THE SUPREME COURT OF NEW HAMPSHIRE

Public Employee Labor Relations Board
No. 2017-0472

APPEAL OF NEW ENGLAND POLICE BENEVOLENT ASSOCIATION, INC.;
APPEAL OF STATE EMPLOYEES' ASSOCIATION OF NEW HAMPSHIRE, INC., SEIU, LOCAL 1984
(New Hampshire Public Employee Labor Relations Board)

Argued: May 9, 2018
Opinion Issued: November 6, 2018

Nolan | Perroni, P.C., of North Chelmsford, Massachusetts (Peter J. Perroni on the brief and orally), for petitioner New England Police Benevolent Association, Inc.

Glenn R. Milner, of Concord, by brief, and Nolan | Perroni, P.C., of North Chelmsford, Massachusetts (Peter J. Perroni orally), for petitioner State Employees' Association of New Hampshire, Inc., SEIU, Local 1984.

Gordon MacDonald, attorney general (Jill A. Perlow, assistant attorney general, on the brief and orally), for the respondent.

HANTZ MARCONI, J. The petitioners, the New England Police Benevolent Association, Inc. (NEPBA) and the State Employees' Association of New Hampshire, Inc., SEIU, Local 1984 (SEA), appeal a decision of the New

Hampshire Public Employee Labor Relations Board (PELRB) dismissing their unfair labor practice complaints filed against the respondent, the State of New Hampshire. We affirm.

The parties stipulated to, or the record supports, the following facts. The SEA, the NEPBA, the Teamsters Local 633 (Teamsters), the New Hampshire Troopers Association (NHTA), and the New Hampshire State Police Command Staff of the New Hampshire Troopers Association are individual unions that, together, represent approximately 50 separate state employee bargaining units. In December 2016, those five unions began negotiating with the State on successor contracts under RSA 273-A:9, I (2010), which requires unions representing state employees to negotiate with the State as a "bargaining committee" on "[a]ll cost items and terms and conditions of employment affecting state employees." The first session was an organizational meeting, where the parties identified spokespersons, discussed bargaining schedules, reviewed, revised, and signed "ground rules," and discussed and agreed upon the order in which each of the five unions would make "proposal presentations" to the State.

After several bargaining sessions, the State rejected all wage proposals, explaining that "the Governor was not offering any wage increases . . . given anticipated increases in prescription drug costs in the healthcare market." As a result, on March 7, 2017, the Teamsters and the NHTA declared an impasse. See RSA 273-A:1, VI (2010) (defining "impasse" as the parties' failure, "having exhausted all their arguments, to achieve agreement in the course of good faith bargaining, resulting in a deadlock in negotiations").

Although no other unions declared an impasse, the State took the position that all five unions must proceed to impasse mediation. See generally RSA 273-A:12 (Supp. 2017) (setting forth the procedures the parties must use when they have reached an impasse in negotiations, including mediation and fact-finding by a neutral third party). The SEA challenged the State on this position, and subsequently, the petitioners each filed complaints with the PELRB. During the pendency of these complaints, the State advised all five unions that it would select a mediator and continued to assert that all of the unions must participate in impasse mediation "because the issues to be resolved affected all bargaining units."

The PELRB consolidated the petitioners' complaints and found in a 2-1 vote that RSA 273-A:9, I, "requires all five unions to utilize the Union Committee format at the bargaining table and during impasse resolution proceedings until such time as the common terms and condition[s] of employment are settled." Based upon that determination, the PELRB found: (1) the State was "entitled to insist that the five unions continue to adhere to the Union Committee format in the event one or more unions declares a bargaining impasse" in negotiating common costs, terms, and conditions; and

(2) the unions have the obligation to "coordinate with each other" to determine whether the bargaining committee will engage with the State at the bargaining table or in impasse resolution proceedings. The PELRB, therefore, dismissed the complaints and ordered the petitioners to coordinate with the other unions "to determine the forum in which negotiations will go forward." The petitioners unsuccessfully moved for rehearing, and this appeal followed.

