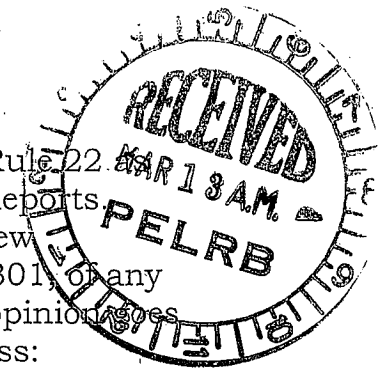
Affirms PELRB Decision No. 2011-269



THE SUPREME COURT OF NEW HAMPSHIRE

MANDATE
Certified and Issued as Mandate Under NH Sup. Ct. R. 24
Allison R. Cole 3/12/13
~~Clerk~~/Deputy Clerk Date

Public Employee Labor Relations Board
No. 2011-646

APPEAL OF ERIC JOHNSON
(New Hampshire Public Employee Labor Relations Board)

Argued: September 20, 2012
Opinion Issued: February 25, 2013

Backus, Meyer & Branch, LLP, of Manchester (Jon Meyer on the brief and orally), for the petitioner.

Molan, Milner & Krupski, PLLC, of Concord (John S. Krupski on the brief and orally), for the respondent.

BASSETT, J. The petitioner, Eric Johnson, appeals a decision of the New Hampshire Public Employee Labor Relations Board (PELRB) finding the evidence insufficient to support his claim that the respondent, the New Hampshire Troopers Association (Union), breached its duty of fair representation. We affirm.

The parties either stipulated to, or the PELRB found, the following facts. The petitioner became a New Hampshire State Trooper in 1994 and retired in July 2007. In 2004, the Union filed an unfair labor practice charge alleging that the State had unlawfully deducted annual and sick leave from the troopers' leave accounts. The PELRB ruled in favor of the Union and ordered the State to "restore accumulated annual . . . and sick leave to [affected

bargaining unit] members." We affirmed the PELRB's decision. See Appeal of N.H. Dep't of Safety, 155 N.H. 201 (2007). Immediately thereafter, the Union demanded that the State restore leave for all troopers, including retired troopers.

The negotiations over restoring leave to the troopers lasted for more than a year, during which time the petitioner retired. From the beginning of the negotiations, the State opposed restoring leave to non-active troopers. Additionally, the Union was advised by its attorney that it "did not represent retired or other non-active troopers because upon leaving their employment they were no longer members of the bargaining unit." See Chemical Workers v. Pittsburgh Glass, 404 U.S. 157, 181 n.20 (1971). Eventually, on July 16, 2008, the Union and the State entered into a settlement agreement that did not provide compensation for troopers who had retired or resigned before the settlement date.

In 2010, the petitioner filed an unfair labor practice charge alleging that the Union had breached its duty of fair representation when it agreed to a settlement that did not provide compensation to retired troopers. The petitioner alleged that, by so doing, the Union acted arbitrarily and in bad faith. The Union did not dispute that it owed the petitioner a duty of fair representation even though he was retired, but denied that it breached its duty.

The PELRB determined that the petitioner had failed to prove that the Union acted in bad faith. Specifically, the PELRB found that there was no evidence "proving animosity or discriminatory intent on the part of the Union . . . with respect to [the petitioner] or other retired or resigned troopers."

The PELRB also found that the petitioner failed to prove that the Union acted arbitrarily. Relying upon O'Brien v. Curran, 106 N.H. 252, 256-57 (1965), the PELRB stated that "[t]he duty of fair representation does not prevent a union from choosing to seek a particular outcome even though the inevitable result may be harmful to some members of the bargaining unit." Examining the totality of the circumstances, the PELRB decided that "the Union's decision to enter into a Settlement Agreement, which did not provide compensation for retired troopers but was otherwise beneficial to the rest of the bargaining unit members, was [not] . . . so far outside a wide range of reasonableness as to be irrational." (Quotation omitted.) See Air Line Pilots v. O'Neill, 499 U.S. 65, 67 (1991). The petitioner unsuccessfully moved for rehearing, and this appeal followed. On appeal, the petitioner challenges only the PELRB's finding that he failed to prove that the Union acted arbitrarily.

"When reviewing a decision of the PELRB, we defer to its findings of fact, and, absent an erroneous ruling of law, we will not set aside its decision unless

the appealing party demonstrates by a clear preponderance of the evidence that the order is unjust or unreasonable." Appeal of Laconia Sch. Dist., 150 N.H. 495, 496 (2004); see RSA 541:13 (2007).

"[A] union breaches the duty of fair representation when its conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith.". Marquez v. Screen Actors, 525 U.S. 33, 44 (1998); see O'Brien, 106 N.H. at 256-57 (relying upon federal law when discussing breach of duty of fair representation); cf. University System v. State, 117 N.H. 96, 99 (1977) (suggesting that newly created PELRB look to decisions of the National Labor Relations Board (NLRB) for guidance). "[U]nder the arbitrary prong, a union's actions breach the duty of fair representation only if the union's conduct can be fairly characterized as so far outside a wide range of reasonableness that it is wholly irrational or arbitrary." Marquez, 525 U.S. at 45 (quotations omitted). "This 'wide range of reasonableness' gives the union room to make discretionary decisions and choices, even if those judgments are ultimately wrong." Id. at 45-46. "A union's conduct can be classified as arbitrary only when it is irrational," meaning that "it is without a rational basis or explanation." Id. at 46.

On judicial review of a union's performance, a court may not substitute its own view of the merits of a bargain for that of the union. Air Line Pilots, 499 U.S. at 78. "Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for effective performance of their bargaining responsibilities." Id. In the instant case, in order to prevail, the petitioner must show that the Union's decision to negotiate a settlement agreement that did not provide a remedy for retired troopers was "without a rational basis or explanation." Marquez, 523 U.S. at 46.

The petitioner first argues that the mere fact that retired troopers had no remedy under the settlement agreement establishes, as a matter of law, that the Union breached its duty of fair representation. We disagree. As the Supreme Court has noted:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953); see O'Brien, 106 N.H. at 256. "As a practical matter, unions are rarely able to negotiate agreements that completely satisfy the desires of all its represented members." Bowerman v. UAW Local 12, 646 F.3d 360, 369 (6th Cir.), cert. denied, 132 S. Ct. 766 (2011). "Moreover, there is no requirement that unions treat their members identically as long as their actions are related to legitimate union objectives." Vaughan v. Air Line Pilots Ass'n, Intern., 604 F.3d 703, 712 (2d Cir. 2010). A union has the discretion to "balance the rights of individual employees against the collective good, or it may subordinate the interests of one group of employees to those of another group, if its conduct is based upon permissible considerations." Postal Workers (Postal Service), 345 N.L.R.B. 1282, 1285 (2005). "If a union resolves conflicts between employees or groups of employees in a rational, honest, and nonarbitrary manner, its conduct may be lawful . . . , even if some employees are adversely affected by its decision." Id.

