Reverses & Remands
PELRB Decision No.
2016-293

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THE SUPREME COURT OF NEW HAMPSHIRE

Public Employee Labor Relations Board
No. 2017-0115

APPEAL OF STATE EMPLOYEES' ASSOCIATION/SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 1984
(New Hampshire Public Employee Labor Relations Board)

Argued: November 9, 2017
Opinion Issued: April 25, 2018

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

Morgan, Brown & Joy, LLP, of Boston, Massachusetts (Jeffrey S. Siegel on the brief, and Joseph P. McConnell orally), for the respondent.

HICKS, J. The petitioner, the State Employees' Association of New Hampshire/Service Employees' International Union, Local 1984 (Union) appeals an order of the New Hampshire Public Employee Labor Relations Board (PELRB) dismissing its unfair labor practice complaint against the respondent, the Community College System of New Hampshire (CCSNH). The Union argues that the PELRB erred in ruling that CCSNH was not obligated to: (1) bargain over wages for on-campus tutoring services performed by adjunct faculty; and (2) compensate an adjunct faculty member for lost tutoring income resulting

from his participation in collective bargaining negotiations. We reverse and remand.

I

The record supports the following facts. The Union is the exclusive bargaining representative of adjunct faculty "who are employed by CCSNH and who have taught at least five semesters in the last five years or who have currently begun their fifth semester of teaching and have taught four semesters within the last five years." The most recent collective bargaining agreement (CBA) between the parties covered the period from September 25, 2013, through June 30, 2016. The CBA classifies adjunct faculty as "part-time" employees and delineates that they are responsible for teaching specific assigned courses and making themselves available for student consultation "before or after class, or by appointment." CCSNH also hires adjunct faculty from the bargaining unit — along with full-time faculty and, occasionally, students — to provide tutoring services to its student body at the Academic Center for Excellence (ACE). This includes Rick Watrous, who has taught English at CCSNH as an adjunct professor since the 1990s, tutored students at ACE since 2010, and currently serves as a member of the Union's bargaining team.

The CBA does not address the subject of tutoring generally, or compensation for tutoring specifically. Accordingly, while negotiating a successor agreement in 2016, the Union sought to bargain over tutoring wages paid to adjunct faculty bargaining unit members. See RSA 273-A:3, I (2010) (requiring a public employer and a bargaining unit representative to negotiate in good faith over the "terms of employment"). CCSNH, however, refused, maintaining that tutoring was not "bargaining unit work" — i.e., tutoring is not among the duties adjunct faculty are hired to perform. For the same reason, CCSNH refused to reimburse Watrous for ACE tutoring hours he forewent to attend collective bargaining negotiations. See RSA 273-A:11, II (2010) (requiring public employers to meet with a bargaining unit's representatives "during working hours without loss of compensation or benefits").

As a result, the Union filed an unfair labor practice complaint with the PELRB, alleging that CCSNH had violated its bargaining obligations under RSA chapter 273-A. Following an adjudicatory hearing, a three-member panel of the PELRB issued an order dismissing the complaint in its entirety. In its order, the panel, construing our decision in Appeal of Berlin Education Association, 125 N.H. 779, 780-84 (1984), maintained that "public employers like CCSNH are only obligated to bargain over wages paid for the performance of bargaining unit work." Unanimously agreeing that tutoring did not fall within the scope of the adjunct faculty's "bargaining unit work," the panel found that CCSNH was not obligated to bargain over wages for these services.

In turn, by a two-to-one decision, the panel determined that, because tutoring was outside the scope of the bargaining unit's work, CCSNH also did not commit an unfair labor practice when it refused to reimburse Watrous for his lost income. This appeal followed.

II

"RSA chapter 541 governs our review of PELRB decisions." Appeal of Prof'l Fire Fighters of Hudson, 167 N.H. 46, 51 (2014); see RSA 273-A:14 (2010); RSA 541:2 (2007). "Pursuant to RSA 541:13 (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." Prof'l Fire Fighters of Hudson, 167 N.H. at 51. "The PELRB's findings of fact are presumed prima facie lawful and reasonable." Id.; see also RSA 541:13. "In reviewing the PELRB's findings, 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." Prof'l Fire Fighters of Hudson, 167 N.H. at 51. "We review the PELRB's rulings on issues of law de novo." Id.