"RSA chapter 541 governs our review of PELRB decisions." Appeal of Nashua Sch. Dist., 170 N.H. 386, 391 (2017) (quotation omitted); see RSA 273-A:14 (2010). "Pursuant to RSA 541:13 (2007), we will not set aside the PELRB's order except for errors of law, unless we are satisfied, by a clear preponderance of the evidence, that it is unjust or unreasonable." Nashua Sch. Dist., 170 N.H. at 392 (quotation omitted). "The PELRB's findings of fact are presumed prima facie lawful and reasonable." Id. (quotation omitted); see also RSA 541:13. "In reviewing the PELRB's findings, our task is not to determine whether we would have found differently or to reweigh the evidence, but, rather, to determine whether the findings are supported by competent evidence in the record." Nashua Sch. Dist., 170 N.H. at 392 (quotation omitted). "We review the PELRB's rulings on issues of law de novo." Id. (quotation omitted).

On appeal, the petitioners argue that the PELRB erred in finding that RSA 273-A:9, I, requires the unions to remain in the bargaining committee format, and acted unlawfully or unreasonably when it dismissed the petitioners' complaints. They assert that the PELRB's interpretation of RSA 273-A:9, I: (1) contradicts the plain language of the statute; and (2) leads to an absurd result. Because the petitioners challenge the PELRB's ruling on an issue of law, the court reviews the PELRB's decision de novo. Id.

Resolution of this issue requires that we interpret the language of the pertinent statutes. See Appeal of Laconia Patrolman Assoc., 164 N.H. 552, 555 (2013). "Although the PELRB's findings of fact are presumptively lawful and reasonable and will not be disturbed if supported by the record, we are the final arbiters 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 SEA (N.H. Community College System), 170 N.H. 699, 703 (2018).

When examining the statutory language, "we ascribe the plain and ordinary meaning to the words used." Laconia Patrolman Assoc., 164 N.H. at 555. "We do not consider words and phrases in isolation, but rather within the context of the statute as a whole," id., and "construe all parts of a statute together to effectuate its overall purpose and to avoid an absurd or unjust result," Appeal of Exeter Police Assoc., 154 N.H. 61, 65 (2006). "We interpret 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." Laconia Patrolman Assoc., 164 N.H. at 555. "We do not look

beyond the language of a statute to determine legislative intent if the language is clear and unambiguous." Appeal of Town of Deerfield, 162 N.H. 601, 603 (2011).

RSA chapter 273-A, New Hampshire's Public Employee Labor Relations Act, recognizes the right of public employees to create unions, see RSA 273-A:10 (Supp. 2017), :11, and sets forth rules governing negotiations between public employees and employers. See, e.g., RSA 273-A:3, II(a) (2010) (explaining when and how the parties must commence negotiations), :12 (setting forth impasse resolution procedures). RSA 273-A:3, I, sets forth a general rule that requires all parties "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 [cooperating] in mediation and fact-finding required by this chapter." RSA 273-A:3, I; see also RSA 273-A:5, I(g) (prohibiting any public employer from "refus[ing] to negotiate in good faith with the exclusive representative of a bargaining unit"). In this way, "good faith" negotiation encompasses all parts of the negotiating process.

RSA 273-A:9, I, sets forth an additional rule that applies only to negotiations between the State and the unions representing state employees. RSA 273-A:9, I, provides:

> All cost items and terms and conditions of employment affecting state employees in the classified system generally shall be negotiated by the state, represented by the governor as chief executive, with a single employee bargaining committee comprised of exclusive representatives of all interested bargaining units. Negotiations regarding terms and conditions of employment unique to individual bargaining units shall be negotiated individually with the representatives of those units by the governor.

RSA 273-A:9, I, sets forth a framework for negotiations to occur between the Governor, on behalf of the State, and a single committee comprised of the exclusive representatives of all interested bargaining units when negotiating common cost items and terms and conditions of employment. This framework arguably provides for efficient and fair negotiations between the State and the unions on cost items and terms and conditions of employment that affect all unions representing state employees.

