

THE STATE OF NEW HAMPSHIRE SUPREME COURT

NO. 2021-0478

*Cassandra Caron, Brandon Deane, Alison Petrowski, and
Aaron Shelton*

v.

*The State of New Hampshire, New Hampshire Employment Security and
George Copadis, Commissioner, New Hampshire Employment Security*

**Appeal from Trial Court Decision on the Merits
Pursuant to New Hampshire Supreme Court Rule 7**

APPELLANTS' REPLY BRIEF

Respectfully submitted,

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Argument

I. State law controls who has the authority to secure Pandemic Unemployment Assistance for New Hampshire.

Federal law provides for Pandemic Unemployment Assistance (“PUA”) to be administered through agreements with the “States.” 15 U.S.C. § 9021(f) and (h); *see also* 25 C.F.R. § 625. To do so, the U.S. Department of Labor (“DOL”) sought to execute a standard agreement with the appropriate authority of each State. *See* Appendix to Defendant’s Brief, at 42. DOL requested a signatory to the agreement and either a certification of the signatory’s authority or a delegation of such authority. *Id.* at 36 and 45. The agreement does not require a specific role for the signatory or for the certification of authority. *Id.* at 45. The certification calls for confirmation that the signatory “has the authority under the Constitution and laws of this state to sign this Agreement on behalf of the state.” *Id.* In New Hampshire, the Legislature “authorized and directed” NHES to secure “all advantages available under the provisions of the Social Security Act.” RSA 282-A:127, I.¹

¹ RSA 282-A:127, I provides, in pertinent part:

In the administration of this chapter, the commissioner of the department of employment security shall cooperate to the fullest extent consistent with the provisions of this chapter, with the United States Department of Labor, and is authorized and directed to take such action, through the adoption of appropriate rules, the adoption of administrative methods and standards, as may be necessary to secure to this state and its citizens all advantages available under the provisions of the Social Security Act, under the provisions of section

It is not disputed that the broad scope of RSA 282-A:127, I applies to NHES. In a contemporaneous suit based on RSA 282-A:127, I, *Collins v. Sununu*, 215-2021-CV-00198 (Grafton SS.), the Attorney General argued to dismiss a *pro se* plaintiff’s complaint because it failed to name NHES as a party:

According to Plaintiff, Governor Sununu has unlawfully “ordered” NHES to “deprive” individuals of federal “benefits for the unemployed” that he suggests were made available by the American Rescue Plan Act of 2021. Plaintiff claims that Governor Sununu’s so-called “order” is “in stark violation” of RSA 282-2 A:127, and he insists that NHES has followed that “order” and thereby violated the statute itself. Relying on these assertions—and without naming NHES as a defendant or serving NHES with his complaint—Plaintiff asks the Court to “[o]rder [NHES] to comply with [RSA 282-A:127]...”

See Defendant’s Motion to Dismiss, *Collins v. Sununu*, 215-2021-CV-00198 (Grafton SS.) (Appendix to Plaintiffs’ Reply Brief, at 6-7). The Superior Court agreed, stating:

The defendant further contends that, even if the plaintiff has standing to maintain this action, he is not entitled to the requested mandamus relief against NHES, which is not a party to this action...The Court agrees. The plaintiff may not obtain mandamus or other relief against an unnamed, unserved party.

3302 of the Federal Unemployment Tax Act and under the provisions of the Wagner-Peyser Act approved June 6, 1933, as amended...

See Order on Motion to Dismiss, *Collins v. Sununu*, 215-2021-CV-00198 (Grafton SS.) (Appendix to Plaintiffs’ Reply Brief, at 4).

II. The Legislative mandate in RSA 282-A:127, I is not restricted to “system-sustaining advantages.”

NHES’s brief asserts that the scope of RSA 282-A:127, I is limited to “system-sustaining advantages” and excludes “temporary individual unemployment benefits.” *See* NHES Brief, at 15-21. The plain language of RSA 282-A:127, I, however, does not distinguish between system-sustaining advantages and those that are temporary or that are just for individuals. *See* RSA 282-A:127, I. The Legislature authorizes and directs NHES to secure “all advantages available under the provisions of the Social Security Act...as amended,” without exception. RSA 282-A:127, I; *see also Grand China, Inc. v. United Nat’l Ins. Co.*, 156 N.H. 429, 433 (2007) (the Court “will not...add words to a statute that the legislature did not see fit to include”).

Other than PUA, a variety of unemployment insurance benefits are available under the provisions of the Social Security Act, some of which are generally available and some of which are only available under special economic conditions. *See e.g.* 26 U.S.C. §§ 3301-11 (codifying several unemployment compensation amendments and providing benefits for individuals who have exhausted their benefits during periods of high unemployment, for domestic employees in private households, state and local government employees, employees of nonprofits, and Indian tribes). All of these benefits, like PUA, flow to the states through the

Unemployment Trust Fund created by the Social Security Act. *See* 42 U.S.C. § 1104(e).