A

The Union first challenges the PELRB's determination that CCSNH is not obligated to bargain over compensation paid to adjunct faculty bargaining unit members for ACE tutoring.

The Public Employee Labor Relations Act obligates public employers and employee organizations to negotiate in good faith over the terms and conditions of employment. RSA 273-A:3 (2010). The Act defines "terms and conditions of employment," in relevant part, as "wages, hours, and other conditions of employment." RSA 273-A:1, XI (2010). Wages paid to members of a bargaining unit, therefore, constitute a mandatory subject of negotiations between public employers and employee organizations. Berlin, 125 N.H. at 783.

That the foregoing is well-established is not questioned by CCSNH. According to CCSNH, however, "first and foremost" it must be determined whether the work being performed is "bargaining unit work." This is because, CCSNH reasons, our decision in Berlin dictates that it is only those wages paid for the performance of "bargaining unit work" that must be negotiated. Maintaining that the PELRB properly recognized this distinction, CCSNH argues that we should defer to its findings that tutoring is not part of the adjunct faculty's "bargaining unit work" and, thus, wages paid for such services need not be negotiated.

In Berlin, we were called upon to determine whether a school board was obligated to negotiate with teachers over a salary scale for performance of extracurricular duties. Id. at 780. Thus, our decision rested upon the subject matter that the teachers sought to negotiate — a salary scale. Id. at 783-84.

Because the Act did not define the statutory term, we ascribed to the term "wages" its plain and obvious meaning of "monetary remuneration by an employer for labor or services." Id. at 783 (quotation and ellipses omitted). We also recognized that other courts had "rather consistently held that such items as overtime pay, extra duty pay, vacation and holiday pay, bonus or merit pay, severance pay, shift differentials, and pensions are mandatory subjects of bargaining encompassed within the term 'wages.'" Id. at 783-84 (quotation omitted). Given this expansive definition, it followed that the salary scale sought to be negotiated fell within the term "wages" and, thus, was a mandatory subject of bargaining. Id. at 784. We also concluded contrary to the school board's primary argument, but consistent with a number of other jurisdictions, "that extracurricular activities are within the scope of a teacher's duties" — or constitute "bargaining unit work" as CCSNH terms it. Id. at 782.

We need not consider whether Berlin should be interpreted to require that bargaining is mandatory any time the topic at issue concerns wages paid or to be paid to the employee by the employer, or whether, in addition to concerning wages, the subject matter must be work that is closely related to, or "within the scope" of, the employees' duties that are already the subject of bargaining. Even if we construe that case in the latter fashion, as CCSNH advocates, we conclude that the tutoring services at issue here are, if anything, more closely related to the normal adjunct faculty members' duties than the extracurricular activities in Berlin were related to the teachers' regular duties. Thus, the result reached in Berlin applies a fortiori to control the outcome here. Either way, the PELRB erred as a matter of law.

B

The Union next challenges the PELRB's consequent conclusion that, because tutoring was not "bargaining unit work," CCSNH did not commit an unfair labor practice when it refused to compensate Watrous for ACE tutoring hours he forewent to participate in collective bargaining negotiations.

RSA 273-A:11 (2010) requires a public employer to extend certain rights to the exclusive representative of a bargaining unit, in this case the Union, including the following: "A reasonable number of employees who act as representatives of the bargaining unit shall be given a reasonable opportunity to meet with the employer or his representatives during working hours without loss of compensation or benefits." RSA 273-A:11, II. Interpreting "without loss of compensation or benefits," id., to encompass only lost compensation or

benefits deriving from "bargaining unit work," the PELRB concluded that Watrous was not entitled to reimbursement.

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. See Appeal of Laconia Patrolman Assoc., 164 N.H. 552, 555 (2013). "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).

Nor, when engaging in statutory interpretation, will we "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. Yet, as the Union asserts, that is exactly what the PELRB's interpretation of RSA 273-A:11 would require us to do. The term "bargaining unit work" is simply not found in the statutory provision.