RSA 273-A:12, which applies to all public bargaining units and public employers, sets forth detailed procedures designed to assist parties who are at an impasse in negotiations reach a resolution to their dispute. When the parties reach an impasse, RSA 273-A:12, I(b) requires the parties to engage in mediation with a neutral third party. The statute further provides that, if the parties so choose, or if mediation does not resolve the dispute, a neutral party chosen by the parties or appointed by the PELRB shall make and report

findings of fact and recommendations. RSA 273-A:12, I(b). If one or both parties reject the recommendations, the statute sets forth additional steps to resolve the dispute. See RSA 273-A:12, II (submission of the neutral party's findings of fact and recommendations to the union's full membership and employer's board for a vote), III (submission of the neutral party's findings of fact and recommendations to the legislative board), IV (reopening negotiations if the parties still have not reached an agreement).

The petitioners do not dispute their obligation under RSA 273-A:9, I, to negotiate as a bargaining committee at the bargaining table on common cost items, terms, and conditions. However, the SEA asserts that the plain language of RSA 273-A:12 requires an impasse between the individual union and the State in order to trigger the impasse resolution procedures. Because neither the SEA nor the State has declared an impasse, the SEA argues that the impasse resolution procedures have not been triggered and, therefore, the State must continue bargaining with the SEA.

Similarly, the NEPBA argues that the plain language of RSA 273-A:9, I, and RSA 273-A:12 limits the bargaining committee format to negotiations at the bargaining table. Pointing to the absence of the word "committee" in RSA 273-A:12 and the references to individual bargaining units, see RSA 273-A:12, I(a)(1)-(2), the NEPBA asserts that requiring all five unions to maintain the bargaining committee format through impasse resolution procedures "improperly reads a committee bargaining requirement into RSA 273-A:12 that does not exist." Though the petitioners set forth different arguments, their conclusion is the same: once one or more unions in the bargaining committee reach an impasse in negotiations with the State, the plain language of the statute no longer obligates the unions to negotiate as a single bargaining committee and instead requires the State to negotiate individually with the unions who have not declared an impasse.

Here, the impasse declared by the Teamsters and the NHTA occurred after the State rejected all of the proposals on an item held in common by all of the bargaining committee members — wages. The reason for the State's rejection of the wage proposals was the same for all — the anticipated increase of prescription drug costs. Thus, the Teamsters' and NHTA's impasse declarations resulted from the State's position on wages that applied to "all union wage proposals."

The statutory scheme is silent as to the proper course of action under these circumstances. Arguably, such silence creates an ambiguity. See In re Juvenile 2005-212, 154 N.H. 763, 766 (2007). Because the legislative history is silent on this issue, it also provides no guidance to resolve any ambiguity. See Laws 1997, 351:53 (adding the bargaining committee language to RSA 273-A:9). We look, therefore, to the structure of the statutory scheme as a whole to discern the legislature's objectives. When we examine the pertinent

statutes in the context of the entire statutory scheme, rather than in isolation, we conclude that the legislature intended unions negotiating on behalf of state employees to continue negotiating with the State as a bargaining committee under the circumstances in this case when the item causing impasse with one or more unions is common to all. See Exeter Police Assoc., 154 N.H. at 65.

Such an interpretation is consistent with the plain language of RSA 273-A:3, I, which defines "good faith negotiation" to include the steps provided in RSA 273-A:12 to resolve an impasse. See RSA 273-A:3, I (defining "good faith negotiation" as including "cooperat[ing] in mediation and fact-finding"), :12, I-IV (setting forth the steps to resolving an impasse). It is also consistent with the plain language of RSA 273-A:9, I, which mandates that "cost items and terms and conditions of employment affecting state employees . . . be negotiated by the state . . . with a single employee bargaining committee." See McCarthy v. Wheeler, 152 N.H. 643, 645 (2005) ("The use of the word 'shall' is generally regarded as a command."). Furthermore, it is consistent with the apparent purpose of RSA 273-A:9, I, namely, to provide for efficiency and fairness in negotiations on common items and terms and conditions of employment between the State and the unions representing state employees. Finally, it is consistent with the evident purpose of RSA 273-A:12, which is to enable the parties to resolve the impasse.

We disagree with the petitioners that our interpretation leads to an absurd result or is unjust and unreasonable. When, as in this case, the State has rejected all proposals on an item common to all unions, which has caused at least one union to declare an impasse, it is reasonable to allow the State to engage in impasse negotiations with all of the unions participating as a single bargaining committee.