Thus, in Postal Workers (Postal Service), the NLRB ruled that the union's decision to exclude the estates of deceased employees from sharing the settlement proceeds was reasonable, practicable, and did not breach the duty of fair representation. Id. at 1284-85. The NLRB similarly decided in Letter Carriers (Postal Service), 347 N.L.R.B. 289, 289-90 (2006), that the union did not breach the duty of fair representation when it allocated more settlement proceeds to active employees than it did to retired employees. In Steelworkers Local Union No. 2869, 239 N.L.R.B. 982, 982-83 (1978), the NLRB explained that a union's decision to limit distribution of settlement proceeds to those employees in the bargaining unit at the time of settlement "simply constituted one of a series of reasonable, practical administrative determinations regarding those employees entitled to share in the settlement proceeds."

Accordingly, in this case, merely because the Union agreed to a settlement that excluded retired troopers from a remedy does not establish, as a matter of law, that the Union breached its duty of fair representation. This is particularly so given the "ambiguous nature of the legal landscape on the issue of whether unions owe any duty of fair representation to retirees." Letter Carriers (Postal Service), 347 N.L.R.B. at 289. We have not yet decided whether a union owes a duty of fair representation to retirees under the New Hampshire Public Employee Labor Relations Act (PELRA). The PELRA pertains to "public employees," RSA 273-A:1, IX (2010), and we have not yet determined whether the statutory definition of "public employees" includes retirees.

Although the petitioner posits, and the Union appears to agree, that we decided the issue in Rochester School Board v. New Hampshire PELRB, 119 N.H. 45 (1979), he is mistaken. In that case, we held only that the PELRB had jurisdiction to adjudicate the back-pay claims of former employees. Rochester School Bd., 119 N.H. at 55-57. While we may have implied that the retired employees in that case constituted "public employees" under the PELRA, we

did not so hold. Indeed, we specifically acknowledged that "some claims of former employees may not be within the jurisdiction of the PELRB." Id. at 56. In Rochester School Board, we did not hold that, or even address whether, the duty of fair representation extends to retired employees. Thus, this is an open question under our state law.

Under federal law, it appears well-established that, generally, a union does not owe a duty of fair representation to retired employees. In Pittsburgh Glass, 404 U.S. at 165-76, the United States Supreme Court held that a retired worker is not an "employee" within the meaning of the National Labor Relations Act for purposes of establishing the scope of an employer's duty to bargain collectively. In a footnote, the court stated: "Since retirees are not members of the bargaining unit, the bargaining agent is under no statutory duty to represent them in negotiations with employers." Id. at 181 n.20. Subsequently, in UMWA Health & Retirement Funds v. Robinson, 455 U.S. 562, 574-75 (1982), the Court reiterated its view that "former union members . . . may suffer from discrimination in collective bargaining agreements because the union need not affirmatively represent them or take into account their interests in making bona fide economic decisions on behalf of those whom it does represent." (Quotation, brackets, and ellipses omitted.)

Federal courts have relied upon Pittsburg Glass and Robinson to hold that a union owes no duty of fair representation to retirees. See Anderson v. Alpha Portland Industries, Inc., 727 F.2d 177, 181-82 (8th Cir. 1984); Merk v. Jewell Food Store Div., Jewell Companies, 641 F. Supp. 1024, 1027-32 (N.D. Ill.), aff'd on other grounds, 848 F.2d 761 (7th Cir. 1986). In Anderson, the court observed that imposing a duty on unions to represent both active and retired employees "would create the potential for severe internal conflicts that would impair the bargaining unit's ability to function" because of the divergence of interests between the two groups. Anderson, 727 F.2d at 183 (quotation omitted). The court also noted that any actual conflicts of interests would unavoidably be resolved in favor of the active employees because retirees are not eligible to vote in union elections and therefore the union leadership could have "no political interest in serving the interests of retirees." Id.

The district court in Merk, like the Eighth Circuit Court of Appeals in Anderson, concluded that former employees were no longer bargaining unit members and, therefore, the union owed them no duty of fair representation. Merk, 641 F. Supp. at 1030. The court reasoned that if the union owed the former employees a duty of fair representation, it "would be forced to deal with an intolerable conflict of interest," which would ultimately operate to their detriment, because, being unable to participate in union elections, they would have "no control over their representatives." Id. at 1028 (emphasis omitted).

We find Merk instructive because it is factually similar to the instant case. In Merk, the union and the employer had a dispute regarding the employer's reduction of employee wages and benefits. Id. at 1026. The union and employer eventually settled the dispute with the employer agreeing to restore "most of the wages and benefits to their previous level," but only for employees who were then on the payroll. Id. The employer in Merk, like the State in this case, insisted that the settlement exclude former employees. Id. at 1032. The union in Merk, like the Union here, "reluctantly abandoned [the former employees] at [the employer's] insistence." Id. As a result, a class of as many as 2,000 former employees filed an action, alleging that the union had breached its duty of fair representation. Id. at 1026-27.

In deciding that the union did not owe a duty of fair representation to the former employees, the Merk court observed that there was a real conflict of interest between the active and former employees. Id. at 1029. Once they left employment, the court noted, the former employees "had one narrow interest – recovering lost wages," while active employees had a much broader range of interests, including obtaining good future wages and working conditions, as well as securing future peace and stability. The current employees had everything to gain and nothing to lose by cutting [the former employees] loose without a remedy." Id. at 1029-30. In leaving the former employees out of the settlement, the current employees "gave up nothing of economic value to themselves, but gave [the employer] an economic plum." Id. at 1030. The court stated: "Because [the employer] apparently took a hard line as to [the former employees], the current employees could not have helped [the former employees] without hurting their own position. This is a classic case of conflict of interest." Id.

Similarly, here, the Union reasonably could have decided that given the State's insistence upon excluding retired troopers from the settlement agreement, there was "an intolerable conflict of interest" between the interests of active and retired State Troopers. Id. at 1028. Under these circumstances, and "in light of the ambiguous nature of the legal landscape" regarding whether unions even owe a duty of fair representation to retirees, Letter Carriers (Postal Service), 347 N.L.R.B. at 289, we cannot say that, by entering into the settlement agreement, the Union acted "so far outside a wide range of reasonableness" as to be "wholly irrational or arbitrary." Marquez, 525 U.S. at 45 (quotations omitted).

