THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2021-0248

APPEAL OF STATE OF NEW HAMPSHIRE

BRIEF FOR APPELLEE
(State Employees' Association of NH, Inc., SEIU Local 1984)

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Local 1984
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RSA 4:40 Disposal of Real Estate

Disposal of state owned real estate shall occur as follows:

I. Except as provided in RSA 4:39-c, RSA 228:31-b, and RSA 204-D, upon recommendation of the head of any state department having jurisdiction over the same, all requests for the disposal or leasing of state-owned properties shall be reviewed and approved by the long range capital planning and utilization committee, with advice from the council on resources and development, prior to submission to the governor and council for approval. Upon determination that the property is no longer needed by the state, the governor and council shall first offer it to the town, city, or county in which the property is located. If the town, city, or county refuses the offer, the governor and council may sell, convey, transfer, or lease the real property.

II. [Repealed.]

III. Sales of real property under this section shall be at not less than a current market value of the subject property as may be determined by the governor and council. If the town, city, or county decides to resell the property, it shall first offer the property to the state at the market value at the time of sale.

III-a. All state agencies shall charge an administrative fee for the disposal of real property under this section. The administrative fee shall be at least $1,100 and shall be subject to the approval of the long range capital planning and utilization committee, except that the committee may waive or approve a fee less than $1,100 in appropriate circumstances, provided the authority of the committee to waive or lower the fee shall be applied in a fair and consistent manner. The revenue from the administrative fees shall be deposited into the general, highway, turnpike, or fish and game fund, depending on which fund initially purchased the property, except that for disposals of real property by the department of natural and cultural resources the administrative fee shall be deposited into the separate account within the forest improvement fund, as provided in RSA 227-G:5, II(b), for the purchase and improvement of areas suitable for state reservations.

IV. This section shall not apply to sale of institutional lands as provided by RSA 10:4, to real estate given or bequeathed to the state under provisions of trust or in settlement of public assistance claims or liens, or to state lands or their products required to be held to procure a continuance of

federal conservation work; provided, however, that the state-capitol-region planning commission shall be provided written notice 60 days before any sale in the city of Concord or Concord area. This section shall also not apply to the exchange of state-owned lands for other lands of equal or greater value, which are under the jurisdiction of a department and used by such department during right-of-way negotiations or to the sale of buildings that need to be moved to clear such right-of-way for public projects found necessary under other state laws.
V. No state-owned property adjacent to or providing access to a river or river segment shall be recommended for disposal by the council on resources and development except upon the review and recommendation of the advisory committee established in RSA 483:8.
Source. 1931, 105:1. 1935, 140:3. RL 27:34. RSA . 1982, 42:222. 1983, 428:5. 1986, 224:1. 1987, 381:2. 1988, 250:3, 8. 1990, 233:9. 1991, 116:3; 302:1. 1993, 25:1. 2005, 12:2; 212:4; 291:23, 26. 2006, 98:1; 307:1. 2008, 351:1, eff. Sept. 5, 2008. 2017, 156:14, I, eff. July 1, 2017.

RSA 21:1 Application
In the construction of all statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the same statute.
Source. RS 1:30. CS 1:30. GS 1:1. GL 1:1. PS 2:1. PL 2:1. RL 7:1.

RSA 21:31 Designation of Office Title
When a court, officer, or board is named by official title, such designation shall apply to the court, officer, or board of the county, town, or district within and for which they are qualified to act in such capacity.
Source. RS 1:24. CS 1:24. GS 1:29. GL 1:29. PS 2:31. PL 2:31. RL 7:31.

RSA 273-A:5, I (c) Unfair Labor Practices Prohibited.
I. It shall be a prohibited practice for any public employer:
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(c) To discriminate in the hiring or tenure, or the terms and conditions of employment of its employees for the purpose of encouraging or discouraging membership in any employee organization

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Source. 1975, 490:2. 1979, 374:4, eff. Aug. 22, 1979

273-A:9 Bargaining by State Employees.

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.

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.

III-a. No person who is appointed to serve as a state negotiator or as a member of the state negotiating team or any person who serves as a member of the employee bargaining committee shall use his or her position to obtain anything of value for the private benefit of such person or the person's immediate family. Nothing in this section shall prevent an employee or taxpayer from serving on a negotiating team or bargaining committee.

