



**State of New Hampshire**  
Public Employee Labor Relations Board

**State Employees' Association of New Hampshire, SEIU Local 1984,**

v.

**State of New Hampshire**  
**Case G-0115-12**

**Decision No. 2021-074**

**Appearances:** Gary Snyder, Esq., Concord, New Hampshire for the  
State Employees' Assoc. of NH, SEIU Local 1984

Jessica A. King, Esq., Office of the Attorney General,  
Concord, New Hampshire for the State

**Background:**

On September 17, 2020 the State Employees' Association of NH, SEIU Local 1984 (SEA) filed an unfair labor practice complaints against the State under the Public Employee Labor Relations Act (the "Act"). The SEA contends the State violated its duty to bargain contrary to RSA 273-A:5, I(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)<sup>1</sup> when the Governor unilaterally provided wage increases and stipends to certain bargaining unit employees. The SEA asks the PELRB to: 1) find that the State committed an unfair labor practice because of the unilateral changes in pay; 2) order the State to

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<sup>1</sup> The SEA also claims the State has violated RSA 273-A:5, I (a)(to restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter); (g)(to fail to comply with this chapter or any rule adopted under this chapter); and (i)(to make any law or regulation, or to adopt any rule relative to the terms and conditions of employment that would invalidate any portion of an agreement entered into by the public employer making or adopting such law, regulation or rule).

cease and desist from making unilateral changes to the pay of bargaining unit employees; 3) order the State to bargain with the SEA over wages and all other mandatory subjects of bargaining; and 4) provide such relief as may be just and proper.

The State denies the charges. According to the State, the Governor's disputed actions were authorized pursuant to RSA 4:45, III (b) given the Governor's State of Emergency Declarations issued in response to the Covid-19 pandemic. The State also argues that the Public Employee Labor Relations Board (PELRB) does not have jurisdiction to decide whether the Governor's actions were authorized or justified under the provisions of this law.

As per PELRB Decision No. 2020-261 (November 10, 2020), this case has been submitted for decision on stipulations, exhibits, and briefs. The parties' stipulations and exhibits are the basis for the findings of fact, set forth below.

#### **Findings of Fact**

1. The State is a public employer within the meaning of RSA 273-A:1(X).
2. The SEA is the certified bargaining representative for certain state employees working in numerous state agencies, including the Liquor Commission, the New Hampshire Veteran's Home, the Glencliff Home for the Elderly, the John H. Sununu Youth Services Center, and the New Hampshire Department of Natural and Cultural Resources (Hampton Beach State Park).
3. On March 13, 2020, Governor Sununu issued Executive Order 2020-04, "An order declaring a state of emergency due to Novel Coronavirus (COVID-19)," stating:

*[B]y the authority vested in me pursuant to part II, article 41 of the New Hampshire Constitution and New Hampshire RSA 4:45, I do hereby declare a state of emergency to exist in the entire State of New Hampshire as of 5:15 p.m. on March 13, 2020.*

#### **Stipulation #4; Joint Exhibit 2.**

4. The Governor's state of emergency declaration has remained in place continuously

since March 13, 2020, having being renewed multiple times.<sup>2</sup> See Stipulation #5.

5. The Liquor Commission produced \$162.0 million in net profits in fiscal year 2019. It produces revenue for the state's general fund, which supports state programs, including substance misuse prevention and treatment, education, health and social services, transportation, and natural resource protection and conservation. Stipulation #15.

6. The State is the sole operator of retail liquor establishments in New Hampshire, although wine is sold in both state liquor stores and other privately licensed retailers, and per Emergency Order #6<sup>3</sup>, restaurants, bars, clubs, diners, saloons and other such establishments licensed to sell alcohol were allowed to sell beer and wine through takeout and delivery services. Stipulation #16.

7. Pursuant to Emergency Order #17 Exhibit A, "groceries, pharmacies, florists, and other retail, including farmers markets and farm stands, that sells food and beverage products, including liquor stores" were deemed to provide "essential services and support to COVID-19 and the core missions of the State." Other states, including Massachusetts, Maine, and Vermont, also deemed liquor stores as essential. Stipulation #17.

8. State Liquor Stores were required to close or reduce hours during the COVID state of emergency due to staffing deficiencies. Stipulation #18.

9. State employees for Glencliff Home for the Elderly, the New Hampshire Veteran's Home, and the John H. Sununu Youth Services Center provide medical and supportive care to residential populations. Stipulation #19.

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<sup>2</sup> The PELRB takes official notice that the state of emergency was most recently renewed on March 26, 2021. See Governor Sununu's Executive Order 2021-05.

<sup>3</sup> The Governor has issued multiple COVID-19 related emergency orders since March of 2020, some of which the parties have referenced and described in detail in their filings, and some of which are referenced only by number.

