



State of New Hampshire
Public Employee Labor Relations Board

**State Employees' Association of New Hampshire SEIU Local 1984 and
State of New Hampshire and Interveners New Hampshire Troopers Association,
New Hampshire Troopers Association-Command Staff, New Hampshire Probation &
Parole, New Hampshire Probation & Parole-Command Staff.**

**Case No. G-0115-11
Decision No. 2020-244**

Appearances: Gary Snyder, Esq., SEA of NH Inc., SEIU Local 1984
Concord, New Hampshire for the Petitioner

Jill Perlow, Esq., Attorney General's Office,
Concord, New Hampshire for the State

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Concord, New Hampshire for the Interveners

Background:

This is a decision on a petition for declaratory ruling filed on August 5, 2020 by the State Employees' Association of New Hampshire, SEIU Local 1984 (SEA). In substance, the SEA's petition asks the board to issue a ruling as to the effect, under RSA 273-A:12, III and IV, of the state legislature's recent vote to adopt a fact finder's report. These two RSA 273-A:12 subsections provide that:

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.

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.

After the petition was filed the board notified the parties that it would issue a decision on the petition. See PELRB Decision No. 2020-177 (August 18, 2020). The New Hampshire Troopers Association, New Hampshire Troopers Association-Command Staff, New Hampshire Probation & Parole, New Hampshire Probation & Parole-Command Staff motion to intervene was granted. The parties filed briefs by the September 18, 2020 deadline, and the facts giving rise to the SEA's petition are set forth in the findings of fact.

Findings of Fact

1. The State is a public employer within the meaning of RSA 273-A:1.
2. The State Employees' Association of New Hampshire, SEIU Local 1984 (SEA) is the RSA 273-A certified exclusive representative of state employees in numerous state bargaining units.¹ The interveners represent certain employees of the Department of Safety and Department of Corrections.
3. In the fall of 2018 the parties began negotiating a collective bargaining agreement for the period covering July 1, 2019 to June 30, 2021 (2019-21 term). After they reached impasse the parties proceeded to impasse mediation and fact finding per RSA 273-A:12.
4. The fact finder's report issued on November 12, 2019.
5. The SEA and interveners accepted the fact finder's report but the Governor did not. The Governor subsequently declined to submit the fact finder's report to the Executive Council.
6. On June 29 and 30, 2020 the state legislature voted to adopt the fact finder's report.

¹ For a current inventory of State bargaining units represented by the SEA see www.nh.gov/pelrb/certifications/cert_s_z.htm.

7. The SEA and the interveners take the position that the fact finder's report should be implemented given the legislature's vote.

8. The State takes the position that the legislature's action is not binding, but merely advisory.

Decision and Order

Decision Summary:

The state legislature's vote adopting the fact finder's report constitutes an approval of the cost items in the report but is not binding on the Governor, who has exclusive authority to negotiate the terms and conditions of employment for state employees pursuant to RSA 273-A:9.

Jurisdiction:

The board issues declaratory rulings pursuant N.H. Admin. Rule Pub 206, which provides as follows:

Pub 206.01 Petition for Declaratory Ruling.

(a) Any public employer, any public employee or any employee organization may petition the board under RSA 541-A for a ruling regarding the specific applicability of any statute within the jurisdiction of the board to enforce, or any rule or order of the board, by filing with the board a petition for declaratory ruling setting out:

(1) The specific statute, rule or order whose applicability is in question; and

(2) A clear and concise statement of the facts giving rise to the petition.

(b) The board shall determine within 30 days of filing whether it shall dismiss such a petition or issue a ruling, and it shall subsequently give a ruling on all such petitions properly before it as expeditiously as possible.

(c) The board shall dismiss any such petition whose subject matter:

(1) Is substantially the same as that of a petition for declaratory ruling previously dismissed; or

(2) Was the subject of a previous ruling on the merits, absent a showing that the circumstances attending the previous ruling or dismissal have changed substantially in the intervening period.

(d) The board shall determine whether briefs will assist in issuing a ruling on a declaratory ruling petition and in the event briefs will be received shall establish a schedule for their submission.

Discussion:

We recently determined that a local legislative body vote (county delegation) "accepting" a fact finder's report was not binding on a union which had rejected the report. See *AFSCME Local 3657, Hillsborough County Sheriff's Office v. Hillsborough County*, Case No. G-0012-20, PELRB Decision No. 2016-298 (December 22, 2016)(*AFSCME Local 3657*). *AFSCME Local 3657* was an unfair labor practice case and involved the same sub-sections of RSA 273-A:12 at issue in this declaratory ruling proceeding. The union filed an unfair labor practice complaint after the county implemented cost items in the fact finder's report based on the county delegation's approval. The board concluded that the county had committed an unfair labor practice in violation of 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), (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). The board's decision included the following discussion of the issue:

There is no question that collective bargaining can be a prolonged and difficult process which sometimes results in a stalemate. To address this, the PELRA includes a multi-tier process, set forth in RSA 273-A:12, designed to help the parties break the impasse and reach agreement. In general, the process consists of third party mediation and fact-finding. If the impasse persists, the local legislative body becomes involved by voting "to accept or reject so much of the (fact finder's) recommendations as otherwise is permitted by law." The "permitted by law" phrase refers to the legislative body's exclusive authority to

approve cost items² set forth in RSA 273-A:3, II (b). See *Appeal of Derry Education Association*, 138 N.H. 69, 71-72 (1994)(noting that under RSA 273-A legislative bodies do not have authority to negotiate and enter into collective bargaining agreements but do have power to appropriate public money to fund cost items).