RSA 282-A:127, I, furthermore, identifies “citizens” as a beneficiary of the benefits that NHES must secure. RSA 282-A:127, I. Additionally, this Court has long recognized that the purpose of New Hampshire’s unemployment compensation statute is “to lighten the burden on those workers who are involuntarily unemployed through no fault of their own.” *In re Niadni, Inc.*, 166 N.H. 256, 263 (2014) (quoting *Appeal of Aspen Contracting NE, LLC*, 164 N.H. 88 (2012)).² The Court interprets the statute in light of this purpose. *See In re Stewart*, 164 N.H. 772, 777 (2013) (“We fail to see how our reading of the statute is at odds with. . . the broader purpose of RSA chapter 282-A”).

To the extent that NHES is arguing that the “system” is distinct from “individuals,” that distinction has no basis in the plain language of the law. To the extent NHES is arguing that the “advantages” in RSA 282-A:127, I do not include the unemployment benefits themselves, that likewise has no basis in the plain language of the law.

III. The U.S. Department of Labor’s accounting practices have no bearing on the plain meaning of RSA 282-A:127, I.

NHES argues that PUA is just another “book account” within the Unemployment Trust Fund and that the Trust Fund plays a “wholly passive

² NHES argued in the lower court that the advantages they secure under RSA 282-A:127, I only concern federal subsidies for the state and lowering the tax burden on employers. *See* Appendix to NHES’ Brief, at 17.

role” for PUA. *See* NHES Brief at 22. Neither of these characterizations has any bearing on PUA being “available” under the Social Security Act. *See* RSA 282-A:127, I.

First, the Unemployment Trust Fund plays more than a “wholly passive” role for administering PUA. Precisely because PUA funds are held, accounted for, and withdrawn from the Trust Fund, a variety of requirements established by the Social Security Act apply to NHES as it administers PUA. *See* Plaintiffs’ Brief, at 15-16. The DOL Agreement with the State also requires NHES to conform to the requirements of the Social Security Act. *See* Appendix to NHES’ Brief, at 44.

Whether the Trust Fund is described as passive or active, however, is irrelevant to whether PUA is “available” under the Social Security Act pursuant to RSA 282-A:127, I. NHES must secure “all advantages available under the provisions of the Social Security Act.” RSA 282-A:127, I (emphasis added). NHES is able to withdraw PUA benefits from the Trust Fund because the funds are “available” in the Trust Fund, which is established and controlled by the Social Security Act. *See* 42 U.S. § 503(a)(4); Plaintiffs’ Brief, at 19 (reviewing the plain meaning of “available” in RSA 282-A:127, I); NHES’s Brief at 22 (describing how each state withdraws from the Unemployment Trust Fund and citing the Social Security Act as requiring this practice).

Keeping separate “books” to organize funds is a basic accounting practice that is required by the Social Security Act. 42 U.S.C. § 1104(e). It is used for a variety of monies held in the Unemployment Trust Fund. *Id.*; *see also* 42 U.S.C. § 1105(a)(requiring that Extended Unemployment

Benefits be held in a separate book). “Although the [Unemployment Trust Fund (UTF)] contains 59 separate accounts (often referred to as book accounts) to attribute and distribute the monies based on program purpose, the UTF is a single trust fund. The use of separate accounts solely means that revenues and distributions are directly linked to [Unemployment Compensation] program purpose.” *Congressional Research Service* “Unemployment Compensation (UC) and the Unemployment Trust Fund (UTF),” found at <https://crsreports.congress.gov/product/pdf/RS/RS22077/> (last checked February 3, 2022).

In arguing the significance of accounting, NHES largely relies on another court’s reasoning about Congress’s choice to use the Unemployment Trust Fund for PUA. *See* NHES’ Brief, at 23. In *Holcomb v. T.L.*, the Indiana Court of Appeals concluded that use of the Trust Fund to administer PUA benefits was not dispositive because PUA benefits “are established and conferred by entirely different statutes than [the Social Security Act].” *Holcomb v. T.L.*, No. 21A-PL-1268, 2021 WL 3627270 at 6 (Ind. Ct. App. Aug. 17, 2021) (emphasis added). “Established” and “conferred by,” however, are materially different than “available under” in RSA 282-A:127, I. *See* Plaintiffs’ Brief, at 21-22 (comparing RSA 282-A:127, I to Ind. Code § 22-4-37-1).

Conclusion

NHES’ interpretation of RSA 282-A:127, I is not supported by the plain language of the statute. The plain language of RSA 282-A:127, I

requires that all weeks of Pandemic Unemployment Assistance be secured for New Hampshire citizens to apply for and receive, if eligible.

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CERTIFICATE OF SERVICE

I, Michael Perez, hereby certify that a copy of the foregoing brief was served upon all counsel of record via this Court’s electronic filing system, contemporaneously with this brief’s filing.

Dated: March 6, 2022

/s/Michael Perez

Michael Perez, Esquire

CERTIFICATION PURSUANT TO SUPREME COURT RULE 16(3)

I, Michael Perez, hereby certify that the appealed decision is in writing and is appended to Appellants’ Opening Brief.

Dated: March 6, 2022

/s/Michael Perez

Michael Perez, Esquire

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I, Michael Perez, hereby certify that this brief contains a total of 1917 words and meets the requirement of 3,000 words or less for Appellants’ Reply Brief.

Dated: March 6, 2022

/s/Michael Perez

Michael Perez, Esquire