10. At the time of implementation of Emergency Order #31 and prior to implementation, residential facilities such as Glencliff Home, the New Hampshire Veteran's Home, and the John H. Sununu Youth Services Center faced a potential severe workforce shortage. Stipulation #20.

11. There was potential for an increase in the number of these employees seeking unemployment compensation as a result of COVID-19 and due to the federal government's additional \$600/week stipend for unemployed citizens. Stipulation #21.

12. During summer months, activity in Hampton Beach State Park and use of its facilities by the public, including visitors from neighboring states, is increased and concentrated. Stipulation #22.

13. Department of Natural and Cultural Resources ("DNCR"), Division of Parks and Recreation employees provide maintenance for Hampton Beach State Park's bathroom facilities and trash disposal. DNCR typically hires approximately 25 employees on J1 visas for the summer to help with the demands DNCR faces during summer months. In a typical year, DNCR has difficulties maintaining a full staff, however, due to travel bans, the Department was not able to rely on the J1 visa process to fill vacancies. Stipulation # 23.

14. Further, DNCR employees providing sanitation services at Hampton Beach State Park may have experienced a heightened risk of transmission of COVID-19 from sanitary facilities such as restrooms and trash disposal areas, as well as a heightened exposure to out of state travelers. Stipulation #24.

15. On or about March 16, 2020, the SEA proposed a potential memorandum of understanding to the State regarding multiple areas of concern surrounding the impact of the pandemic, such as employee safety, leave for sick or quarantined employees, and communication

between the parties during the pandemic. The State denied the SEA's proposal, and the parties have not engaged in other negotiations surrounding such topics. Stipulation #6.

16. On or about March 27, 2020, SEA Executive Branch Negotiator Randy Hunneyman and SEA General Counsel Gary Snyder contacted the State's Manager of Employee Relations, Elizabeth McCormack, to discuss potential pay increases for State employees who may be facing a higher degree of risk for exposure to COVID-19. Snyder and Hunneyman told McCormack that positions at multiple agencies such as Transportation, Corrections, Safety, Liquor Commission, and Health and Human Services were entitled to enhanced pay because of their increased risk levels. McCormack agreed to discuss a temporary wage increase for Liquor Commission employees but not necessarily for others. The parties further agreed that such wage changes could be documented and implemented through a memorandum of agreement (MOA). McCormack advised that she would inform the Governor's office of the SEA's request and would contact the SEA about a possible MOA. See Stipulation #7.

17. On March 30, 2020, the Governor issued "Emergency Order #20 Pursuant to Executive Order 2020-04." Emergency Order #20 implemented a 10% temporary emergency wage enhancement applicable to certain Liquor Commission bargaining unit employees represented by the SEA. The State did not negotiate with, or obtain the SEA's approval of, this wage enhancement. Emergency Order #20 included the following:

....

*WHEREAS, the State is the sole operator of retail liquor establishments in New Hampshire and there exist no alternatives within the state for the purchase of liquor; and*

*WHEREAS, closure of retail liquor establishments within the State would encourage increased travel to neighboring states at a time when such travel ought to be minimized or eliminated in order to prevent increased community transmission of COVID-19; and*

*WHEREAS, requiring retail liquor establishments to remain open will mitigate against the risk of such transmission on a regional basis; and*

*WHEREAS, during the duration of the State of Emergency, revenues to the State have and will continue to be critically impacted to the detriment of the citizens of the State; and*

*WHEREAS, continuity of operations of the State liquor stores will mitigate against further fiscal harm to the State and its citizens; and*

*WHEREAS, for the foregoing reasons, pursuant to Emergency Order # 17, issued under Section 18 of Executive Order 2020-01, the State of New Hampshire has declared liquor stores to be an industry sector that provides essential services to the core missions of the State, thereby requiring that they continue to operate with essential staff; and*

*WHEREAS, as a result of the decision of the State of New Hampshire to declare liquor stores to be essential, the employees thereof may bear a heightened risk of exposure to and community transmission of COVID-19 to a degree not inherent to the performance of other state services.*

....

*4. The wage enhancement authorized herein is granted exclusively under the emergency authority exercised under Executive Order 2020-04 and does not modify or supplement the terms or conditions of employment established under any collective bargaining agreement or any wage schedules established therein or in RSA 99:1-a.*

*5. This Order shall remain in effect until the State of Emergency declared under Executive Order 2020-04, or any extension or superseding order thereof, is no longer in effect.*

See Stipulation #8 and Joint Exhibit 3.

