute direct dealing under RSA 273-A:5, I(e). The PELRB's determination that the State engaged in an unfair labor practice in violation of RSA 273-A:5, I(e) should, therefore, be reversed.

RSA 273-A:5, I(e) states that "[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 . . . ." RSA 273-A:3, I, provides,

> 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.

Together, RSA 273-A:3, I, and :5, I(e) compel a public employer to negotiate terms of employment in good faith with the association's

exclusive representative. *Appeal of Franklin Educ. Ass'n, NEA-New Hampshire*, 136 N.H. 332, 335 (1992). This Court has interpreted this requirement to mean that a public employer "must not only negotiate with the association's exclusive representative, but also refrain from negotiating with anyone other than the association's exclusive representative." *Id.* The prohibition against direct dealing forbids an employer from negotiating directly with its employees, not communicating directly with its employees. *See In re Town of Hampton*, 154 N.H. 132, 134 (2006) (citing *Appeal of AFL-CIO Local 298*, 121 N.H. at 946) ("[T]he mere act of communication by an employer with its employees is not a *per se* unfair labor practice under RSA 273-A:5."). It is the act of negotiating that the statute forbids, because "[i]f an employer can negotiate directly with its employees, then the statute's purpose of requiring collective bargaining is thwarted." *Appeal of Franklin Educ. Ass'n*, 136 N.H. at 336.

In interpreting RSA 273-A's prohibition against direct dealing, this Court has recognized the similarity between RSA 273-A:5, I(e) and 29 U.S.C. § 158(a)(5), the equivalent provision in the NLRA. *Appeal of Franklin Educ. Ass'n*, 136 N.H. at 335. Because the direct dealing provisions of RSA 273-A and the NLRA are similar, this Court may rely upon federal case law interpreting the federal provision as persuasive authority. *See id.* at 335-36.

In developing the standard for what constitutes direct dealing under the NLRA, federal courts recognize the need to balance the rights of the workers, the union, and the employer. *See Americare Pine Lodge Nursing & Rehab. Ctr. v. N.L.R.B.*, 164 F.3d 867, 875 (4th Cir. 1999) ("This standard recognizes the right of represented employees to negotiate

exclusively through the union, while protecting the right of employers to tell their side of the story."); *N.L.R.B. v. Pratt & Whitney Air Craft Div., United Techs. Corp.*, 789 F.2d 121, 135 (2d Cir. 1986) ("[D]etermining whether direct dealing has taken place is a complex task involving a balancing of the rights of the workers, the union, and the employer."). Balancing the rights of all interested parties is consistent with this Court's recognition that the First Amendment is a significant factor in the construction of RSA 273-A and its reliance on section 8(c) of the NLRA for guidance in construing RSA 273-A:5. *See Appeal of City of Portsmouth, Bd. of Fire Comm'rs*, 140 N.H. at 439.

In *N.L.R.B. v. Pratt & Whitney Air Craft Div., United Techs. Corp.*, the Court of Appeals for the Second Circuit explained that "granting an employer the opportunity to communicate with its employees does more than affirm its right to freedom of speech; it also aids the workers by allowing them to make informed decisions while also permitting them a reasoned critique of their unions' performance." 789 F.2d 121, 134 (2d Cir. 1986). The Second Circuit observed that,

> Labor negotiations do not occur in a vacuum. While the actual bargaining is between employer and union, the employees are naturally interested parties. During a labor dispute the employees are like voters whom both sides seek to persuade. . . . [U]nions are granted extensive powers to communicate with employees in the represented unit. Consistent with the First Amendment, the employer must also be afforded an opportunity to communicate its positions.

Id. "[P]ermitting the fullest freedom of expression by each party nurtures a healthy and stable bargaining process." *Americare Pine Lodge Nursing*, 164 F.3d at 875; *see also Appeal of City of Portsmouth, Bd. of Fire Com'rs*,

140 N.H. at 439 (recognizing that the purposes of RSA 273-A are "best served by permitting the free flow of information from both union and employer").