In arguing to the contrary, the petitioner likens this case to Baker v. Board of Education, Hoosick Falls, 770 N.Y.S.2d 782, 786 (App. Div. 2004). In Baker, the union and employer had negotiated a collective bargaining agreement that included a new salary schedule reflecting retroactive salary increases. Baker, 770 N.Y.S.2d at 784. The union and employer had also negotiated a separate agreement under which the retroactive salary increases

would be paid only to active employees. Id.

Thereafter, eleven retired employees sued the union for breaching its duty of fair representation by failing to represent them in the negotiations. Id. The union unsuccessfully moved to dismiss the claim and then appealed. Id. at 784-85. In determining whether the union had a duty to represent the retired employees, the court first observed that, generally, "a union does not have a duty to represent its former members in contract negotiations because, among other things, retirees typically do not have the same interests as active employees." Id. at 785; see Pittsburgh Glass, 404 U.S. at 171-73. Nevertheless, the court decided that the retired and active employees shared a mutuality of interests with regard to the retroactive salary increases. Baker, 770 N.Y.S.2d at 785. The court also ruled that the plaintiffs sufficiently stated a cause of action for breach of the duty of fair representation. Id. at 786. In so deciding, the court rejected the union's argument that distinguishing between current and former employees is "permissible and, thus, neither arbitrary nor discriminatory." Id. (citation omitted). To the contrary, the court ruled, the union "did not endeavor to balance the rights of these two classes of employees; it quite simply failed to represent plaintiffs at all." Id.

Baker is distinguishable from this case. In Baker, it was alleged that the union had never advocated for the interests of retired employees. See id. at 784-86. Indeed, it was alleged that the union had rejected the employer's "offer to have the retroactive salary schedule apply to retirees." Id. at 784. Here, however, the PELRB specifically found that during the lengthy negotiations over the settlement, the Union "did not propose to exclude retired or other non-active troopers from the list of troopers to be compensated." The PELRB also found that the Union "satisfied its duty of fair representation" to all of the bargaining unit members, "including [the petitioner], when it successfully pursued a breach of contract claim against the State before the PELRB . . . and later before the Supreme Court." The PELRB further found that following the issuance of our opinion in Appeal of New Hampshire Department of Safety, 155 N.H. 201, "the Union demanded that the State comply with [our] decision and restore all leave for all troopers, including the retired troopers." In short, in this case, the PELRB found that the Union advocated for the retired troopers initially, even though it ultimately entered into a settlement agreement that did not provide them with compensation.

The petitioner next asserts that "[t]he [Union's] decision . . . did not meet the threshold for fair representation because it was not based upon a reasoned decision regarding [his] claim or even the weighing of that claim against the claims of other bargaining unit members." He contends that absent "a weighing of the pros and cons of inclusion of retired troopers in the agreement, and more generally, the development of a reasonable standard for determining inclusion under the Agreement," the Union's decision to exclude retired

troopers lacked a rational basis or explanation. The petitioner asserts that the Union could not possibly have engaged in such a balancing of interests because retired troopers, like him, received no remedy under the agreement.

Contrary to the petitioner's assertions, the PELRB found that the Union did balance the interests of retired troopers against those of active troopers when it entered into the settlement. The PELRB found that the Union's attorney informed the Union "that attempting to resolve retired troopers' compensation issue[s] would slow down negotiations," which would further delay a remedy to all bargaining unit members when bargaining unit members were, according to the Union, already "upset that this matter ha[d] been pending for so long." Although the petitioner argues that there is no record support for this finding, he is mistaken. This finding is supported by an e-mail from the Union's attorney as well as hearing testimony.

To the extent that the petitioner argues that the Union had to meet particularized standards for its decision to fall within the "wide range of reasonableness," Marquez, 525 U.S. at 45 (quotation omitted), we disagree. We decline to subject the Union's decision-making to such standards because doing so would not comport with the deference required by Air Line Pilots, 499 U.S. at 78.

The Supreme Court in Air Line Pilots rejected a similar argument. In that case, the Fifth Circuit Court of Appeals had ruled that for a union decision "to be non-arbitrary" it had to be: "(1) based upon relevant, permissible union factors . . . ; (2) a rational result of the consideration of those factors; and (3) inclusive of a fair and impartial consideration of the interests of all employees." Air Line Pilots, 499 U.S. at 72 (quotation and emphasis omitted). The Supreme Court ruled that this "refinement of the arbitrariness . . . standard authorizes more judicial review" of union decisions "than is consistent with national labor policy." Id. at 77. Like the Supreme Court in Air Line Pilots, we decline to "unduly constrain[ ] the 'wide range of reasonableness' within which unions may act without breaching their fair representation duty." Id. at 79 (citation omitted).

The petitioner next contends that "the overwhelming weight of testimony from the [Union's] own witness [was] that [the Union] was . . . motivated by a belief that it could not represent retired troopers." This belief, the petitioner asserts, was the Union's "exclusive motivation" for "failing to advocate" on behalf of the retired troopers. The Union, for its part, appears to agree with the petitioner that it decided, ultimately, to exclude retired troopers from the settlement agreement based upon advice from counsel.

The petitioner argues that the Union cannot satisfy its duty of fair representation by contending that it relied upon advice of counsel. See Gregg

v. Chauffeurs, Teamsters & Helpers U. Local, 699 F.2d 1015, 1017 (9th Cir. 1983) (reliance on advice of counsel does not "insulate [a] union from liability for its breach of its duty to represent its members fairly"). While we agree with this general proposition, we conclude that where, as here, counsel's advice was itself reasonable given the legal landscape at the time, the Union's reliance on such advice was rational. Letter Carriers (Postal Service), 347 N.L.R.B. at 289.

Although the petitioner challenges other PELRB factual findings, they are not material to our decision and are supported by the record. Because the petitioner has failed to demonstrate by a clear preponderance of the evidence that the PELRB's order was unjust or unreasonable, we uphold it. See Appeal of Laconia Sch. Dist., 150 N.H. at 496.

Affirmed.

DALIANIS, C.J., and HICKS, CONBOY and LYNN, JJ., concurred.

NH Supreme Court affirmed PELRB Decision 2011-167 on 2-25-2013, Slip Op. No. 2011-646 (NH Supreme Court Case No. 2011-646)

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Eric Johnson

v.

New Hampshire Troopers Association
&
New Hampshire Department of Safety

Case No. G-0097-8
Decision No. 2011-202

Order on Motion for Review of Hearing Officer Decision

Mr. Johnson filed a Motion for Review of Hearing Officer Decision 2011-167 pursuant to Pub 205.01, which provides in part as follows:

(a) Any party to a hearing or intervenor with an interest affected by the hearing officer's decision may file with the board a request for review of the decision of the hearing officer within 30 days of the issuance of that decision and review shall be granted. The request shall set out a clear and concise statement of the grounds for review and shall include citation to the specific statutory provision, rule, or other authority allegedly misapplied by the hearing officer or specific findings of fact allegedly unsupported by the record.