We further disagree with the NEPBA that our interpretation somehow deprives the petitioners of their ability to exercise independent negotiation strategies. When, as in this case, the State seeks to negotiate with the unions as a single bargaining committee after it has rejected all proposals on a common item, we fail to see how requiring the parties to engage in impasse resolution proceedings, with the unions participating as a single bargaining committee, deprives the unions of their ability to "maintain an effective bargaining posture." Both stages of negotiation — bargaining at the table and resolving an impasse — allow the unions to advocate for the interests of their respective members. See RSA 273-A:12, I(a)(1)-(2) (allowing parties to make presentations to the other party), I(b) (mediation and fact-finding). Whether the parties continue negotiating at the table or enter into impasse resolution procedures, the unions will be negotiating with the State as to an item that all five unions have in common.

Because our function "is not to make laws, but to interpret them, any public policy arguments relevant to the wisdom" of the statutory scheme "and

its consequences should be addressed to the General Court." Logan v. Logan, 120 N.H. 839, 843 (1980). If the legislature disagrees with our interpretation, it is free to amend the statutory scheme as it sees fit. See Appeal of Town of Nottingham, 153 N.H. 539, 566 (2006).

Because we interpret the statute under these circumstances to require the unions to negotiate with the State as a single bargaining committee, the PELRB did not act unlawfully or unreasonably in dismissing the petitioners' unfair labor practice complaints or in ordering the petitioners to "coordinate with each other to determine the forum in which negotiations will go forward and thereafter utilize the Union Committee format accordingly."

All arguments the petitioners raised in their notice of appeal, but did not brief, are deemed waived. In re Estate of King, 149 N.H. 226, 230 (2003).

Affirmed.

LYNN, C.J., and HICKS, BASSETT, and DONOVAN, JJ., concurred.

NH Supreme Court affirmed this decision on 11-6-2018, Slip Op. No. 2017-0472.
(NH Supreme Court Case No. 2017-0472)

State of New Hampshire
Public Employee Labor Relations Board

SEA of NH, Inc., SEIU Local 1984 v. State of New Hampshire
Case No. G-0252-1

and

NEPBA, Inc. Local 40 (Fish & Game) et. al. v. State of New Hampshire
Case Nos. G-0254-1, G-0255-1, G-0110-2, G-0106-2, G-0107-2

Consolidated Cases
Decision No. 2017-094

Appearances:

Glenn Milner, Esq., State Employees Assoc. of NH,
Concord, New Hampshire for the SEA, SEIU Local 1984

Peter J. Perroni, Esq., Nolan Perroni, P.C.
No. Chelmsford, Massachusetts for the NEPBA

Nancy J. Smith, Esq., Senior Assistant Attorney General, and
Jill Perlow, Esq., Assistant Attorney General
Concord, New Hampshire for the State

Background:

On March 24, 2017, the SEA filed an unfair labor practice complaint under the Public Employee Labor Relations Act (Act), complaining that the State has improperly refused to continue negotiations with the SEA at the bargaining table because other unions (exclusive representatives) have declared impasse and are pursuing mediation, an impasse resolution procedure available under RSA 273-A:12. The NEPBA filed a similar complaint[1] on April 10, 2017. According to the SEA and the NEPBA, the State's refusal to continue negotiations is an unfair labor practice in violation of RSA 273-A:5, I (a)(to restrain, coerce or otherwise interfere

[1] The above captioned matters were previously consolidated. See PELRB Decision No. 2017-071 (April 24, 2017).

with its employees in the exercise of the rights conferred by this chapter); (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); and (g)(to fail to comply with this chapter or any rule adopted under this chapter)(RSA 273-A:3 and 11). The NEPBA also claims the State has violated sub-section (b)(to dominate or to interfere in the formation or administration of any employee organization).

The SEA and the NEPBA request that the PELRB: 1) find that the State's refusal to continue bargaining violates the cited sub-sections of RSA 273-A:5, I; 2) issue an order directing the State to return to the bargaining table; and 3) grant additional relief as appropriate.