Thus, under the NLRA, communications to employees that inform them of the employer's bargaining position do not constitute direct dealing. *Americare Pine Lodge Nursing & Rehab. Ctr. v. N.L.R.B.*, 164 F.3d 867, 876 (4th Cir. 1999); *see also Ryan Iron Works, Inc., v. N.L.R.B.*, 257 F3d 1, (1st Cir. 2001) ("[A]n employer may communicate or clarify its position to employees[.]"). "[E]mployers may freely inform employees of bargaining proposals, and certainly may do so if the proposals are already before the union." *Americare Pine Lodge Nursing*, 164 F.3d at 876. "An employer may speak freely to its employees about a wide range of issues including the status of negotiations, outstanding offers, its position, the reasons for its position, and objectively supportable, reasonable beliefs concerning future events." *Id.* at 875.

An employer communication only becomes improper direct dealing if it seeks to negotiate directly with union members rather than with their exclusive representative.[3] *Appeal of Franklin Educ. Ass'n*, 136 N.H. at 335 ("If an employer can negotiate directly with its employees, then the statute's purpose of requiring collective bargaining is thwarted."); *Americare Pine Lodge Nursing*, 164 N.H. at 875 ("Improper direct dealing

---

[3] The PELRB's reliance on *In re Town of Hampton*, 154 N.H. 132 (2006), is misplaced. While the facts of that case involve communication by a public employer to his employees regarding past negotiations, that case does not stand for the proposition that all communication from an employer to its employees regarding ongoing negotiations constitutes direct dealing, particularly where the communication does not seek to negotiate directly with the employees. *Id.*

is characterized by actions that persuade employees to believe that they can achieve their objectives directly through the employer and thus erode the union's position as the exclusive bargaining representative.").

For example, in *Appeal of Franklin Education Association,* the Franklin school board sent new employment contracts—which were the subject of ongoing negotiations between the school board and the teacher's union—directly to teachers without consulting the teachers' union. 136 N.H. at 336. The contracts contained the following language: "This document is an offer by the Franklin School Board to contract for your professional services. *Sign both copies and return them to your Principal on/or before 4:00 p.m., Friday, June 15, 1990.*" *Id.* (emphasis in original). "The contracts indicated that the teachers could not refuse to sign without risking their job[,]" and "the teachers were given only eleven days to accept the school board's offer." *Id.* The school board's conduct in that case constituted improper direct dealing because the school board did not simply communicate to the teachers the details of a proposal it had made to the union; rather, it sought to negotiate directly with the teachers themselves by asking them to accept the offer and sign the contract.

In contrast, the Governor's December 3, 2019 email in no way sought to negotiate directly with Union members. The email simply informed employees about the status of negotiations and provided details about the State's most recent proposal to the Unions. The Governor did not seek to strike a deal with employees outside of the collective bargaining process; in fact, he specifically referenced "union leadership" in the email and expressly stated that he hoped "the remaining *unions* will reconsider the many valuable benefits that the state's proposal offers to state

employees." Add50 (emphasis added). The email clearly recognized the Unions as the legitimate bargaining representatives and made no attempt to negotiate directly with employees. If the Unions believed that the email was somehow confusing or misleading, they were free to communicate their position to employees, which they did. *See Appeal of City of Portsmouth, Bd. of Fire Com'rs*, 140 N.H. at 439 (recognizing the benefit of allowing "the free flow of information from both union and employer").

Because the facts as found by the PELRB demonstrate that the Governor did not seek to negotiate directly with state employees, his December 3, 2019 email did not constitute direct dealing. The PELRB's determination that the State engaged in an unfair labor practice in violation of RSA 273-A:5, I(e) should, therefore, be reversed.

C. The Governor's Email Did Not Violate RSA 273-A:12, I(a)(2).

Finally, the PELRB concluded that the Governor's email violated RSA 273-A:12, I(a)(2), and, therefore, constituted an unfair labor practice in violation of RSA 273-A:5, I(g). A15. The PELRB erred in interpreting RSA 273-A:12, I(a)(2) as prohibiting a public employer from communicating with its employees about the status of ongoing negotiations and proposals presented to the employees' bargaining representative. Because the PELRB's determination is based on an error of law, this Court should reverse.