(b) The board shall review whether the hearing officer has misapplied the applicable law or rule or made findings of material fact that are unsupported by the record and the board's review shall result in approval, denial, or modification of the decision of the hearing officer. The board's review shall be made administratively based upon the hearing officer's findings of fact and decision and the filings in the case and without a hearing or a hearing de novo unless the board finds that the party requesting review has demonstrated a substantial likelihood that the hearing officer decision is based upon erroneous findings of material fact or error of law or rule and a hearing is necessary in order for the board to determine whether it shall approve, deny, or modify the hearing officer decision or a de novo hearing is necessary because the board concludes that it cannot adequately address the request for review with an order of approval, denial, or modification of the hearing officer decision. All findings of fact contained in hearing officer decisions shall be presumptively reasonable and lawful, and the board shall not consider requests for review based upon objections to hearing officer findings of fact unless such requests for review are supported by a complete transcript of the proceedings conducted by the hearing officer prepared by a duly certified stenographic reporter.

We have reviewed the hearing officer decision in accordance with the provisions of Pub 205.01 and unanimously approve the hearing officer's decision and deny Mr. Johnson's motion.

So ordered.

Date: July 27, 2011

Charles S. Temple, Esq.
Alternate Chair

By vote of Alternate Chair Charles S. Temple, Esq., Board Member Kevin C. Cash, and Board Member Carol Granfield.

Distribution:
Jon Meyer, Esq.
John S. Krupski, Esq.
Marta A. Modigliani, Esq.
Lynmarie C. Cusack, Esq.

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Eric Johnson

v.

New Hampshire Troopers Association
&
New Hampshire Department of Safety

Case No. G-0097-8
Decision No. 2011-167

Appearances:

Jon Meyer, Esq., Bacus, Meyer and Branch, LLP, Manchester, New Hampshire for Eric Johnson

John S. Krupski, Esq., Molan, Milner & Krupski, PLLC, Concord, NH for the New Hampshire Troopers Association

Lynmarie C. Cusack, Esq., Assistant Attorney General, Concord, NH for the New Hampshire Department of Safety

Decision Summary

This case involves claims of breach of duty of fair representation and breach of contract by a former State Trooper Mr. Johnson against the Union and the former employer. The Union's and the State's motions to dismiss the complaint on the ground of timeliness are denied. The Union's motion to dismiss the complaint on the ground that the complaint is barred by the doctrines of res judicata and collateral estoppel is denied. However, Mr. Johnson's claims against the Union are denied because the evidence is insufficient to prove that the Union breached its duty of fair representation or restrained, coerced or otherwise interfered with Mr. Johnson's rights under RSA 273-A when it entered into a Settlement Agreement with the State which did not contain any compensation for Mr. Johnson or other troopers who retired or resigned prior to

the settlement. Any derivative or related claim against the State is likewise denied. Any independent breach of contract claim against the State is dismissed as Mr. Johnson lacks standing to maintain an unfair labor practice claim against the State and it has been otherwise resolved by PELRB Decision No. 2005-028, the subsequent Settlement Agreement, and PELRB Decision No. 2010-060 on Mr. Johnson's petition for enforcement. Mr. Johnson's requests for relief are denied.

Background:

Eric Johnson, a retired New Hampshire State Trooper, filed an unfair labor practice complaint against the New Hampshire Troopers Association (hereinafter Union or Association) and the New Hampshire Department of Safety, Division of State Police (hereinafter State or Division) on August 13, 2010. Mr. Johnson claims that the Union breached its duty of fair representation in violation of RSA 273-A:5, II (a) and the State breached the collective bargaining agreement (CBA) in violation of RSA 273-A:5, I (h) when they entered into a Settlement Agreement, which resolved legal proceedings and related PELRB and New Hampshire Supreme Court decisions ordering the State to restore annual and sick leave to certain troopers, because the agreement did not provide any compensation for retired troopers like Mr. Johnson. Mr. Johnson requests that the PELRB order the State to restore his annual and sick leave accounts for the hours improperly deducted and to pay him for such hours at his rate of pay as of the date of his retirement with interest accrued from the date of the complaint; order the Union to pay him the value of accumulated annual and sick leave multiplied by the hourly rate of pay at the time of retirement with interest accrued from the date of the complaint; and order the State and/or the Union to reimburse him for the reasonable attorney's fees and expenses.

The Union and the State deny the charges and move to dismiss. The Union argues among other things, that Mr. Johnson's complaint is untimely, fails to state a claim, and is barred by the doctrines of collateral estoppel and res judicata. The State argues that the complaint fails to state

a claim and is barred by the statute of limitation set forth in RSA 273-A:6, VII, by the doctrines of res judicata and collateral estoppel, and by release in the Settlement Agreement between the Union and the State.

The hearing in this case was originally scheduled for October 14, 2011, but at the parties' requests was rescheduled twice and was ultimately conducted on January 13, 2011 at the Public Employee Labor Relations Board (PELRB) offices in Concord. The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. The parties filed post-hearing briefs and the decision is as follows.

Findings of Fact

1. The New Hampshire Department of Safety, Division of State Police is a public employer within the meaning of RSA 273-A:1, IX.

2. The New Hampshire Troopers Association is the exclusive representative of a bargaining unit consisting of certain State Troopers.

3. Eric Johnson is a former New Hampshire State Trooper, who was appointed a State Trooper in April of 1994. Mr. Johnson was a member of the bargaining unit represented by the Union. He went on active duty with the Coast Guard in October, 2006 and has been on continuous full-time active duty from July 15, 2007 to present. He retired from the Division of State Police on July 1, 2007.

4. On September 9, 2004 the Union filed with the PELRB an unfair labor practice complaint alleging that the State violated RSA 273-A:5, I (h) when it began deducting more than 8 hours of annual or sick leave from troopers' leave accounts for each day of annual or sick leave taken. The Union was represented by Attorney James Donchess and the State was represented by Attorney Martha Modigliani.

5. The PELRB ordered the State "to restore accumulated annual leave and sick leave to those members affected by the change ... and to cease and desist from future deductions of

annual leave or sick leave usage for a number of hours greater than eight (8) hours for each full shift taken as either annual leave or sick leave by members of the association and otherwise return to the status quo ante July 1, 2004." See PELRB Decision No. 2005-028 (dated March 16, 2005).

