THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0248

Appeal of the State of New Hampshire

APPEAL PURSUANT TO RULE 10 FROM A DECISION OF THE PUBLIC EMPLOYEE LABOR RELATIONS BOARD

REPLY BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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A. The Governor's Email Did Not Interfere With Union Member's Rights.

In arguing that the Governor's email constitutes "interference" under RSA 273-A:5, I(a) and (b), the SEA Union relies primarily on a PELRB decision from 2011, *AFSCME, Council, Local 3657/Milford Police Employees v. Town of Milford*, Decision No. 2011-084. SEA Br. 16-25. That case is clearly distinguishable. *AFSCME* involved statements made by a Town Administrator admonishing bargaining unit members about the contents of a flier the Union prepared and distributed. *Id.* at *2-3. The Town Administrator "communicated his outrage about the Union flier; he lectured about the obligations of bargaining unit employees and the Union; and he instructed bargaining unit employees about how they should engage with the Union and be involved in Union business and operations." *Id.* The PELRB found that the Town Administrator coerced and interfered with bargaining unit employees in the exercise of their statutory rights because he "directly engage[d] and confront[ed] bargaining unit employees about legitimate Union business." *Id.* at *6-7. The PELRB pointed out that the Town Administrator "directly engage[d] bargaining unit employees in an intimidating and coercive manner," misrepresented the applicable law in lecturing them about their rights under RSA 273-A, "strongly counseled employees, or even ordered them, as to how Union business must be

conducted[,]" "demanded that they defend the accuracy and general efficacy of the Union flier," and "generally badgered and berated bargaining unit employees about matters clearly within the exclusive prerogative of the employees and the Union." *Id.* at 6.

In contrast, the Governor's email did not interfere with Union member's rights in any way. The email simply informed employees about the status of negotiations and provided details about the State's most recent proposal to the Unions. The email expressly recognized the Unions and "union leadership" as the exclusive bargaining representatives for the employees and in no way interfered with employees in the exercise of their rights under RSA 273-A.

Next, the Unions argue that the Governor's email constituted "interference" within the meaning of RSA 273-A:5, I(a) and (b), because they claim it contained "misrepresentations." *See* SEA Brief 19-25; NEPBA Brief 7-15. The Unions rely on *Appeal of City of Portsmouth*, 140 N.H. 435, 438-39 (1995), in which this Court recognized that there is no infringement on the right to engage in union activities "by virtue of a public employer's expression of its view on union representation, absent intimidation, coercion, or misrepresentation." (Emphasis added). This standard does not apply to the fact of this case.

First, this standard relates to an employer's "expression of its view *on union representation*." *Id.* (emphasis added). *Appeal of City of Portsmouth* involved statements by a fire commissioner criticizing union leadership in the local newspaper. 140 N.H. 435. The fire commissioner "specifically attacked the union leadership and suggested that leadership hurt members during recent contract negotiations." *Id.* at 437. In contrast,

the Governor's email did not express any views at all on union representation or union leadership. Add50. In fact, it expressed an intention to continue working cooperatively with union leadership in hopes of reaching an agreement with the remaining unions. *Id.*

Second, even if this standard applies to this case, the Governor's email does not contain any misrepresentations. While the Unions describe in detail why they believe the email was misleading or confusing, they do not identify any false statements of fact within the email. The most the Unions demonstrate is that they disagree with the Governor's characterization of the State's proposal as being "nearly identical" to the fact-finder's report, and that certain statements in the email confused some of their members.

To constitute a misrepresentation—whether intentional or negligent—the statement must be false. *See Tessier v. Rockefeller*, 162 N.H. 324, 332 (2011) ("The tort of intentional misrepresentation, or fraud, must be proved by showing that the representation was made with knowledge of its *falsity* or with conscious indifference to its *truth* and with the intention of causing another person to rely on the representation.") (Emphasis added); *Akwa Vista, LLC v. NRT, Inc.*, 160 N.H. 594, 601 (2010) ("To prevail on a negligent misrepresentation claim, a plaintiff is required to prove that the defendants made a representation with knowledge of its *falsity* or with conscious indifference to its *truth* with the intention to cause [the plaintiff] to rely upon it and that [the plaintiff] justifiably relied upon it.") (Emphasis added). As explained in the State's opening brief on pages 20-24, nothing stated in the Governor's email was false. To the extent the Unions believed that the email was somehow confusing or misleading, they

were free to communicate themselves with their members about the fact-finder's report and the State's most recent proposal, which they did. *See Appeal of City of Portsmouth*, 140 N.H. at 439 ("Proof of 'disruptive effect,' 'whether intended or not,' and whether 'justified' or not, does not amount to, or rise to the level of, interference.").