RSA 273-A:12 provides a multi-step process for resolving disputes when the parties have bargained to impasse. The first step is optional and provides an opportunity for the negotiator for the employee bargaining unit

to make a presentation directly to the board of the public employer, RSA 273-A:12, I(a)(1), or the negotiator for the public employer to make a presentation directly to the bargaining unit, RSA 273-A:12, I(a)(2). Specifically, RSA 273-A:12, I(a) provides in relevant part:

> (a) Whenever the parties . . . have bargained to impasse, . . .
>
> > (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.

In this case, neither party elected to pursue this option. As a result, the parties moved on to the next step in the dispute resolution process—mediation and fact-finding by a neutral party. *See* RSA 273-A:12, I(b). Despite the fact that neither party opted to engage in the direct presentation alternative, the PELRB nevertheless concluded that the procedures set forth in RSA 273-A:12, I(a)(2) applied and prohibited the State from discussing the ongoing negotiations and its bargaining proposal directly with employees. A12-15. The plain language of the statute does not support this

broad construction, which would raise significant constitutional concerns. *See Appeal of City of Portsmouth, Bd. of Fire Comm'rs*, 140 N.H. at 438 (1995 (recognizing that the first amendment is a significant factor to consider in construing RSA 273-A:5); *Loc. 79, Serv. Emp. Int'l Union*, 314 N.W.2d at 651 (expressing "grave doubts about the constitutionality of a statute forbidding the expression of views on union representation by a public employer").

The statute's plain language indicates that the parties to collective bargaining "may" elect to participate in the direct presentation procedures if they have bargained to impasse. RSA 273-A:12, I(a). "The intention of the Legislature as to the mandatory or directory nature of a particular statutory provision is determined primarily from the language thereof." *City of Rochester v. Corpening*, 153 N.H. 571, 574 (2006) (citation omitted). "The first two definitions of 'may' in *Black's Law Dictionary* are '[t]o be permitted to' and '[t]o be a possibility.'" *Appeal of Cover*, 168 N.H. 614, 618 (2016) (quoting *Black's Law Dictionary* 1127 (10th ed. 2014)). "Moreover, in New Hampshire, it is a general rule of statutory construction that 'may' is permissive, not mandatory." *Id.* (citation omitted). Thus, the word "may" in the statute indicates that the direct presentation procedure is one possible mechanism by which the parties can try to resolve the impasse, but it does not foreclose other options. *See id.* (holding that the word "may" in RSA 541-A:24 indicates that a declaratory judgment action is one possible mechanism, but not the only one, through which a party can challenge the validity of an administrative rule). The statutory language is straightforward. The decision whether to engage in the direct presentation process lies within each party's discretion.

Neither the State nor the Unions elected to participate in the direct presentation option; therefore, the parties were not required to follow the procedures set forth in RSA 273-A:12, I(a)(2), and the PELRB erred as a matter of law in concluding that the State violated the statute.

The PELRB further erred in interpreting the statute as creating a new prohibition against public employers communicating with their employees about ongoing negotiations. As discussed in subsections A and B above, RSA 273-A:5 does not prohibit public employers from communicating with their employees about the status of negotiations, outstanding offers, the employer's position, and the reasons for its position. Both the First Amendment and the purposes of RSA chapter 273 support the free flow of information from both union and employer, so long as the employer does not seek to negotiate directly with the employees. When interpreting a statute, this Court "will not add language to the statute that the legislature did not see fit to include." *Polonsky v. Town of Bedford*, 173 N.H. 226, 236 (2020). If the legislature had intended to create a new category of unfair labor practice, it would have stated as much, and would have placed that prohibition in RSA 273-A:5, not RSA 273-A:12.[4]

Finally, this Court construes a statute "to avoid a conflict with constitutional rights whenever reasonably possible." *Appeal of Public Serv. Co. of N.H.*, 122 N.H. 919, 922 (1982). As discussed above, an employer has a First Amendment right to communicate with its employees, *Gissel*,

[4] And, in any event, the Governor's email cannot reasonably be construed as a "presentation" for purposes of RSA 273-A:12, I(a). If the statute bars informal speech such as the Governor's email, it would likewise bar speech by union representatives, such as protests at Governor and Council meetings.