6. On April 17, 2007 the New Hampshire Supreme Court affirmed the PELRB Decision No. 2005-028 stating as follows:

> In sum, we agree with the Board that the language of the CBA is ambiguous and that the parties' actions evidence their acceptance of a practice not specifically expressed in the CBA. We further agree that calculation of the amount, accrual, and utilization of annual and/or sick leave is subject to negotiation between the parties. We therefore affirm the Board's decision and order on the basis that the Division committed an unfair labor practice beginning on July 1, 2004, by unilaterally modifying the leave deduction policy without first negotiating with the Association.

See *Appeal of New Hampshire Department of Safety*, 155 N.H. 201, 211-12 (2007) (citation omitted).

7. On April 17, 2007 Attorney Donchess wrote to Attorney Modigliani on behalf of the Union requesting the State to confirm that it would comply with the Supreme Court decision "beginning immediately and that the Division will restore time improperly taken from troopers" and stating as follows:

> The Association also expects that the Division will restore to each trooper (*including those still employed and those retired since July 1, 2004*) all leave taken by the Division in more than eight blocks since July 1, 2004, the date when the Division unilaterally changed the leave deduction practice.

See Johnson Exhibit 1 (emphasis added).

8. The State's and the Union's representatives met on June 28, 2007 to discuss implementation of PELRB Decision No. 2005-028. Johnson Exhibit 2.

9. On October 1, 2007 Attorney Modigliani sent to Attorney Donchess, the President of the Union Trooper Louis Copponi, and the Vice President of the Union Trooper William

Graham a document memorializing the parties' discussions which took place earlier that day. The document provided in part:

> ... *The settlement covers only active troopers of the NOTA.*
> The period of restoration of leave is July 1, 2004 through June 30, 2007, otherwise understood to be a 3 year period.
> Based on the above assumptions:
> . . . over a three year period, a road trooper in the same assignment would be restored 32 hours of Annual Leave and 16 hours of Sick Leave. . .
> All sick leave will be deposited into the Troopers Sick bank with the exception of those individual troopers who have used their sick leave during the subject 3 years because of catastrophic illness or injury. These individuals will have 30 days from the date of the executed settlement to notify the Colonel in writing that they wish their actual sick leave be restored into their individual bank. If approved, the individual's settlement for sick leave will be deducted from that deposited into the sick bank as part of the settlement agreement and the individuals (sic) individual account will be credited with the actual sick leave restored based on their usage for the 3 years.
> All annual leave restored will be restored as comp time. Comp time will be used within 36 months or lost. Except in the instance of retirement, comp time will not be paid out for monetary compensation.
> This is subject to all necessary approvals.

Union Exhibit 3 (Emphasis added).

10. On October 4, 2007 Attorney Donchess sent a letter to Attorney Modigliani on behalf of the Union expressing concern that the State had "not yet credited troopers with the annual leave and sick leave time lost," and discussing various approaches to the leave restoration, including "blanket" and individual approaches. Although the Union stated its preference for individual approach, it described the "blanket" approach to which the Union would agree. The letter provided in part:

> ... The Division has proposed to offer blanket additions to troopers' annual leave and sick leave accounts in order to save the clerical time necessary to comply with the decision of the Supreme Court...
> We met with Colonel Booth and worked out a blanket approach that would have accomplished both goals, the goal of saving clerical time and the goal of not shortchanging any trooper of time as a result of the blanket approach sought by the Division. The NHTA then communicated the approach discussed in the meeting and got membership approval for that approach. It is simply too late now to change the crediting formula...
> If this approach is not acceptable to the Division, then we ask that the

> Division immediately credit each trooper with the annual leave and sick leave time that was improperly deducted between 2004 and 2007.
> Please get back to us as to which approach is acceptable to the Division within the next seven days. *The members of the NHTA are upset that this matter has been pending for so long. The NHTA prefers to reach an agreement as to how to proceed rather than to seek enforcement of the Supreme Court decision on this issue.*

Union Exhibit 5 (emphasis added).

11. Attorney Donchess was not called as a witness but Union Vice President Graham and Union Secretary Sergeant Jill Rockey believed, based upon their communications with Attorney Donchess, that the Union did not represent retired or other non-active troopers because upon leaving their employment they were no longer members of the bargaining unit.

12. On October 8, 2007 Attorney Modigliani sent a letter to Attorney Donchess regarding "Restoration of Leave" stating that the parties' "positions with regard to what was initially offered are not the same" and that, since the parties were "unable to resolve the matter with the 'blanket approach', the Department is committed to dedicating the resources to restore individual leave time in a timely fashion..." See Johnson Exhibit 2.

13. The State sent to the Union a list of troopers with the proposed number of hours due each trooper. The list did not include troopers who resigned or retired and the Union did not demand that the retired troopers, like Mr. Johnson, be added to the list.

14. Sgt. Rockey distributed the list to the troops. If employees disagreed with the proposed amounts, she asked them to fill out a discrepancy form and give her weekly duty reports for the hours in question. She forwarded the completed forms to Attorney Modigliani. If a trooper could not prove the claimed number of hours by supporting documentation, the hours proposed by the State were used. Sgt. Rockey and Attorney Modigliani reviewed each claimed hour discrepancy together.

15. On June 17, 2008 Mr. Johnson sent the following email message to the management representative Claude Ouellette:

> I have now made two inquires (sic) regarding the adjustments made to vacation hours while I was employed by the Department of Safety. I have received no response. Please let me now (sic) if I have voiced my inquiry to the correct office or if I should seek guidance elsewhere.

In his response, Mr. Ouellette stated that the "adjustments made were only for current employees as they were given comp. time which would serve no purpose for you. There is no cash payout available[,] only the time off in the future for employees." Johnson Exhibit 4.

16. Mr. Johnson attempted to contact Union representatives several times regarding the restoration of his leave under PELRB Decision 2005-028. Trooper Doyle was the first Union representative who responded to him. Trooper Doyle told Mr. Johnson that the Union will not be taking up his grievance and referred him to the Retired Troopers' Association. Mr. Johnson did not contact the Retired Troopers' Association because he believed that it was not his bargaining representative.

17. Mr. Johnson contacted Attorney Donchess several times attempting to ascertain whether retired troopers would be compensated. He also asked Attorney Donchess whether he would be reimbursed if he hired an attorney. Attorney Donchess responded that he would not be reimbursed and that he had to hire an attorney at his own expense.

18. On June 27, 2008 Attorney Donchess sent the following email message to Ms. Rockey:

> I have received a message from a retired trooper whose name I think is Eric Johnson. He is asking about the annual leave settlement. He doesn't appear to be on the either list of hours we have been working with. After all this time, I don't think we can try to reopen negotiations to try to add retired troopers to the settlement. That could result in a lot of delay. Do you agree?

In her response, Sgt. Rockey stated: "My understanding is we don't represent anyone who has retired. If that is correct I would tell him that and anyone else that calls. I'm not sure what to do if that isn't correct." Johnson Exhibit 5.