The State denies the charges and contends that RSA 273-A:9, I imposes a union bargaining committee ("Union Committee") requirement as to common terms and conditions of employment ("common terms and conditions")[2] that the SEA and the NEPBA are refusing to follow. According to the State, the five unions are required to utilize the RSA 273-A:9, I Union Committee structure to address common terms and conditions at the bargaining table and during any RSA 273-A:12 impasse resolution, like mediation or fact-finding, until contractual provisions addressing common terms and conditions are settled. The State argues that none of the five unions can be excused from the Union Committee requirement even in the event that some, but not all, declare a bargaining impasse and invoke impasse resolution procedures under RSA 273-A:12. The State maintains that non-impasse unions, like the SEA and the NEPBA, may not continue negotiations at the bargaining table over common terms and conditions, either on their own or as a reduced Union Committee (i.e. without the participation of all five unions). Likewise, the State argues that impasse unions may not proceed to impasse resolution mediation

[2] The State describes these as cost items and terms and conditions of employment affecting employees in the classified system generally.

(or fact-finding), over common terms and conditions, as a reduced Union Committee (i.e. without the participation of the non-impasse unions). The State is ready to address common terms and conditions of employment with the Union Committee on this basis, and requests that the PELRB deny all requests for relief and dismiss the complaints.

At the parties' request, the scheduled hearing was cancelled, and the parties have submitted these consolidated cases for decision on stipulations and briefs, all of which have been duly filed.The stipulations are reflected in the Findings of Fact, set forth below.

Findings of Fact

1. The State is a "public employer" under RSA 273-A:1, X.

2. There are approximately fifty separate state executive branch bargaining units that are represented by five separate exclusive representatives, or unions.

3. The SEA is the exclusive representative and bargaining agent for approximately 42 bargaining units, and its representation of the majority of these dates to 1976. The collective bargaining agreements on file with the PELRB per RSA 273-A:16, I reflect that the SEA and the State negotiate a master agreement covering all SEA represented bargaining units, with a number of different sub-unit provisions and wage schedules. State collective bargaining agreements are available online at https://www.nh.gov/pelrb/collective/index.htm. The current collective bargaining agreement between the SEA and the State will remain in force and effect until June 30, 2017 or until such time as a new agreement is executed.

4. The NEPBA represents and bargains for five separate bargaining units (two Fish and Game Department units since 2006, one Liquor Commission/Division of Enforcement and Licensing unit since 2009, and two Department of Corrections/ Probation and Parole units since

2010). The five NEPBA collective bargaining agreements have a term and duration clause similar to the one in the SEA agreements.

5. The Teamsters Local 633 (Teamsters) has represented and bargained for a Department of Corrections bargaining unit (Corrections Officers and Corrections Officers Corporals) since 2012 (PELRB Decision No. 2012-266). The current Teamsters collective bargaining agreement has a term and duration similar to the SEA contract.

6. The New Hampshire Troopers Association (NHTA) has represented and bargained for Department of Safety sworn personnel up to and including the rank of Sergeant since 1990 (see PELRB Certification of Representative and Order to Negotiate, Case No. P-0754, available online at https://www.nh.gov/pelrb/certifications/documents/state_troopers.pdf. The current NHTA collective bargaining agreement has a term and duration similar to the SEA contract.

7. The New Hampshire State Police Command Staff, New Hampshire Troopers Association (Command Staff) has represented and bargained for the Department of Safety Command Staff unit comprised of the positions of Major, Captain, and Lieutenant since 2016 (PELRB Decision No. 2016-040). The current Command Staff collective bargaining agreement has a term and duration similar to the SEA contract.

8. As chronicled in the parties' stipulations,[3] bargaining on successor contracts began in December, 2016. The first session was an organizational meeting, where introductions were made, spokespersons were identified for each group, bargaining schedules were discussed, and ground rules were reviewed, revised, and signed. The order in which each of the five unions would make proposal presentations was also discussed and agreed upon. There were fourteen subsequent bargaining sessions between December 15, 2016 and March 7, 2017.

[3] Incorporated herein by reference.

9. At the February 21, 2017 bargaining session, the State finally announced and informed all five unions that it was rejecting all union wage proposals. The State explained that the Governor was not offering any wage increases during this bargaining cycle given anticipated increases in prescription drug costs in the healthcare market.

10. On March 7, 2017, the State's teams and the Union Master teams met (SEA, NHTA, Command Staff, Teamsters, and NEPBA).

11. The SEA withdrew proposals, submitted amended proposals, discussed the remaining proposals on the table, and challenged the State's position on wages.