Because the plain language of RSA 273-A:11, II obligates CCSNH to afford "[a] reasonable number of employees who act as representatives of the bargaining unit . . . a reasonable opportunity to meet" for collective bargaining negotiations "during working hours without loss of compensation or benefits," we agree with the Union that CCSNH must compensate Watrous for the ACE tutoring hours he missed while attending such negotiations. We conclude, therefore, that the PELRB erred as a matter of law with regard to this finding as well and remand for proceedings consistent with this opinion.

Reversed and remanded.

LYNN, C.J., and BASSETT, J., concurred; DALIANIS, C.J., retired, specially assigned under RSA 490:3, concurred; HANTZ MARCONI, J., concurred in part and dissented in part.

HANTZ MARCONI, J., concurring in part and dissenting in part. I concur in Section IIB of the majority's opinion regarding the correct interpretation of RSA 273-A:11, II (2010). I disagree, however, with the majority's conclusion in Section IIA that "the PELRB erred as a matter of law" when it conducted the inquiry set forth in Appeal of Berlin Education Association, 125 N.H. 779 (1984), and determined that the tutoring services at issue do not fall within the scope of an adjunct professor's duties. In reaching this conclusion, the majority fails to adhere to the standard of review established by RSA 541:13 (2007). Because this standard of review dictates that we affirm the PELRB's determination on this issue, I respectfully dissent.

The PELRB concluded, and the parties agree, that Berlin is controlling precedent with respect to the first issue, which is whether CCSNH is obligated to bargain over compensation for tutoring services performed by members of the adjunct faculty bargaining unit. As the majority's opinion correctly notes, in Berlin, "we were called upon to determine whether a school board was obligated to negotiate with teachers over a salary scale for performance of extracurricular duties." See Berlin, 125 N.H. at 780. In that case, the union that represented "all permanent full-time teachers employed by the Berlin public schools" sought to negotiate a salary scale for bargaining unit members who performed "extracurricular duties such as coaching and supervising student activities." Id. at 780-81. When the school board refused, the union "filed an unfair labor practice charge with the PERLB," which ruled in favor of the school board. Id. at 780.

On appeal, we first considered whether the extracurricular duties at issue in Berlin were "within the scope of a teacher's duties." Id. at 782. We defined activities constituting "an integral part of" an employee's duties as falling "within the scope of" those duties. Id. at 781-82 (quotation omitted). We then concluded that the extracurricular duties at issue were an integral part of a teacher's duties. Id. We reasoned:

> There is general agreement that extracurricular activities are a fundamental part of a child's education, making the supervision of such activities an integral part of a teacher's duty toward his or her students.
>
> Teaching is not limited to classroom instruction, but also involves the complete training of a child for citizenship and leadership. Extracurricular activities can be a significant part of that training. To hold[, as the school board suggests,] that extracurricular activities are dissimilar, distinct and outside the community of interest of teachers would be to limit a teacher's role in a child's education merely to classroom instruction. Consequently, we conclude that extracurricular activities are within the scope of a teacher's duties.

Id. (quotation and citations omitted). Based upon that conclusion, we held that compensation for teachers who performed these extracurricular duties constituted "wages" under RSA chapter 273-A and, therefore, this compensation was "a mandatory subject of bargaining." Id. at 783-84 (quotation omitted); see id. at 782 (noting that RSA chapter 273-A requires public employer and union to negotiate in good faith over "terms of employment" and defines "terms and conditions of employment" to include "wages" (quotation omitted)).

The majority attempts to diminish Berlin's holding by characterizing Berlin as a case about whether "a salary scale" constitutes "wages," and by citing Berlin as support for the proposition that "[w]ages paid to members of a bargaining unit . . . constitute a mandatory subject of negotiations between public employers and employee organizations." (Quotation omitted.) However, the dispute between the parties in Berlin was not whether "a salary scale" fell within the statutory definition of "wages," but, rather, whether a salary scale for performance of extracurricular duties constituted "a mandatory subject of bargaining under RSA chapter 273-A." Id. at 781-82 (quotation omitted). The language of Berlin's holding makes clear that, to fall within the definition of "wages" under the Public Employee Labor Relations Act, see RSA ch. 273-A (2010 & Supp. 2017), the compensation must be for activities that are within the scope of the bargaining unit member employee's duties. See Berlin, 125 N.H. at 782-84. Specifically, we held that "compensation for extracurricular activities, which is remuneration for services constituting an integral part of a teacher's duties, is within the term 'wages' and is therefore a mandatory subject of bargaining." Id. at 784 (emphasis added). We owe deference to our holding in Berlin, which the parties agree is controlling precedent. See Brannigan v. Usitalo, 134 N.H. 50, 53 (1991).