395 U.S. at 617, and this Court has recognized that the First Amendment is a significant factor to consider in construing the provisions of RSA 273-A, *Appeal of City of Portsmouth, Bd. of Fire Comm'rs*, 140 N.H. at 438. Consistent with the plain language of the statute and the obligation to construe statutes as constitutional if possible, this Court should not construe RSA 273-A:12, I(a)(2) as creating a new category of unfair labor practice prohibiting public employers from communicating with their employees about ongoing negotiations. Such a communication only constitutes an unfair labor practice if it violates one of the existing provisions of RSA 273-A:5, I.

The PELRB's determination that the Governor's email violated RSA 273-A:12, I(a)(2), and, therefore, constituted an unfair labor practice in violation of RSA 273-A:5, I(g), should be reversed.

III. THE PELRB ERRED AS A MATTER OF LAW IN CONCLUDING THAT THE GOVERNOR'S DECISION NOT TO PLACE THE FACT-FINDER'S REPORT ON THE COUNCIL'S AGENDA CONSTITUTED AN UNFAIR LABOR PRACTICE.

The PELRB found that the State violated RSA 273-A:12, II when the Governor opted not to place the fact-finder's report on the Executive Council's agenda, and, as a result, failed to bargain in good faith and committed an unfair labor practice in violation of RSA 273-A:5, I(e) and (g). A18. The PELRB's interpretation of RSA 273-A:12, II directly contradicts this Court's decision in *Sunapee Difference, LLC v. State of New Hampshire*, 164 N.H. 778 (2013), and should, therefore, be rejected.

Because the State did not violate RSA 273-A:12, II, this Court should reverse the PELRB's determination that the State committed an unfair labor practice in violation of RSA 273-A:5, I(e) and (g) by declining to place the fact-finder's report on the agenda.

RSA 273-A:12, II provides, "[i]f 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." RSA 273-A:1, II(a)(1) defines "[b]oard of the public employer" for executive branch employees as "the governor and council." RSA 21:31-a provides that, in the construction of all statutes, "[t]he phrase 'governor and council' shall mean the governor with the advice and consent of the council."

In *Sunapee Difference*, this Court considered whether the governor had to put before the executive council a proposed lease amendment where the relevant statute provided that "all requests for the disposal or leasing of state-owned properties shall be . . . [submitted] to the governor and council for approval." 164 N.H. at 790-91 (quoting RSA 4:40, I (Supp. 2012)). Relying on the statutory definition in RSA 21:31-a, this Court construed "governor and council" to mean "governor with the advice and consent of council." *Id.* at 791. The Court then interpreted the phrase "governor with the advice and consent of council" to mean that the governor and council act independently, with the power to act residing with the governor, and 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 791-92.

Likewise, RSA 273-A:12, II does not require the Governor to put before the Executive Council a fact-finder's report that he rejects. Consistent with both RSA 21:31-a and *Sunapee Difference*, the phrase "governor and council" in RSA 273-A:1, II(a)(1) means "governor with the advice and consent of council." Inserting this definition into RSA 273-A:12, II, that statute therefore requires the submission of the fact-finder's report "to [governor with the advice and consent of council], which shall vote to accept or reject so much of [the fact-finder's] recommendations as is otherwise permitted by law." By its terms, RSA 273-A:12, II gives to the Governor the sole power to accept or reject the fact-finder's recommendations, subject to the consent of the Executive Council. *See Brouillard v. Governor and Council*, 114 N.H. 541, 547 (1974) (where statute called for appointment of official by governor and council, "[i]n accordance with RSA 21:31-a the sole power of appointment lies with the Governor subject to the consent of the council"). Because the statute vests the power to accept or reject the fact-finder's recommendations in the governor with the advice and consent of council, the Governor is not required to put before the Executive Council a fact-finder's report that the Governor rejects. *See Sunapee Difference*, 164 N.H. at 791-92.