Because the Governor's email did not "restrain, coerce or otherwise interfere" with union member's exercise of their rights, or "dominate or . . . interfere in the formation or administration of" the Unions, it did not constitute interference within the meaning of RSA 273-A:5, I(a) and (b).

B. The Governor's Email Did Not Constitute Direct Dealing.

The SEA urges this Court to adopt a new standard for direct dealing based on a 2007 decision of the PELRB. *See* SEA Brief 25-29 (relying on *American Association of University Professors UNH Chapter v. University System of New Hampshire*, PELRB Decision No. 2007-039). This Court should decline to adopt this new standard, which is inconsistent with this Court's case law. "While the PELRB is vested with the authority to initially define and interpret the terms of RSA chapter 273-A, this [C]ourt is the final arbiter of the intent of the legislature as expressed in the words of the statute." *Appeal of Derry Educ. Ass'n, NEA-New Hampshire*, 138 N.H. 69, 70 (1993).

As discussed in the State's opening brief, this Court's precedent makes clear that the prohibition against direct dealing forbids an employer from *negotiating* directly with its employees, not *communicating* directly with its employees. *See* State's Opening Brief at 33-38. To the extent that

the PELRB has adopted a standard inconsistent with this Court's case law, it should be rejected.

In any event, the PELRB decision that the Union relies on supports the State's position that the Governor's email did not constitute direct dealing. In *University Professors UNH Chapter*, the PELRB found that the University did not engage in direct dealing when it sent an email to the UNH community, including members of the bargaining unit, after the parties had reached impasse. PELRB Decision No. 2007-039. The email "inform[ed] the entire university community of the status of faculty negotiations," was "factual and discussed the University's proposals in the past tense," and made "no promise nor offer of future benefits." *Id.* at *5. The PELRB noted that, "[n]o bargaining unit member responded to the University . . . to either engage in negotiations or for any other purpose." *Id.* at *6.

Even if this Court were to apply the standard adopted by the PELRB in *University Professors UNH Chapter*, the Governor's email did not constitute direct dealing. Similar to the email at issue in *University Professors UNH Chapter*, the Governor's email factually discussed the status of negotiations and the State's latest proposal the Unions, and did not seek to negotiate directly with bargaining unit members or make any promise or offer of future benefits. Therefore, the Governor's email did not constitute direct dealing. *See id*.

C. RSA 273-A:12, I(A)(2) Does Not Prohibit Public Employers From Communicating With Their Employees.

The Unions argue that RSA 273-A:12, I, creates a new statutory prohibition against communication by a public employer to its employees regarding the status of negotiations and contract proposals. *See* SEA Brief 29-35. As discussed in the State's opening brief, the direct presentation process is an optional first step that a party may take before the parties enter into mediation and fact-finding. *See* RSA 273-A:12, I(a). If either party asks to engage in the process and receives approval from the other side, the statute permits the chief negotiator for each party "to make a *presentation* directly to" the bargaining unit or the board of the public employer, respectively. *Id.* (emphasis added). The statute provides that "[t]he cost of the respective presentations shall be borne by the party making the presentation." *Id.*

The statute's reference to a "presentation" plainly envisions something more than an email. Moreover, the clear intent of the direct presentation provision is to *increase* communication between the parties, not *limit* communication. As the first step in the dispute resolution process, the direct presentation option seeks to increase the amount of information provided directly to both the employees and the board of the public employer in hopes of breaking the impasse before having to engage in the costly and lengthy process of mediation and fact-finding. The Union's attempts to construe the statute as somehow creating a new prohibition against speech by a public employer is unavailing.

As discussed in the State's opening brief, both the First Amendment and the purposes of RSA chapter 273 support the free flow of information

from both union and employer, so long as the employer does not seek to negotiate directly with the employees. *See Appeal of City of Portsmouth, Bd. of Fire Comm'rs*, 140 N.H. at 438 (recognizing that the First Amendment is a significant factor to consider in construing the provisions of RSA 273-A). Consistent with the plain language of the statute and the obligation to construe statutes as constitutional if possible, this Court should not construe RSA 273-A:12, I(a)(2) as creating a new category of unfair labor practice prohibiting public employers from communicating with their employees about ongoing negotiations. If the legislature had intended to create a new category of unfair labor practice, it would have stated as much, and would have placed that prohibition in RSA 273-A:5, not RSA 273-A:12.

D. The SEA Union Misconstrues The State's Discussion Of First Amendment Issues.

The SEA argues that, "were the court to determine that communications made in violation of RSA 273-A are protected speech under the Constitution, it would have the deleterious effect of rendering significant portions of RSA 273-A unenforceable, and would alter long standing public sector labor law in New Hampshire in a manner inconsistent with the legislature's intentions." SEA Brief 36. Nothing in the State's opening brief suggests that the State is arguing that communications made in violation of RSA 273-A are protected speech. The State does not argue—as the SEA claims—that "the PELRB ruling . . . violates the State's or the Governor's rights to free speech, or that the PELRB erred as a matter of law in determining the Governor's email was

not protected by a right to free speech." SEA Br. 35. The State is not raising a First Amendment claim with respect to the Governor's email; rather, the State encourages the Court to keep in mind First Amendment principles—as it has in the past—*in construing the provisions of RSA 273-A*. *See* State's Opening Br. 29-42. It is the Unions, not the State, which seeks to broaden the definitions of unfair labor practices in ways never before recognized by this Court.