19. On July 9, 2008 Mr. Johnson sent an email message to the Union President Trooper Copponi, which provided in part:

> On July 8th, 2008 I spoke with Attorney James W. Donchess in an attempt to gain clarity as to whether any settlement was forthcoming for retirees who may have been affected by the unfair labor practice.
> I was informed that the settlement was for present employees and would be paid in comp. hours. I was further informed that no provisions were made to make any former employee whole.
> Attorney Donchess stated that any attempt to gain back hours or pay from the State would have to be the responsibility of the former member and not the Trooper's Association.
> In this case there is a continuing duty to represent a former employee...
> We all suffered losses due to the unfair labor practice, we all should be compensated...

Union Exhibit 4.

20. The negotiations between the Union and the State regarding the implementation of the order to restore annual and sick leave lasted longer than a year after the issuance of the Supreme Court decision affirming the PELRB leave restoration order.

21. Attorney Donchess informed the Union that attempting to resolve retired troopers' compensation issue would slow down negotiations. According to Trooper Graham, for the Union the Settlement Agreement was about saving time, and, for that reason, Attorney Donchess' advice on how to proceed seemed reasonable.

22. On July 16, 2008 the Union and the State entered into a Settlement Agreement which did not provide any compensation for troopers who retired or resigned prior to the settlement date. The Settlement Agreement provides in part:

> Each Trooper who is credited with comp time . . . will have three (3) years from the date comp time hours are added to his/her accrual to use such comp time. At the end of three (3) year time, any and all comp time hours remaining in accordance with this Agreement will be reduced to a zero balance and will be considered utilized. If such Trooper retires before he/she has used the comp time hours added to his/her comp time accrual pursuant to Paragraph 1 hereof, at retirement he/she will be paid an amount equal to the number of such accrued comp time hours multiplied by his/her base pay hourly rate at the time or retirement.

Exhibit 1 to the Settlement Agreement contains a list of troopers with amounts of annual leave and sick leave comp hours to be restored. Mr. Johnson's name was not on the list. See Union Exhibit 2.

23. The Union did not offer or propose the exclusion of the retired troopers from the Settlement Agreement.

24. Section 6 of the Settlement Agreement provides:

> Upon satisfaction of the restoration of comp time hours as set forth in Paragraph 1 of this Agreement, the NHTA hereby fully, forever, irrevocably and unconditionally releases and discharges the State and NHDS from any and all claims, charges, complaints, demands, actions, causes of action, suits, rights, debts, sums of money, costs, accounts, contracts, agreements, promises, doings, omissions, damages, executions, obligations, liabilities and expenses of every kind and nature, known or unknown, which NHTA and its members has against the NHDS arising out of the implementation of the remedy required by the Public Employee Labor Relations Board Decision No. 2005-028 and New Hampshire Supreme Court decision Appeal of Department of Safety, 155 N.H. 201 (2007) for certain troopers who worked more than eight hours shifts during the period of time between July 1, 2004 and June 30, 2007.

Union Exhibit 2.

25. On September 4, 2009 Mr. Johnson filed a petition for enforcement with the PELRB naming the State as the respondent. The petition did not contain any claims against the Union. See *Eric Johnson v. New Hampshire Department of Safety, Division of State Police,* Case No. G-0097-4 and PELRB Decision 2010-060. In his petition, Mr. Johnson complained that "the Division has failed with respect to Petitioners (sic) and other retired troopers to implement the order on their behalf, citing the Settlement Agreement as a basis for its refusal." Mr. Johnson requested as relief, among other things, that the PELRB "direct the Department to restore Petitioner's leave account for those hours improperly deducted, and to pay him for all such hours at his rate of pay as of the date of his retirement with interest accrued from the date of the Petition." See *id.*

26. On March 23, 2010, the PELRB dismissed M. Johnson's petition for enforcement

stating that "only the Association, and not current or former individual Troopers, has authority or standing to maintain proceedings at the PELRB seeking enforcement of PELRB Decision No. 2005-028"; and that "the Association had exclusive authority on behalf of bargaining unit employees, including Mr. Johnson, to file, maintain, and resolve the underlying unfair labor practice complaint by agreement with the State at any stage, including subsequent to the conclusion of the appeal proceedings." See PELRB Decision No. 2010-060. The PELRB also held as follows:

> ... even assuming that Mr. Johnson is entitled to maintain a Petition for Enforcement his claims would be barred by the Settlement Agreement, which precludes any proceedings against the State to obtain the relief awarded in Decision No. 2005-028. This interpretation is consistent with Commissioner Barthelmes' understanding of the purpose of the Settlement Agreement, which was to reach a final agreement about how the relief ordered under PELRB Decision No. 2005-028 would be implemented. The Settlement Agreement provides the State and the Association's acknowledgement that the ordered relief would apply only to the Troopers named on Exhibit 1 to the Settlement Agreement and the relief would be distributed to such employees in the manner outlined in the Settlement Agreement.

PELRB Decision No. 2010-060. Mr. Johnson did not appeal this decision.

27. Mr. Johnson testified that he did not appeal the PELRB decision on his petition for enforcement because he believed that the decision was just and that, before the decision was issued, he did not understand that the Union agreed to forgo payments to some troopers.

28. Mr. Johnson does not know how many hours of annual or sick leave should have been restored to his account under PELRB Decision 2005-028. He testified that he almost exhausted his annual leave, because he took his annual leave when he was activated before he switched to military leave, but he must have a lot of sick leave. The October 22, 2010 email message from Attorney Modigliani to Attorneys Krupski and Meyer provided that leave calculations for Mr. Johnson during the period of July 1, 2004 until June 30, 2007 were as follows: "37 hours AL[,] 11 hours SL." See Johnson Exhibit 6.

29. Article 10.4 of the parties' 2005-2007 CBA provides that "[u]pon resignation, retirement, or dismissal of any employee, he/she shall receive a sum equal to the number of days of annual leave remaining to his/her credit, provided that any or all amounts may be applied to offset any amounts owed the state by the employee." See Union Exhibit 1A.

30. Article 11.1.2 of the parties' 2005-2007 CBA provides that "[u]pon retirement under the provision of RSA 100-A:5 and PSA (sic) 100-A:6 only, or upon eligibility under RSA 100-A:5 but electing to receive a lump sum in lieu of annuity, an employee shall receive payment in a sum equal to 41.7% of the number of sick leave days remaining to the employee's credit to a maximum of fifty (50) days." See Union Exhibit 1A.

31. According to Trooper Graham and Sgt. Rockey, the Union and its leadership and representatives had no animosity toward Mr. Johnson or other retired members of the bargaining unit and did not intend to discriminate against them.

