



**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.<sup>1</sup> 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:

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<sup>1</sup> 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.