We must also afford deference to the PELRB on certain matters due to the standard of review established by the legislature. See RSA 541:13 (standard of review governing appeals brought pursuant to RSA chapter 541); RSA 273-A:14 (2010) (aggrieved party can appeal PELRB's final order pursuant to RSA chapter 541). We do not owe deference to the PELRB on issues of law, however. See Appeal of Hillsborough County Nursing Home, 166 N.H. 731, 733 (2014). We review the PELRB's legal rulings, including its interpretation of statutes and precedent, de novo. See id.; Appeal of N.H. Dep't of Transportation, 144 N.H. 555, 556-58 (1999) (reversing PELRB on issue of statutory interpretation); Appeal of State of N.H., 138 N.H. 716, 719-20 (1994) (abandoning this court's "policy of deferring to the PELRB on issues of law," including statutory interpretation, and "adopt[ing] a strict adherence to the standard of review set forth in RSA 541:13"); cf. Appeal of State Employees' Assoc. of N.H., 156 N.H. 507, 510-11 (2007) (affirming PELRB's decision because its reliance upon prior case with very similar "legally significant facts" was not "erroneous or unreasonable," but overruling that prior case prospectively).

Here, the PELRB conducted the "integral part" inquiry from Berlin and concluded, based upon its factual findings, that the tutoring in this case is distinguishable from the extracurricular duties involved in Berlin. Because the PELRB applied the correct inquiry from Berlin, its ruling of law on this issue is not erroneous. Absent an error of law, we cannot overturn the PELRB's decision "unless we are satisfied, by a clear preponderance of the evidence, that it is unjust or unreasonable." Appeal of Prof'l Fire Fighters of Hudson, 167

N.H. 46, 51 (2014); accord RSA 541:13; see also Appeal of Hollis Educ. Assoc., 163 N.H. 337, 340 (2012) ("To succeed on appeal, the association must show that the PELRB's decision is unlawful, or clearly unjust or unreasonable.").

Although the majority acknowledges this deferential standard of review at the outset of its analysis, it does not adhere to that standard in reviewing the PELRB's decision on the first issue. The majority's opinion concludes that "the PELRB erred as a matter of law" because, in the majority's view, "the tutoring services at issue here are, if anything, more closely related to the normal adjunct faculty members' duties than the extracurricular activities in Berlin were related to the teachers' regular duties."

Yet the PELRB explained in detail the basis for its conclusion that this case is "factually distinguishable" from Berlin "in a number of significant respects." Unlike the full-time teachers who taught school children in the Berlin public school district, see Berlin, 125 N.H. at 780, the adjuncts at CCSNH are "part-time faculty" who "are responsible for teaching a specific assigned course" to college students. The adjuncts are also responsible for making themselves available for what the PELRB termed "limited consultation" with their students — "before or after class, or by appointment." (Quotation omitted.) There is no expectation that adjuncts tutor any of the students, through the Academic Center for Excellence (ACE) or otherwise. The PELRB also noted that the activity at issue, tutoring, "is clearly not an extracurricular activity like a sport or other student activity at issue in [Berlin]. Instead, it is merely a service CCSNH offers to students who would like help completing class assignments." Another factual distinction is that, in Berlin, it was not the superintendent's "practice" to "fill extracurricular positions outside of the bargaining unit," even though this was permissible, id. at 781 (quotation omitted), whereas tutors at CCSNH are not only adjuncts but full-time professors, plus students "occasionally" serve as "'peer' tutors." Indeed, the director of ACE testified that "most" of the tutors she hires are not current adjuncts. Finally, and perhaps most importantly, the PELRB found that community college adjunct professors at CCSNH are not responsible for the "training of a child for citizenship and leadership," as was the case with the school children in Berlin. Id. at 782. For all of these reasons, the PELRB concluded that "tutoring cannot fairly be classified as 'an integral part' of an adjunct's duties."