12. The Teamsters requested the State's final and best offer on wages. In response, the State offered no wage increase. The Teamsters then discussed pay and working conditions at the different state prisons and in particular the discrepancies that exist between pay rates for State Department of Corrections officers and pay rates for corrections officers employed at county correctional facilities and New Hampshire federal correctional facilities. The State's position remained unchanged and the Teamsters declared a bargaining impasse.

13. The State responded "no" to pending NHTA proposals and the NHTA also declared impasse.

14. The State then took the position that all five unions would have to proceed to impasse mediation since the Teamsters and the NHTA had declared impasse and the five unions needed to decide upon a mediator. The SEA claimed the State's position was contrary to RSA 273-A and asked how the State could justify its position when the State did not try and force the other unions into impasse mediation when the SEA had declared impasse in prior bargaining cycles, including during the 2014-2015 cycle. The State said it could not answer this question and represented that it was willing to meet with SEA sub-unit teams but would only meet with

the SEA Master Team if they followed the other unions into mediation or if the Teamsters and the NHTA (Troopers and Sergeants) withdrew their impasse declaration and returned to the bargaining table.

15. On March 16, 2017, the State's team and the SEA, Command Staff, and NEPBA met to discuss the declarations of impasse made by the Teamsters and NHTA (Troopers and Sergeants) on March 7, 2017. The State reiterated its position that because two of the unions (NHTA and Teamsters) had declared impasse all units must go to impasse mediation or all units must return to the bargaining table. At one point, the SEA cited the procedural difficulties with the State's position by pointing out that the SEA was not responsible for coordinating the actions of the other unions.

16. On April 27, 2017, the State advised all five unions that it would select a mediator and that the impasse mediation sessions were not limited to the Teamsters and NHTA contracts because the issues to be resolved affected all bargaining units. A mediator has been selected and all five unions have been invited to participate.

17. The SEA declined to participate but agreed to attend as an observer.

18. The NEPBA continues to object to the State's actions and has reserved all of its rights.

19. On May 1, 2017, State offered to meet with the SEA and NEPBA outside of impasse mediation on all non-cost items unique to their respective bargaining units.

Decision and Order

Decision Summary

By a 2-1 vote, a majority of the Board (Members Eills and O'Mara) find that RSA 273-A:9, I requires all five unions to utilize the Union Committee format at the bargaining table and

during impasse resolution proceedings until such time as the common terms and condition of employment are settled. The SEA and NEPBA complaints charging the State with violations of various sub-sections of RSA 273-A:5, I are therefore dismissed.

For the reasons stated in his dissent, Board Member Hounsell voted to find that the State has committed an unfair labor practice as charged.

Jurisdiction:

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

Discussion

The basic issue is whether the RSA 273-A:9, I Union Committee format requirement, which the parties agree applies to bargaining table activity over common terms and conditions, extends to RSA 273-A:12 impasse resolution activity dealing with the same subject matter. We conclude that bargaining table activity, impasse mediation, and impasse fact-finding are all a version of negotiation within the meaning of RSA 273-A:9, I. In other words, they are each different phases of the overall negotiation process. Therefore, to the extent of negotiations over common terms and conditions, the State is entitled to insist that the five unions continue to adhere to the Union Committee format in the event one or more of the unions declares a bargaining impasse as has happened in this case. It is the obligation of the five unions to coordinate with each other and determine whether the Union Committee will engage with the State at the bargaining table or in impasse resolution proceedings.

We base our decision on several different provisions of the Act. First, there is RSA 273-A:9, I, applicable to Executive Branch state employee bargaining units. This establishes the Union Committee format:

> All cost items and terms and conditions of employment affecting state employees in the classified system generally shall be negotiated by the state, represented by the governor as chief executive, *with a single employee bargaining committee comprised of exclusive representatives of all interested bargaining units.* Negotiations regarding terms and conditions of employment unique to individual bargaining units shall be negotiated individually with the representatives of those units by the governor.

(Emphasis added).

The statutory impasse process, set forth in RSA 273-A:12, is also relevant. Unlike RSA 273-A:9, I, it is applicable to all bargaining units[4] in the state, regardless of whether they involve municipal, county, or state employees, and provides, in part, as follows:

> 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

[4] There are approximately 600 PELRB certified bargaining units in the state. They are indexed online at https://www.nh.gov/pelrb/certifications/index.htm.