18. On April 16, 2020, the Governor issued "Emergency Order #31 Pursuant to Executive Order 2020-04 as Extended by Executive Order 2020-05." Emergency Order #31 established the COVID-19 Long Term Care Stabilization Program and provided for the payment of stipends to certain front line employees providing Medicaid funded services, including bargaining unit employees represented by the SEA working at the New Hampshire Veteran's Home and the John H. Sununu Youth Services Center. The State did not negotiate with, or obtain the SEA's approval of, these stipends. Emergency Order #31 included the following:

....

1. *There is established the COVID-19 Long Term Care Stabilization Program (the "Program") for services provided by front line workers employed by certain Medicaid providers, and contracted entities through the developmental services system, as determined by the Department of Health and Human Services (DHHS) and the New Hampshire Department of Employment Security (NHES). The Program shall provide temporary stabilization funding to incentivize frontline workers to remain in or rejoin this critical workforce during the COVID-19 Emergency.*

2. *The Program shall be available to front line workers that provide Medicaid funded services directly to individuals in residential, home, and community settings as well as other front line workers that have a greater risk of exposure of COVID-19 as a result of their employment. To be eligible, the individual must be employed by, or contract with, a qualifying Medicaid provider. In addition to Medicaid funded services, the Program shall also be available to front line workers at the New Hampshire Veterans Home and the John H. Sununu Youth Services Center. DHHS and NHES shall have the authority, with approval of the Governor, to determine which provider types ("qualifying Medicaid providers) and workers ("qualifying frontline workers") qualify for the Program consistent with the provisions of this Order. DHHS and NHES shall publish guidance with additional detail for providers and workers in accordance with this order.*

....

See Stipulation #9 and Joint Exhibit 4.

19. On June 25, 2020, Governor Sununu extended the stipends provided for in Emergency Order #31 to July 31, 2020 via Emergency Order #55, which extended the Program dates applicable to certain State employees. The Program expired on July 31, 2020. Stipulation #10 and Joint Exhibit 7.

20. On June 29, 2020, the Governor issued "Emergency Order #57 Pursuant to Executive Order 2020-04, as extended by Executive Orders 2020-05, 2020-08, 2020-09, 2020-10, and 2020-14." Emergency Order #57 provided for a temporary \$3.00 an hour wage enhancement for certain employees, inclusive of bargaining unit employees represented by the SEA, at the New Hampshire Department of Natural and Cultural Resources working at Hampton Beach State Park. This temporary wage enhancement only applied to employees whose duties included restroom cleaning and trash disposal functions at facilities within Hampton Beach State Park.

The State did not negotiate with, or obtain the SEA's approval of, this wage enhancement. See Stipulation 11 and Joint Exhibit 8.

21. At the time the referenced Emergency Orders issued, the parties were attempting to negotiate a successor collective bargaining agreement and were following bargaining impasse procedures. See Stipulation #12.

22. None of the wage increases mentioned herein occurred because the appointing authority submitted a request to the director of personnel pursuant to NH Admin. R. Per 904.01. Stipulation #13.

23. The Executive Council did not approve or disapprove any of the wage changes at issue or discussed herein. See Stipulation #14.

24. Other State department employees, such as Department of Transportation toll workers and highway maintainers, also may have faced a heightened risk of transmission for COVID-19 due to, respectively, taking money from numerous travelers or removing trash along the side of the highways. These employees have not received any wage increases or stipends as the result of COVID-19. See Stipulation #25.

### **Decision and Order**

#### **Decision Summary:**

The PELRB cannot address the merits of the SEA's complaint without deciding whether the Governor's issuance of the emergency orders referenced in this decision was a proper exercise of the authority conferred upon him by RSA 4:45, III (b). Such a determination is beyond the jurisdiction of this board. Accordingly, the SEA's complaint is dismissed on this basis.



**Jurisdiction:**

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5. See RSA 273-A:6. However, for the reasons stated below, the PELRB lacks jurisdiction to decide the complaint in this case.

**Discussion:**

RSA 4:45, State of Emergency Declaration; Powers, provides:

I. The governor shall have the power to declare a state of emergency, as defined in RSA 21-P:35, VIII, by executive order if the governor finds that a natural, technological, or man-made disaster of major proportions is imminent or has occurred within this state, and that the safety and welfare of the inhabitants of this state require an invocation of the provisions of this section. The general court shall have the same power to declare a state of emergency by concurrent resolution of the house and senate. An executive order or concurrent resolution declaring a state of emergency shall specify the:

- (a) Nature of the emergency;
- (b) Political subdivisions or geographic areas subject to the declaration;
- (c) Conditions that have brought about the emergency; and
- (d) Duration of the state of emergency, if less than 21 days.

II. (a) A state of emergency shall terminate automatically 21 days after its declaration unless it is renewed under the same procedures set forth in paragraph I of this section. The governor may, by executive order, renew a declaration of a state of emergency as many times as the governor finds is necessary to protect the safety and welfare of the inhabitants of this state.