Moreover, the State's interpretation of RSA 273-A:12, II avoids straining the constitutionally mandated separation of powers of the state government. 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." *Petition of Mone,* 143 N.H. 128, 134 (1998). "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 Justices*, 129 N.H. 714, 717 (1987).

Under Part II, Article 41, "[t]he executive power of the state is vested in the governor." The Executive Council, in turn, is responsible "for advising the governor in the executive part of government." N.H. CONST. pt. II, art. 60. Under Part II, Article 62, the "full power and authority to convene the council" falls within the governor's discretion. The State's interpretation of RSA 273-A:12, II preserves and reinforces the constitutionally mandated separation of powers by vesting the Governor with the exclusive authority to decide what items to place on the agenda of a meeting for which he holds the sole constitutional power to convene. The PELRB's interpretation of the statute to require the Governor to put the fact-finder's report before the Executive Council would impose the legislature's will upon the constitutional duties properly vested in another branch. Such action would fundamentally alter the constitutionally determined roles and responsibilities of the Governor and Executive Council and undermine the proper functioning of this body. This is precisely the kind of "legislative encroachment" against which Part I, Article 37 endeavors to prevent.

Because RSA 273-A:12, II does not require the Governor to put before the Executive Council a fact-finder report that the Governor rejects, the PELRB erred in determining that the State committed an unfair labor practice in violation of RSA 273-A:5, I(e) and (g) by declining to place the fact-finder's report on the Executive Council's agenda.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court reverse the decision of the PELRB.

The State requests a 15-minute oral argument to be presented by Laura Lombardi.

CERTIFICATION

The appealed decision is in writing and is submitted with this brief in a separate appendix that contains no documents other than the appealed decision.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

JOHN M. FORMELLA
ATTORNEY GENERAL

ANTHONY J. GALDIERI
SOLICITOR GENERAL

December 28, 2021

/s/ Laura E. B. Lombardi

Laura E. B. Lombardi, Bar No. 12821
Senior Assistant Attorney General
Civil Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3650

CERTIFICATE OF COMPLIANCE

I, Laura E. B. Lombardi, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9,475 words, excluding pages containing the table of contents, table of citations, pertinent statutes, and certifications. Counsel relied upon the word count of the computer program used to prepare this brief.

December 28, 2021 *<u>/s/ Laura E. B. Lombardi</u>*
Laura E. B. Lombardi

CERTIFICATE OF SERVICE

I, Laura E. B. Lombardi, hereby certify that I am filing this brief electronically and that a copy is being served on all other parties or their counsel, in accordance with the rules of the Supreme Court, as follows: I am serving registered e-filers through the court's electronic filing system; I am serving or have served all other parties by mailing or hand-delivering a copy to them..

December 28, 2021 */s/ Laura E. B. Lombardi*
Laura E. B. Lombardi

ADDENDUM TABLE OF CONTENTS

Page

December 3, 2019 Email from Governor Sununu ……..50

From: State of New Hampshire - Broadcast <SoNH.Broadcast@nh.gov>
Sent: Tuesday, December 3, 2019 4:32 PM
Subject: Message from the Governor

Dear fellow state employee:

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.

It is my hope that the remaining unions will reconsider the many valuable benefits that the state's proposal offers to state employees. It is my hope that we can deliver a new contract soon based upon our proposal that reflects our state's priorities and the hard work of our state employees.

As noted above, our proposal is estimated to cost $11 million in FY20 and FY21 – $5 million more than had been allocated by the state budget. I was happy to roll up my sleeves and find the additional funding within state government because I understand that our state employees are the backbone of our state and I value your hard work.

This holiday season is a time we can all be grateful to live and work in the greatest state in the country; where we get things done for the benefit of those we serve. Thank you for all you do.

Sincerely,

Chris Sununu
Governor