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We conclude that even in the event of impasse, mutual agreement on the terms and conditions of employment remains the *sine qua non* of a collective bargaining agreement formed under the PELRA. The impasse resolution portion of the PELRA does not expressly grant to the County Delegation, as the local legislative body, any power beyond what is enumerated elsewhere in the PELRA, which is the appropriation of funding for cost items. As the court stated in *Appeal of Derry Education Association*, "had the legislature intended that the (County Delegation) vote be binding" on any portion of the fact finder's recommendation, including cost and/or non-cost items, "it could have so stated." *Id.* at 72. In other words, sub-section IV could have been written to provide for "impasses to be resolved *by* rather than *following* action of the legislative body." *Id.* (Emphasis added). This observation is as germane in this case as it was in *Appeal of Derry Education Association*.

The local legislative body's vote on a fact finder's recommendations creates pressure which will hopefully help the parties move away from impasse and toward an agreement:

[A]ccording to a memorandum to the PELRB from the attorney assigned from the speaker's staff to assist the conference committee in negotiating and drafting RSA chapter 273-A:12, part of its purpose is "to broaden participation in impasse negotiations" and to make the parties vulnerable to "the publicity that will no doubt attend an impasse." Michael LaFontaine, Memorandum to Chairman of New Hampshire Public Employee Labor Relations Board (November 25, 1975) (unpublished Page 468 memorandum, on file under legislative history with the PELRB). Submission of the fact-finder's report to the legislative body will likely heighten public scrutiny of the negotiations, and the expression of the legislative body's position on the report may increase the pressure on the parties to reach agreement. One of the legislative goals will thus be achieved.

Id. at 73. In this case, the County Delegation's vote gives the parties advance notice of a cost approval which could potentially serve as the basis for a subsequent, mutually agreed, and fully ratified collective bargaining agreement. Of course, if there is no such mutual agreement, then bargaining resumes, with mediation involving the board of the public employer if the mediator so directs as outlined in sub-section IV of RSA 273-A:12.

See *AFSCME Local 3657* at 6-8. Unlike *AFSCME Local 3657*, this case involves the role of the Governor and the state legislature in the collective bargaining process. However, for purposes of

² Under RSA 273-A:1, IV a cost item "means any benefit acquired through collective bargaining whose implementation requires an appropriation by the legislative body of the public employer with which negotiations are being conducted."

this proceeding this is a distinction without a difference. The role of the state legislature in the bargaining process for state employees is no different than the role of the county delegation in the bargaining process for county employees. The function of both is the approval of cost items pursuant to RSA 273-A:3, II. In terms of fact finding, both constitute the "legislative body" referenced in RSA 273-A:12, III and IV,³ and in the fact finding process their role is limited to voting "to accept or reject so much of the (fact finder's) recommendations as otherwise is permitted by law" as discussed in *AFSCME Local 3657*. As to what is "permitted by law," nothing in RSA 273-A:12 expands the role of the "legislative body" during the fact finding phase beyond the approval of cost items as stated in RSA 273-A:3, II. There are no provisions in the PELRA which confer upon a legislative body any authority to establish, unilaterally or otherwise, the terms and conditions of employment for bargaining unit employees through negotiations or by a vote on a fact finder's report. In contrast, the PELRA sets out in detail the authority and obligation of the Governor to negotiate state collective bargaining agreements:⁴

I. 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).

II. To assist in the conduct of such negotiations the governor may designate an official state negotiator who shall serve at the pleasure of the governor.

III. The governor shall also appoint an advisory committee to assist in the negotiating process. The manager of employee relations appointed under RSA 21-I:44, II shall be a member of this committee.

See RSA 273-A:9, titled "Bargaining by State Employees."

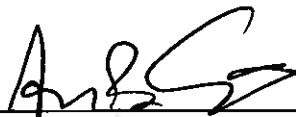
³ RSA 273-A:1, VII. "Legislative body" means that governmental body having the power to appropriate public money. The legislative body of the state community college system and university system shall be the board of trustees.

⁴ The bargaining process for "Judicial Employees" is addressed in RSA 273-A:9-a and is separate from the bargaining process for "State Employees" discussed in RSA 273-A:9.

In summary, recognizing that a collective bargaining agreement has been reached on the basis of the state legislature's vote adopting the fact finder's report and the SEA's (or interveners) acceptance of the report, but without the Governor's agreement, would mean that the state legislature, and not the Governor, has negotiated the terms and conditions of employment for state employees. This is contrary to the PELRA's division of responsibility between the Governor and the state legislature in the collective bargaining process, both before and during impasse proceedings. RSA 273-A:9 provides, without exception, that the Governor "shall" negotiate the terms and conditions of employment for state employees. The role of the state legislature, on the other hand, is limited, pursuant to RSA 273-A:3, II (b) and 273-A:12, III and IV, to the approval of cost items. There is no authority in the PELRA for the proposition that the state legislature, instead of the Governor, has the power to negotiate the terms and conditions of employment on behalf of the public employer at any point in the process, up to and including impasse fact finding. Accordingly, the state legislature's vote to adopt the fact finder's report is not binding on the Governor⁵ and its vote cannot, without the Governor's agreement, finalize a 2019-21 collective bargaining agreement.

So ordered.

November 3, 2020



Andrew B. Eills, Esq.
Chair/Presiding Officer

By unanimous vote of Chair Andrew B. Eills, Esq., Board Member Carol M. Granfield, and Alternate Board Member Glenn Brackett

Distribution: Gary Snyder, Esq.
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⁵ It is also not binding on the SEA and the interveners.