Based upon these findings, which are supported by the record, I cannot say that the PELRB's conclusion on this issue is unjust or unreasonable. See Appeal of Town of Moultonborough, 164 N.H. 257, 261 (2012). Accordingly, in my view, the Union has failed to meet its burden of demonstrating that the PELRB's decision on this issue is "clearly unjust or unreasonable." Hollis Educ. Assoc., 163 N.H. at 340 (emphasis added). Under the circumstances, this court cannot substitute its judgment for that of the PELRB on this issue.

See Moultonborough, 164 N.H. at 261; Appeal of Laconia Patrolman Assoc., 164 N.H. 552, 555 (2013) ("This court is not free to substitute its judgment on the wisdom of an administrative decision for that of the agency making the decision." (quotation omitted)). Therefore, I respectfully dissent from Section IIA of the majority's opinion.

NH Supreme Court reversed & remanded this decision on 04-25-2018, Slip Op. No. 2017-0115

STATE OF NEW HAMPSHIRE
Public Employee Labor Relations Board

SEA/SEIU Local 1984

v.

Community College System of New Hampshire (Adjunct Faculty)

Case No. G-0154-3
Decision No. 2016-293

Appearances:

John S. Krupski, Esq.,
Milner & Krupski, PLLC
Concord, New Hampshire for the Complainant

Joseph P. McConnell, Esq.,
Morgan, Brown & Joy, LLP
Boston, Massachusetts for the Respondent

Background:

On August 18, 2016, the SEA/SEIU Local 1984 (SEA) filed an unfair labor practice complaint alleging that the Community College System of New Hampshire (CCSNH) violated RSA 273-A:3, RSA 273-A:5, I (a), (e), (f), and (g), and RSA 273-A:11, II. The SEA claims CCSNH has improperly refused to bargain with the SEA over tutoring services some adjuncts provide through the Academic Center for Excellence (ACE). The SEA also claims that CCSNH improperly failed to compensate Rick Watrous (RW) for tutoring work he missed in order to

participate in impasse mediation on July 18, 2016 as part of the SEA bargaining team.[1] The SEA requests that the PELRB order CCSNH to cease and desist from refusing to negotiate in good faith; order CCSNH to negotiate with the Union over terms and conditions of employment for tutoring work performed by adjuncts at ACE; and order CCSNH to compensate RW for tutoring work he missed in order to attend impasse mediation.

CCSNH denies the charges. According to CCSNH, any work tutoring adjuncts may perform through ACE is outside the scope of bargaining unit work covered by the adjunct certification and therefore CCSNH has no obligation to bargain tutoring work proposals. CCSNH also contends that the SEA claim based upon CCSNH's refusal to compensate RW for lost compensation attributable to the scheduling of the impasse mediation should be denied because RW volunteered to serve on the SEA bargaining team and because ACE tutoring is not bargaining unit work. In its post-hearing brief CCSNH also raised, for the first time, the six month limitation period set forth in RSA 273-A:6, VII as a bar to the SEA's complaint. CCSNH requests that the PELRB deny all SEA requests for relief and dismiss the complaint.

The undersigned board held a hearing on the SEA complaint on October 3, 2016. Both parties presented evidence at the hearing, and both parties filed post-hearing briefs by the November 4, 2016 deadline.

Findings of Fact

1. CCSNH is a public employer within the meaning of RSA 273-A.

2. The SEA is the exclusive representative of and bargaining agent for certain employees of CCSNH. The bargaining unit description is set forth in PELRB Decision No. 2011-074 (March 14, 2011), which provides as follows:

[1] The parties resolved all other complaints raised in the SEA's unfair labor practice complaint prior to the submission of this case for decision.

Unit: All adjunct faculty who are employed by CCSNH and who have taught at least five semesters in the last five years or who have currently begun their fifth semester of teaching and have taught four semesters within the last five years.

Excluded: Any CCSNH employee who: 1) already holds a full or part-time appointment as a faculty member with CCSNH, and who is currently covered by the existing collective bargaining agreement between the SEA/SEIU Local 1984 and CCSNH; 2) already holds a full-time or part-time appointment as a professional, administrative, technical, or operating staff member with CCSNH, and who is currently covered by the existing collective bargaining agreement between the SEA/SEIU Local 1984 and CCSNH; or 3) already holds a full-time CCSNH position and who is managerial and/or confidential and thus excluded from the existing collective bargaining agreement between the SEA/SEIU Local 1984 and CCSNH.