(b) If the governor finds that maintaining the state of emergency is no longer justified, the governor shall issue an executive order terminating the state of emergency.

(c) The legislature may terminate a state of emergency by concurrent resolution adopted by a majority vote of each chamber. The governor's power to renew a declaration of a state of emergency shall terminate upon the adoption of a concurrent resolution under this subparagraph; provided, however, that such resolution shall not preclude the governor from declaring a new emergency for different circumstances under paragraph I of this section.

III. During the existence of a state of emergency, and only for so long as such state of emergency shall exist, the governor shall have and may exercise the following additional emergency powers:

(a) To enforce all laws, rules, and regulations relating to emergency management and to assume control of any or all emergency management forces and helpers in the state.

(b) To sell, lend, lease, give, transfer, receive, or deliver materials or perform services for emergency management purposes on such terms and conditions as the governor shall

prescribe and without regard to the limitations of any existing law, and to account to the state treasurer for any funds received for such property.

(c) To provide for and compel the evacuation of all or part of the population from any stricken or threatened area or areas within the state and to take such steps as are necessary for the receipt and care of such evacuees.

(d) Subject to the provisions of the state constitution, to remove from office any public officer having administrative responsibilities under RSA 21-P:34 through 21-P:48. Such removal shall be upon charges after service upon such person of a copy of such charges and after giving him or her an opportunity to be heard in his or her defense. Pending the preparation and disposition of charges, the governor may suspend such person for a period not exceeding 30 days. A vacancy resulting from removal or suspension pursuant to this section shall be filled by the governor until it is filled as otherwise provided by law.

(e) To perform and exercise such other functions, powers, and duties as are necessary to promote and secure the safety and protection of the civilian population.

(f) To declare an emergency temporary location or locations for the seat of state government at such place or places within this state as the governor may deem advisable under the circumstances and to take such action and issue such orders as may be necessary for an orderly transaction of the affairs of state government to such emergency temporary location or locations. Such emergency temporary location or locations shall remain the seat of government until the legislature shall by law establish a new location or locations or until the state of emergency is declared to be ended by the governor and the seat of government is returned to its normal location.

The Governor's March 13, 2020 State of Emergency Declaration was issued pursuant to cited provisions of the state constitution and RSA 4:45, and the subsequent Emergency Orders providing the disputed wage enhancements and stipends were issued pursuant to the State of Emergency Declaration. The State maintains these orders were authorized by the following subsection III (b) language:

III. During the existence of a state of emergency, and only for so long as such state of emergency shall exist, the governor shall have and may exercise the following additional emergency powers:

...

(b) To...perform services for emergency management purposes on such terms and conditions as the governor shall prescribe and without regard to the limitations of any existing law, and to account to the state treasurer for any funds received for such property.

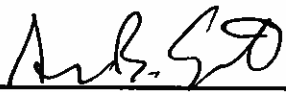
This case cannot be resolved in a vacuum, as though the Governor never invoked RSA 4:45 and declared a State of Emergency, and we cannot disregard the fact that actions the

Governor takes under sub-section III (b) of this law are “without regard to the limitations of any existing law.” The provisions of RSA 273-A:1 *et. seq.* pertaining to a public employer’s obligation to bargain pay increases are “existing law.” To reach the merits of the SEA’s complaint it therefore would first be necessary to determine whether the Emergency Orders at issue constitute the performance of “services for emergency management purposes” under sub-section III (b) which therefore can be taken “without regard to the limitations of” RSA 273-A:1 *et. seq.* This would require, at the very least, a substantive review of the Emergency Orders as well as the interpretation and application of relevant provisions of RSA 4:45. We conclude that this would involve the analysis and determination of legal issues which are beyond the jurisdiction of the PELRB.<sup>4</sup>

Suffice it to say that the SEA’s complaint has arisen in unprecedented circumstances, and by deciding this case on jurisdictional grounds we do not intend to shirk our responsibility to administer and enforce the state’s public sector collective bargaining law. However, for the reasons stated, we can proceed no further, and the complaint is therefore dismissed.

So ordered.

April 30, 2020

  
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Andrew B. Eills, Esq.  
Chair/Presiding Officer

By unanimous vote of Chair Andrew B. Eills, Esq., Board Member James M. O’Mara, Jr., and Alternate Board Member Glenn Brackett

Distribution: Gary Snyder, Esq.  
Jessica A. King, Esq.

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<sup>4</sup> We note that in its opening brief the State cited a number of New Hampshire Superior Court decisions upholding the Governor’s State of Emergency Declaration as a valid exercise of executive power pursuant to RSA 4:45, which suggests that the Superior Court has jurisdiction over these legal questions. See State’s Opening Brief, FN 1.