Decision and Order

Jurisdiction

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, *see* RSA 273-A:6.

Discussion

Both the Union and the State claim that Mr. Johnson's complaint is untimely under RSA 273-A:6, VII. They argue that the tolling under the Servicemembers Civil Relief Act, 50 U.S.C.S. Appx. § 501, *et seq.*,[1] (SCRA) does not apply because Mr. Johnson waived his right to rely upon the tolling of a statute of limitation when he voluntarily filed a petition for enforcement on September 4, 2009 while he was on active duty. Mr. Johnson counters that, because he was on active duty with the Coast Guard since October, 2006 and did not waive his rights under the SCRA, the statute of limitations is tolled pursuant to the SCRA.

[1] Formerly, Soldiers and Sailors Civil Relief Act, 50 U.S.C. App. § 501, et seq.

50 U.S.C.S. Appx. § 526 (a) (formerly § 525) provides as follows:

> Tolling of statutes of limitation during military service. The period of a servicemember's military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department, or other agency of a State (or political subdivision of a State) or the United States by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns.

Active duty with the Coast Guard constitutes "military service" within the meaning of the SCRA. See 50 U.S.C.S. Appx. § 511 (2) (A). 50 U.S.C.S. Appx. § 512 further provides that the SCRA applies to (1) the United States, (2) each of the States, including the political subdivisions thereof, and (3) all territory subject to the jurisdiction of the United States. See 50 U.S.C.S. Appx. § 512 (a). The SCRA "applies to any judicial or administrative proceeding commenced in any court or agency in any jurisdiction subject to this Act." See 50 U.S.C.S. Appx. § 512 (b). The United States Supreme Court has previously recognized that "[t]he statutory command in §525 [presently 526] is unambiguous, unequivocal, and unlimited..." and that a showing of prejudice by military service was not required to invoke the tolling provision. See *Conroy v. Aniskoff*, 507 U.S. 511, 514-16 (1993).

In this case, Mr. Johnson went on active duty in October, 2006 and has been on continuous full-time active duty since July 15, 2007 till at least the date of the hearing on this matter. The PELRB proceeding on this matter falls within the SCRA jurisdiction. As the tolling provision of the SCRA is "unambiguous, unequivocal, and unlimited," Mr. Johnson's complaint is not barred by the RSA 273-A:6, VII six-month limitation period.

The Union also claims that the complaint fails to state a claim and that it is barred by the doctrines of res judicata and collateral estoppel. The Union's claim that the complaint fails to state a claim is without merit as the complaint states a claim for a breach of duty of fair representation and such claim has long been recognized by the PELRB as a basis for unfair labor practice complaints as discussed in more detail below. Further, Mr. Johnson's claim against the

Union is not barred under either res judicata or collateral estoppel.

> Res judicata precludes the litigation in a later case of matters actually decided, and matters that could have been litigated, in an earlier action between the same parties for the same cause of action. For the doctrine to apply, three elements must be met: (1) the parties must be the same or in privity with one another; (2) the same cause of action must be before the court in both instances; and (3) a final judgment on the merits must have been rendered in the first action. The petitioner contests elements (1) and (2).

Portsmouth NH Police Patrolmen's Union, NEPBA Local 11 v. Portsmouth Police Commission, PELRB Decision 2009-081 (citing *Meier v. Town of Littleton*, 154 N.H. 340, 342 (2006)).

> The doctrine of collateral estoppel precludes parties, or those in privity with them, from relitigating in a subsequent action any issue that was actually litigated in a prior proceeding where they were also parties. For collateral estoppel to apply, the issue subject to estoppel must be identical in each action, the first action must have resolved the issue finally on the merits, and the party to be estopped must have appeared in the first action, or have been in privity with someone who did. Further, the party to be estopped must have had a full and fair opportunity to litigate the issue, and the finding must have been essential to the first judgment.

Appeal of Wingate, 149 N.H. 12, 15-16 (2002) (citations and quotation marks omitted).

In this case, the first and second elements of the res judicata doctrine are not satisfied with the respect to Mr. Johnson's claim against the Union as the Union was not a party to the proceedings on Mr. Johnson's petition for enforcement and the previous proceedings did not involve a breach of duty of fair representation claim. Accordingly, Mr. Johnson's claim against the Union in this case is not barred by res judicata. Likewise, Mr. Johnson's claim against the Union is not barred by collateral estoppel as the breach of duty of fair representation issues in this case are not identical to the issues in the action on Mr. Johnson's petition for enforcement. For the forgoing reasons, the Union's motion to dismiss Mr. Johnson's complaint on the grounds that the complaint fails to state a claim and is barred by res judicata and collateral estoppel is denied.

Turning to the merits of Mr. Johnson's claim against the Union, Mr. Johnson contends

that the Union breached its duty of fair representation by acting arbitrarily and in bad faith when it entered into a Settlement Agreement with the State which did not provide compensation for retired troopers like Mr. Johnson, thereby violating RSA 273-A:5, II (a) ("It shall be a prohibited practice for the exclusive representative of any public employee ... to restrain, coerce or otherwise interfere with public employees in the exercise of their rights under this chapter ..."). The Union does not dispute that it owed a duty of fair representation[2] to Mr. Johnson as a retired trooper but denies that it breached its duty.

The PELRB has long recognized a breach of duty of fair representation claim as a basis of unfair labor practice complaints. See *Committee for Fairness in Negotiations v. Somersworth Association of Educators, NEA-New Hampshire and Somersworth School Board, SAU 56*, PELRB Decision No. 86-54. See also *Raymond Porelle, Jr. v. New England Police Benevolent Association Inc.*, PELRB Decision No. 2010-206; *Jeffrey T. Clay v. Newmarket Teachers' Association and Newmarket School District*, PELRB Decision No. 2010-130 (summarily affirmed on appeal, Supreme Court No. 2010-0599). In *Committee for Fairness,* the PELRB has recognized the obligation of a union to provide representation "without hostile discrimination, fairly, impartially, and in good faith." See PELRB Decision No. 86-54. Applying the standard promulgated by the United State Supreme Court, the PELRB explained that while a union has a duty of "complete loyalty to the interests of those whom it represents," the union has a "wide range of reasonableness ... in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Committee for Fairness in Negotiations v. Somersworth Association of Educators, NEA-New Hampshire and Somersworth*

[2] The New Hampshire Supreme Court has recognized that a former employee seeking a relief "under a collective bargaining agreement 'must afford the union the opportunity to act on his behalf' through the contract grievance procedure before he is entitled to direct legal redress in the form of a breach of contract action in the state courts." See *Rochester Sch. Bd. v. Public Employee Labor Relations Bd.*, 119 N.H. 45, 56 (1979) (citing *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965)). See also *New Hampshire Troopers Association/Trooper Karen Therrien v. New Hampshire Department of Safety, Division of State Police*, PELRB Decision No. 2010-165 (appeal declined, Supreme Court No. 2010-0804).