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.

A third provision expressly provides that cooperation during impasse resolution proceedings is part of good faith negotiation under the Act:

> 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.

See RSA 273-A:3, I (emphasis added).

Based upon these statutory provisions it is clear that impasse mediation, impasse fact-finding, and bargaining table activity each occupy different points on the collective bargaining spectrum. Indeed, the overlap between impasse resolution and negotiation is reflected in the first two sentences of sub-section IV of RSA 273-A:12, where mediation is identified as a negotiation option if the fact finding process does not settle the contract: "[i]f 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."

Whether the parties are engaged at the bargaining table or are participating in impasse mediation or fact-finding, the purpose (reaching agreement) is the same. Each of these three options represents a different approach to this common objective, and therefore all are part of the overall statutory negotiation scheme. Impasse resolution proceedings are simply negotiations conducted with the intervention and assistance of a professional mediator or fact-finder. A contract can be settled[5] during impasse mediation, or following impasse fact-finding, just as can happen at the bargaining table. Activity which can result in an agreement must be deemed part and parcel of the negotiation process.

In accordance with the foregoing, we conclude that RSA 273-A:9, I requires all five unions to use the Union Committee format during "negotiations" with the State over common terms and conditions of employment, inclusive of any impasse mediation or fact-finding, and even when there is a split among the unions about how to proceed, as has happened in this case. This is also consistent with the purpose of the Union Committee format, which is to create efficiencies in the bargaining process and organize and structure negotiations between the State and the various State employee bargaining units at issue in this case. It also avoids a diminution of, or strain upon, the State's bargaining resources that might occur if the State is compelled to address contractual provisions common to all bargaining units in different forums and at different times in the event of a bargaining impasse.

The State is prepared to engage with the Union Committee at the bargaining table or in impasse resolution. The unions must now coordinate with each other to determine the forum in

[5] Subject to the approval of cost items under RSA 273-A:3.

which negotiations will go forward and thereafter utilize the Union Committee format accordingly. The SEA and NEPBA complaints are dismissed.

So ordered.

May 26, 2017

/s/ Andrew Eills
Andrew Eills, Esq., Chair

Chair Andrew Eills, Esq. and Board Member James M. O'Mara, Jr. vote to dismiss all claims. Board member Senator Mark Hounsell votes to find that the State has committed an unfair labor practice as charged, as explained in his dissenting decision below.

Dissenting Opinion:

I disagree with the majority's conclusion that all five unions are still subject to the Union Committee format and must all appear together at the bargaining table or at impasse mediation. There is no language in RSA 273-A:9, I or RSA 273-A:12 which effectively allows the Union Committee format to override the right of the SEA and the NEPBA to remain at the bargaining table over common terms and conditions of employment, or to prevent the Teamsters and the NHTA from utilizing statutory impasse procedures. There is also no support for this result in RSA 273-A:3, I. This sub-section of the Act, cited by the State in support of the argument that negotiations at the bargaining table and impasse resolution proceedings are, in substance, synonymous, only states that "cooperation" in impasse resolution is part of good faith negotiations. It does not equate "impasse resolution" with "negotiation" as that term is used, for example, in RSA 273-A:9, I.

The "bargaining impasse" in this case literally means that negotiations have stalled. The resulting legal status is that the Teamsters and NHTA are no longer actively engaged in "negotiations" within the meaning of RSA 273-A:9, I. Therefore, they are no longer subject to the Union Committee format. Instead, their rights and obligations, together with those of the State, are governed by RSA 273-A:12. This sub-section of the Act is detailed and

comprehensive, and it does not contain a Union Committee requirement for state employee bargaining units.

The forced maintenance of the Union Committee structure given the split between impasse and non-impasse unions is also unworkable. Union action through a unified Union Committee is impossible at this juncture. Can two of the five unions force the other three into impasse mediation or fact-finding? Can the three non-impasse unions force the other two impasse unions to remain at the bargaining table? How such issues are to be resolved is unclear.