Note: The summer semester is excluded from the calculation of the appropriate bargaining unit.

3. The parties' first collective bargaining agreement covered the September 25, 2013 to June 30, 2016 time period (2013-16 CBA). It does not specifically address the subject of tutoring or the subject of compensation for tutoring services that an adjunct may be hired to provide through ACE.

4. Under Article 9 of the 2013-16 CBA, adjuncts are responsible for teaching a specific assigned course and making themselves available to students "for consultation before or after class, or by appointment." They are clearly identified as "part-time faculty" who "teach a variable number of credits in an academic year and serve in a non-benefitted instructional position." Nothing in the 2013-16 CBA provides that adjuncts, as part of their job duties and responsibilities, are responsible for, or required to participate in, tutoring services CCSNH offers to students through ACE.

5. Rebecca Dean is the Director of ACE. For the most part, Director Dean operates independently of specific academic departments at CCSNH. She is responsible for hiring tutors, which includes interviewing applicants, consulting with Department Heads as necessary and

issuing appointment letters. She also schedules and coordinates all tutoring on her own, with the exception of Biology Department related tutoring.

6. Tutoring is currently offered at Concord's Community College (NHTI) during the fall, winter, and summer semesters. Tutors are usually adjuncts or full time teachers, but students are also occasionally hired as "peer" tutors, typically following a faculty recommendation and an interview. Tutors generally help students who are having difficulty with specific assignments.

7. During negotiations over the 2013-16 CBA, CCSNH refused to bargain with the SEA over proposals concerning tutoring work performed by adjuncts prior to the 2013-16 CBA because, according to CCSNH, tutoring is not bargaining unit work. CCSNH continues to take the same position. In October of 2015, CCSNH obtained an arbitration award rejecting an SEA grievance based upon a CCSNH unilateral reduction in the hourly rate paid to NHTI adjuncts providing tutoring services. The award was based upon a finding that the 2013-16 CBA did not address the disputed tutoring work.

8. RW has worked at Concord's Community College (NHTI) as an Adjunct in the English Department since the 1990's. He was hired and has worked as a tutor since 2010. He is also a member of the SEA bargaining team and has been actively involved in unit negotiations on a successor contract to the 2013-16 CBA. By May 23, 2016, the parties had reached impasse and by early July they had agreed to proceed to impasse mediation on July 18, 2016.

9. The impasse mediation was scheduled during a time when RW was scheduled to tutor at ACE. On July 6, 2016, RW emailed Director Dean as follows:

> CCSNH Administration and the Adjunct Bargaining Team have reached impasse and have scheduled a contract mediation session on Monday, July 18, at 10:00 at Manchester Community College.
>
> As you may know, I am a member of the Adjunct Bargaining Team. Since I will be engaged in system business I am requesting that I be able to participate in this session

without losing the pay I would otheRwise earn as a writing tutor working 10-2 that Monday.

10. The Director of CCSNH Human Resources informed Director Dean by way of response as follows:

> Please be advised that (RW) is not eligible to be paid for tutoring hours that he has elected not to perform due to his participation in adjunct faculty negotiations. (RW) participates in the adjunct faculty negotiations on a voluntary basis. As such, he is not eligible to receive payment for work not performed due to such participation. Therefore, (RW's) request is denied. (Emphasis in original).

11. Ultimately Director Dean closed ACE on July 18, 2016 due to lack of coverage given RW's planned absence.

Decision and Order

Decision Summary:

CCSNH's request for dismissal based upon the six month limitation period is denied. The Board finds that tutoring services provided by adjuncts like RW through ACE is not bargaining unit work. Therefore, the SEA claim that CCSNH committed an unfair labor practice because it refused to bargain over tutoring services adjuncts may provide through ACE is dismissed. Additionally, by a 2-1 vote (board members Andrew Eills and James M. O'Mara, Jr. in the majority, and board member Senator Mark Hounsell in the minority), a majority of the Board finds that under RSA 273-A:11, II, RW is not entitled to compensation for lost tutoring income when he attended the July 18, 2016 impasse mediation because he did not lose any bargaining unit income. Therefore, that claim is dismissed as well.