School Board, SAU 56, PELRB Decision No. 86-54 (citing *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)). See also *O'Brien v. Curran*, 106 N.H. 252, 256 (1965) (addressing duty of fair representation prior to RSA 273-A).

The courts have recognized that a union's duty of fair representation arises out of the statutory power of exclusive representation granted private sector unions by the National Labor Relations Act (NLRA). See *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1473 (2009). See also *United Steelworkers of America v. Rawson*, 495 U.S. 362, 373 (1990); *Vaca v. Sipes,* 386 U.S. 171, 177 (1967). A union's power to bargain exclusively for the employees of a bargaining unit, and to make binding agreements governing the individual member's employment, imposes on the union the duty of fairly representing all members of the unit. See *Humphrey v. Moore,* 375 U.S. 335, 342 (1964).

In New Hampshire, public employees' unions are granted the same power of exclusive representation by the Public Employee Labor Relations Act, RSA 273-A. See RSA 273-A:11, I. As in the private sector, the power of exclusive representation imposes on the unions a duty to represent all member of the unit fairly. The New Hampshire Supreme Court has previously held that the authority of the bargaining agent is not absolute "and it is subject to a fiduciary duty of fair representation." *O'Brien v. Curran*, supra, 106 N.H. at 256.

Under the duty of fair representation doctrine, a union has a duty fairly to represent the employees both in its collective bargaining and in its enforcement of the collective bargaining agreement. See *United Steelworkers of America v. Rawson*, supra, 495 U.S. at 372.

> Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, and to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. This duty of fair representation is of major importance, but a breach occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.

Id. (citations and quotation marks omitted.) "Mere negligence, even in the enforcement of a collective-bargaining agreement, would not state a claim for breach of the duty of fair representation ..." *Id.* at 373.

> The doctrine of fair representation is an important check on the arbitrary exercise of union power, but it is a purposefully limited check, for a wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents. If an employee claims that a union owes him a more far-reaching duty, he must be able to point to language in the collective-bargaining agreement specifically indicating an intent to create obligations enforceable against the union by the individual employees.

Id. at 374 (citations and quotations omitted).

In this case, the evidence is insufficient to support Mr. Johnson's claim that the Union's conduct toward him was discriminatory or in bad faith. There is no evidence proving animosity or discriminatory intent on the part of the Union or its representatives with respect to Mr. Johnson or other retired or resigned troopers. Furthermore, the evidence is insufficient to prove that the Union's conduct was arbitrary. Arbitrary conduct is "behavior [that] is so far outside a wide range of reasonableness as to be irrational." See *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 67 (1991).

The New Hampshire Supreme Court has previously recognized that a union must make decisions that "cannot always be completely satisfactory to the same degree for all classes and groups of employees." See *O'Brien v. Curran*, supra, 106 N.H. at 256.

> The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Id. The duty of fair representation does not prevent a union from choosing to seek a particular outcome even though the inevitable result may be harmful to some members of the bargaining unit. See *id.* at 256-57.

Here, the evidence shows that the Union satisfied its duty of fair representation to the bargaining unit members, including Mr. Johnson, when it successfully pursued a breach of contract claim against the State before the PELRB (Decision No. 2005-028) and later before the Supreme Court. On the date the Supreme Court issued its decision in *Appeal of New Hampshire Department of Safety*, supra, 155 N.H. 201, the Union demanded that the State comply with the Supreme Court's decision and restore all leave for all troopers, including the retired troopers. At that time, Mr. Johnson was still employed by the State as a Trooper. The entire legal proceeding, from the Union's 2004 complaint to the Settlement Agreement, lasted approximately 46 months. The negotiations over the leave restoration lasted for longer than a year, during which time Mr. Johnson retired. The evidence shows that, during the period of negotiations, the Union represented the bargaining unit members diligently and in good faith. The Union did not propose to exclude retired or other non-active troopers from the list of troopers to be compensated. As it was clear from the beginning of negotiations that the State opposed the restoration of leave to non-active troopers and as by the time the parties entered into a Settlement Agreement more than 3 years had elapsed since the PELRB ordered the restoration of leave and the bargaining unit members' leave had not yet been restored, the Union's decision to enter into a Settlement Agreement, which did not provide compensation for retired troopers but was otherwise beneficial to the rest of the bargaining unit members, was neither in bad faith nor "so far outside a wide range of reasonableness as to be irrational." Accordingly, Mr. Johnson's evidence is insufficient to prove that the Union breached its duty of fair representation or restrained, coerced or otherwise interfered with Mr. Johnson's rights under RSA 273-A. For the foregoing reasons, Mr. Johnson's claims against the Union are denied.

Turning to Mr. Johnson's claims against the State, he contends that the State is liable for a breach of Mr. Johnson's rights under the CBA resulting from the Union's breach of its duty of

fair representation and that a breach of duty of fair representation claim against the Union and a breach of contract claim against the State are "inextricably interdependent."

As, in this case, the claims against the State are derivative of the breach of duty of fair representation claim against the Union and Mr. Johnson's claim against the Union is denied (see above), Mr. Johnson's claims against the State are also denied.[3] Moreover, the contract at issue in this case is not the parties' CBA, the breach of which has been adjudicated by PELRB Decision No. 2005-028 and *Appeal of New Hampshire Department of Safety*, supra, 155 N.H. 201, but the Settlement Agreement in which the Union and the State entered to resolve the issue of implementation of leave restoration order. Further, any independent breach of contract claim by Mr. Johnson against the State is barred, and therefore dismissed, as Mr. Johnson lacks standing to enforce the CBA; see PELRB Decision 2010-060; and as any breach of contract claim against the State has been otherwise resolved by PELRB Decision No. 2005-028, the subsequent Settlement Agreement, and PELRB Decision No. 2010-060 on Mr. Johnson's petition for enforcement. Accordingly, Mr. Johnson's requests for relief are denied.

So ordered.

June 9, 2011

Karina A. Mozgovaya, Esq.
Staff Counsel/Hearing Officer

Distribution:
Jon Meyer, Esq.
John S. Krupski, Esq.
Marta A. Modigliani, Esq.
Lynmarie C. Cusack, Esq.

[3] "A hybrid suit consists of a claim that the employer breached the collective bargaining agreement and a claim that the union breached its duty of fair representation. The claims are 'inextricably interdependent'; neither is sustainable if the other fails." *Benson v. Potter*, 210 Fed. Appx. 530, 531 (7th Cir. 2006) (citing *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 164 (1983)).