The PELRB has certified each of the five unions as the "exclusive" representative of the state bargaining units referenced in the findings of fact. Each represents employees working in different areas of state government, and each is working on finalizing their own collective bargaining agreement with the State. The fact that the five unions have not moved "in lock step" into impasse resolution is not surprising giving the divergent working conditions and responsibilities which characterize the different bargaining units. Contrast, for example, Teamsters represented corrections officers working at the Department of Corrections with SEA represented employees working at the Division of Administrative Services, the Insurance Department, and the Department of Education. Given such fundamental differences between the various bargaining units it is especially important to avoid infringing upon the right of individual unions (Teamsters and NHTA) to leave the bargaining table and pursue impasse resolution without prejudicing the right of non-impasse unions (SEA and NEPBA) to continue at the bargaining table. Continuation of the Union Committee format, however, interferes with, and improperly limits, these important statutory rights. It also gives the State an unfair advantage in the difficult task of settling common terms and conditions of employment because of the

restrictions that are placed upon the unions' ability to fully utilize the tools and options available to them under the Act.

For all these reasons I disagree with the majority decision in this case. The five unions are not bound by the Union Committee format in the event of a bargaining impasse over common terms and conditions of employment. Therefore, the State's refusal to continue to meet the SEA and the NEPBA at the bargaining table to discuss common terms and conditions as demanded is a clear violation of the State's bargaining obligations, and the State has committed an unfair labor practice as charged. The State should be ordered back to the bargaining table to resume negotiations with the SEA and the NEPBA over common terms and conditions of employment.

May 26, 2017

/s/ Mark Hounsell
Mark Hounsell, Board Member

Distribution: Peter J. Perroni, Esq.
Glenn Milner, Esq.
Jill Perlow, Esq.
Nancy J. Smith, Esq.

NH Supreme Court affirmed PELRB Decision No. 2107-094 on 11-6-2018, Slip Op. No. 2017-0472 (NH Supreme Court Case No. 2017-0472)

State of New Hampshire
Public Employee Labor Relations Board

SEA of NH, Inc., SEIU Local 1984 v. State of New Hampshire
Case No. G-0252-1

and

NEPBA, Inc. Local 40 (Fish & Game) et. al. v. State of New Hampshire
Case Nos. G-0254-1, G-0255-1, G-0110-2, G-0106-2, G-0107-2

Consolidated Cases
Decision No. 2017-109

Order on Motion for Rehearing

The SEA and the NEPBA filed motions for rehearing of PELRB Decision No. 2017-094 (May 26, 2017) on June 26, 2017. The State filed an objection to both motions on July 5, 2017. Motions for rehearing are governed by RSA 541:3 and Pub 205.02, which provides in part as follows:

> **Pub 205.02 Motion for Rehearing.**
>
> (a) Any party to a proceeding before the board may move for rehearing with respect to any matter determined in that proceeding or included in that decision and order within 30 days after the board has rendered its decision and order by filing a motion for rehearing under RSA 541:3. The motion for rehearing shall set out a clear and concise statement of the grounds for the motion. Any other party to the proceeding may file a response or objection to the motion for rehearing provided that within 10 days of the date the motion was filed, the board shall grant or deny a motion for rehearing, or suspend the order or decision complained of pending further consideration, in accordance with RSA 541:5.

Upon review, by a 2-1 vote, the motion for rehearing is denied.

Date: July 12, 2017

/s/ Andrew Eills
Andrew Eills, Esq., Chair

Chair Andrew Eills, Esq. and Board Member James M. O'Mara, Jr. vote to deny the motion for rehearing. Board member Senator Mark Hounsell votes to grant the motion, as explained in his dissenting decision below.

Dissenting Opinion:

I vote to grant the motion. Both the NEPBA and the SEA have raised new arguments that should be heard by the PELRB. It would be a disservice to the people of the state if the PELRB were to ignore their pleadings. Additionally, it would be a disservice to the thousands of state employees whose livelihood depends on being heard in order to proceed within a proper contract negotiating framework. The severity of this case is such that to deny the motion for a rehearing would be harmful to many. What is the harm in hearing more on the matter?

Date: July 12, 2017

/s/ Mark Hounsell
Mark Hounsell, Board Member

Distribution: Peter J. Perroni, Esq.
Glenn Milner, Esq.
Jill Perlow, Esq.
Nancy J. Smith, Esq.