Board member Hounsell disagrees with the dismissal of the RW compensation claim because he finds the statute, as written, makes no distinction between bargaining and non-bargaining unit work, and CCSNH committed an unfair labor practice because it failed to compensate RW for his lost tutoring pay.

Jurisdiction:

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

Discussion:

The first issue is CCSNH's argument that the complaint is time barred under RSA 273-A:6, VII. However, we deny this dismissal request because CCSNH did not raise the six month limitation period until its post-hearing brief. As a result, CCSNH failed to give sufficient notice to the SEA that it was contesting the timeliness of the complaint, and therefore the SEA was not provided with an adequate opportunity to address this argument with evidence at hearing or in its post-hearing brief.

The next issue is whether CCSNH is obligated to bargain over tutoring services adjuncts may be hired to provide through ACE. Under RSA 273-A:3, I, CCSNH is obligated to bargain with the Union over the terms and conditions of employment:

> 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.

This includes bargaining over wages ("[t]erms and conditions of employment" means wages…). See RSA 273-A:1, XI. It is axiomatic that wages are a mandatory subject of bargaining. *Appeal of State*, 138 N.H. 716, 721 (1994); *Appeal of Berlin Education Association, NHEA/NEA*, 125 N.H. 779, 784 (1984). Under RSA 273-A:5, I (e), it is an unfair labor practice for an employer to refuse to bargain over wages and/or to make a unilateral change in a mandatory subject of bargaining like wages. However, this rule is limited by the principle that public employers like CCSNH are only obligated to bargain over wages paid for the performance of bargaining unit

work. In other words, the term "employment" in RSA 273-A:1, XI refers to bargaining unit work.

In *Appeal of Berlin,* the court considered a situation that is similar to the one under consideration in this case. In that case the Berlin Board of Education refused to negotiate a wage scale with the teachers' union for extracurricular positions like coaching and supervising student activities. The court decided the Berlin Board of Education was obligated to bargain as demanded by the union:

> ....There is general agreement that extracurricular activities are a fundamental part of a child's education, making the supervision of such activities an integral part of a teacher's duty toward his or her students.
>
> Teaching is not limited to classroom instruction, but also involves the complete training of a child for citizenship and leadership. Extracurricular activities can be a significant part of that training. To hold that extracurricular activities are dissimilar, distinct and outside the community of interest of teachers would be to limit a teacher's role in a child's education merely to classroom instruction. Consequently, we conclude that extracurricular activities are within the scope of a teacher's duties.
>
> [C]ourts have rather consistently held that such items as overtime pay, extra duty pay, vacation and holiday pay, bonus or merit pay, severance pay, shift differentials, and pensions are mandatory subjects of bargaining encompassed within the term 'wages.' Likewise, compensation for extracurricular activities, *which is remuneration for services constituting an integral part of a teacher's duties*, is within the term "wages" and is therefore a mandatory subject of bargaining.

Appeal of Berlin, 125 N.H. at 783-784 (quotations and citations omitted)(emphasis added).

However, the present case is factually distinguishable from *Appeal of Berlin* in a number of significant respects, and we conclude that under the applicable law CCSNH is not obligated to bargain with the SEA over tutoring. Tutoring provided through ACE is clearly not an extracurricular activity like a sport or other student activity at issue in *Appeal of Berlin.* Instead, it is merely a service CCSNH offers to students who would like help completing class assignments. Unlike a sport or other student activity referenced in *Appeal of Berlin,* tutoring cannot fairly be classified as "an integral part" of an adjunct's duties. Based upon the record,

we find that adjuncts, who are part-time faculty, are responsible for teaching a particular course, inclusive of the limited consultation referenced in our findings of fact, but not the "training of a child for citizenship or leadership" as was the situation in *Appeal of Berlin.* There is no requirement (or expectation) that adjuncts provide tutoring services through ACE. We recognize there is some overlap between the skills adjuncts rely upon as instructors and those they may use when providing tutoring services through ACE. However, when RW is providing services through ACE, he is working as a tutor, and not as an adjunct.