II. THE PELRB ERRED AS A MATTER OF LAW IN CONCLUDING THAT THE GOVERNOR'S DECISION NOT TO PLACE THE FACT-FINDER'S REPORT ON THE COUNCIL'S AGENDA CONSTITUTED AN UNFAIR LABOR PRACTICE.

The Unions argue that this Court's reasoning in *Sunapee Difference*, 164 N.H. 778 (2013), should not apply in construing RSA 273-A:12, II because—the Unions claim—such a construction would be "inconsistent with the manifest intent of the legislature [and/or] would be repugnant to the context of the same." SEA Br. 40 (quoting RSA 21:1). Relying on *Appeal of Derry Educ. Ass'n, NEA-New Hampshire*, 138 N.H. 69 (1993), the Unions argue that the purpose of Executive Council review is to heighten public scrutiny of the negotiations and broaden participation in impasse negotiations. SEA Brief 41; NEPBA Brief 6. In addition, they argue that the plain language of RSA 273-A:12, II expressly requires that the board of the public employer "shall vote" on the fact-finder's report. SEA Brief 43.[1]

[1] The Unions also rely on a PELRB decision from 2000, *State Employees' Association, SEIU, Local 1984 and State of New Hampshire Hospital*, PELRB

The Unions' reliance on *Appeal of Derry* is misplaced, as that case involves submission of the fact-finder's report to the legislative body under paragraph III of the statute, not submission of the report to the board of the public employer under paragraph II. Unlike paragraph III of the statute, which expressly requires submission of the fact-finder's report to the legislative body "*at the next annual meeting of the legislative body*," paragraph II includes no similar provision requiring the board of the public employer to vote on the report at a meeting. *See* RSA 273-A:12, II and III. While paragraph II requires the board of the public employer to "vote" on the fact-finder's report, it does not prescribe the manner by which that vote must occur. As explained in the State's opening brief, the Governor routinely exercises his "vote" on matters pending before governor and council by deciding which items to place on the council's agenda. *See* State's Opening Brief at 25; CR315. The Governor did not "unilaterally withdr[a]w from the Section 12 process" as the NEPBA Union alleges. *See* NEPBA Brief 4. Rather, the Governor exercised his "vote" to reject the fact-finder's report by not placing the report on the council agenda.

Moreover, even assuming, for purposes of argument only, that one of the legislative goals of RSA 273-A:12, II is to "heighten public scrutiny" and "increase the pressure on the parties to reach agreement," *see Appeal of Derry*, 138 N.H. at 73, that goal is met regardless of whether the Governor

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Decision 2000-097. SEA Brief 12-13; NEPBA Brief 4-5. That decision pre-dates this Court's decision in *Sunapee Difference*, and, in any event, the case is inapplicable as it involved the State's Employee Relations Manager—not the Governor—refusing to place a fact-finder report on the Executive Council agenda. PELRB Decision 2000-097 at *2.

formally places the matter on the Executive Council's agenda. The fact-finder's report is a public document. As evidenced by the parties' Joint Exhibit 1—a transcript excerpt of the December 19, 2019 Executive Council Meeting—council members were well-aware of the fact-finder's report and referred to it in the public meeting despite the fact that the Governor did not place the report on the agenda as an action item. CR141-43. The Governor's decision not to place the report on the Executive Council's agenda in no way insulated the executive branch from public scrutiny regarding this matter or reduced the pressure on the Governor to reach an agreement with the Unions.

The Governor fully complied with RSA 273-A:12, II when he exercised his "vote" by declining to place the fact-finder's report on the Executive Council's agenda.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court reverse the decision of the PELRB.

Respectfully Submitted,

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March 2, 2022

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CERTIFICATE OF COMPLIANCE

I, Laura E. B. Lombardi, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 2,840 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

March 2, 2022 *<u>/s/ Laura E. B. Lombardi</u>*
Laura E. B. Lombardi

CERTIFICATE OF SERVICE

I, Laura E. B. Lombardi, hereby certify that I am filing this brief electronically and that a copy is being served on all other parties or their counsel, in accordance with the rules of the Supreme Court, as follows: I am serving registered e-filers through the court's electronic filing system; I am serving or have served all other parties by mailing or hand-delivering a copy to them..

March 2, 2022 */s/ Laura E. B. Lombardi*
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