The last issue is whether CCSNH improperly refused to compensate RW for pay he would have earned working as a tutor on July 18, 2016. The SEA says RW is entitled to compensation because he missed bargaining unit work (tutoring) in order to attend mediation. CCSNH argues that this claim should be denied because RW volunteered to serve on the SEA bargaining team and because tutoring is not bargaining unit work.

The PELRA addresses this topic as follows:

> 273-A:11 Rights Accompanying Certification.
>
> .....
>
> II. A reasonable number of employees who act as representatives of the bargaining unit shall be given a reasonable opportunity to meet with the employer or his representatives during working hours without loss of compensation or benefits.

Under this provision, a limited number of bargaining unit employees have the right to participate in contract negotiations during working hours without suffering a loss of pay. The record indicates that RW has been a member of the SEA bargaining team for some time, and he attended the July 18, 2016 impasse mediation in that capacity. CCSNH's argument that he is somehow disqualified from receiving any compensation because he voluntarily chose to serve on the SEA bargaining team is without merit and is rejected. However, a majority of the board (A.

Eills and J. O'Mara, Jr.) find that CCSNH did not violate this provision when it refused to compensate RW as demanded. This is because in the context of the PELRA, which involves collective bargaining over bargaining unit work, we understand the reference to "without loss of pay or benefit" to mean without loss of any pay or benefit derived from bargaining unit work. We have already decided that tutoring is not bargaining unit work, and therefore we dismiss this claim on that basis.

In accordance with the foregoing, the SEA's complaint is dismissed.

So ordered.

December 15, 2016

/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 dismiss all claims except for the RW tutoring compensation claim, as explained in his dissenting decision below.

Dissenting Opinion:

I disagree with the majority's conclusion that RSA 273-A:11, II only covers a claim for pay or benefits derived from bargaining unit work, and therefore I believe we should find that CCSNH committed an unfair labor practice in violation of RSA 273-A:5, (g)(to fail to comply with this chapter or any rule adopted under this chapter) because of its failure to compensate RW for lost tutoring pay. In my view, limiting the application of RSA 273-A:11, II to bargaining unit work unreasonably and improperly restricts the scope of the statute. We are required to apply the statute as it is written. Nowhere has the legislature stated that "without loss of pay or benefit" means, or only refers to, bargaining unit work. Further, if we consider the purpose of this provision, which is to ensure that an employee like RW does not suffer any loss of pay when participating in a statutorily protected, and fundamental, activity like contract negotiations, then

any question about the application of the statute must be resolved in favor of the SEA and RW. In other words, we should interpret the law in a manner that is consistent with facilitating employee participation in the bargaining process, especially where the statutory language is very general and broad enough to include the "pay or benefits" RW would have earned as a tutor had he not attended the impasse mediation. I fear that the majority ruling could have a chilling effect on employee participation in negotiations, which is a crucial component of the collective bargaining framework.

In summary, the law is very clear, and employees should understand that we recognize their right, subject to the "reasonable number of employees" limitation, to participate in negotiations during working hours without losing any pay or benefits, including pay derived from non-bargaining unit work. CCSNH's actions were petty and in bad faith with respect to its treatment of RW and should not be condoned, and that CCSNH has, in fact, committed an unfair labor practice for the reasons stated.

December 15, 2016

/s/ Mark Hounsell
Senator Mark Hounsell, Board Member

Distribution: John S. Krupski, Esq.
Joseph P. McConnell, Esq.

NH Supreme Court reversed & remanded this decision on 4-25-2018, Slip Op. No. 2017-0115

STATE OF NEW HAMPSHIRE
Public Employee Labor Relations Board

SEA/SEIU Local 1984

v.

Community College System of New Hampshire (Adjunct Faculty)

Case No. G-0154-3
Decision No. 2017-017

Order on Motion for Rehearing

The Association filed a motion for rehearing of PELRB Decision No. 2016-293 (December 15, 2016) on January 17, 2017 and the CCSNH has objected. 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, the Association's Motion for Rehearing is denied.

So ordered.

January 31, 2017

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

The Board's decision to deny the motion for rehearing is 2-1, with Chair Andrew Eills, Esq. and Board Member James M. O'Mara, Jr. voting to deny the motion, and Board Member Senator Mark Hounsell voting to grant the motion.

Distribution: John S. Krupski, Esq.
Joseph P. McConnell, Esq.