IV. The division of personnel, through the manager of employee relations and the manager's staff, shall provide administrative and professional support to the governor in the conduct of negotiations.

V. [Repealed.]

Source. 1975, 490:2. 1986, 12:7. 1995, 9:35, 36. 1997, 351:53. 1999, 225:15, 16. 2004, 137:1, eff. July 18, 2004. 2010, 368:1 (50), eff. Dec. 31, 2010.

RSA 273-A:15 Public Employee Labor Relations

273-A:15 Actions By or Against Public Employee Organizations. – Actions by or against the exclusive representative of a bargaining unit may be

brought, without respect to the amount of damages, in the superior court of the county in which it is principally located, or where the plaintiff resides or has its principal place of business, if the plaintiff is a resident of this state or is incorporated in this state.
Source. 1975, 490:2, eff. Aug. 23, 1975.

RSA 541:6 Appeal
Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal by petition to the supreme court.
Source. 1913, 145:18. PL 239:4. 1937, 107:17; 133:78. RL 414:6.

541:13 Burden of Proof
Upon the hearing the burden of proof shall be upon the party seeking to set aside any order or decision of the commission to show that the same is clearly unreasonable or unlawful, and all findings of the commission upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable.
Source. 1913, 145:18. PL 239:11. 1937, 107:24; 133:85. RL 414:13.

541-A:24 Declaratory Judgment on Validity or Applicability of Rules
The validity or applicability of a rule may be determined in an action for declaratory judgment in the Merrimack county superior court if it is alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The agency shall be made a party to the action. The plaintiff shall give notice of the action to the office of legislative services, division of administrative rules, at the time of filing. A declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question. Upon receiving a declaratory judgment, the respondent agency or department shall also file a copy of that judgment with the office of legislative services, division of administrative rules.
Source. 1994, 412:1, eff. Aug. 9, 1994. 2017, 101:3, eff. Aug. 7, 2017.

29 U.S.C. § 158 Unfair Labor Practices

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(c) Expression of views without threat of reprisal or force or promise of benefit.
The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

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N.H. CONST. pt. II, **Article 62 Subsequent Vacancies; Governor to Convene; Duties.**
If any person thus chosen a councilor, shall be elected governor or member of either branch of the legislature, and shall accept the trust; or if any person elected a councilor, shall refuse to accept the office, or in case of the death, resignation, or removal of any councilor out of the state, the governor may issue a precept for the election of a new councilor in that county where such vacancy shall happen and the choice shall be in the same manner as before directed. And the Governor shall have full power and authority to convene the council, from time to time, at his discretion; and, with them, or the majority of them, may and shall, from time to time hold a council, for ordering and directing the affairs of the state, according to the laws of the land.
September 5, 1792

STATEMENT OF THE CASE/STATEMENT OF THE FACTS

The SEA, generally, agrees with the State's case and facts summary contained on pages twelve through twenty of the State's Brief. The SEA disagrees with any characterization that the SEA's claims that the Governor's email misrepresented facts were "baseless", and further disagrees the record

does not support claims that the Governor's email contained misrepresentations. *See* Certified Record[1] at 213, 241, 340. The record plainly establishes the Governor's email contains inaccuracies and false and misleading statements concerning the significance of the difference between the State's proposal and the fact finder's recommendation on wages, which was less than half the value of the fact finder's recommended wage adjustment. *Id.*

The Governor also described the fact finder's recommendation as reopening a previous contract, which is incorrect, as the recommendation was intended to occur in the 2019-2021 bargaining session. CR at 213, 241. The Governor also failed to properly explain the fact finder adjusted her recommendation for wages in recognition of the amount of premium share the employees should absorb, which is misleading because the Governor asserted the State absorbed the increase "with no increase to employees" even though it was reflected in a reduced cost of living adjustment. *Id.*

Additionally, the assertion there is an established practice giving the Governor the discretion to choose what items are placed on the agenda of executive council meetings is inaccurate. The SEA is aware of only one other instance where the Governor refused to submit the report to the council, and the State was found guilty of committing an unfair labor practice (ULP) for violating RSA 273-A:5 I,(e) and (g). *See State Employees' Association, SEIU, Local 1984 and State of New Hampshire Hospital*, PELRB Decision No. 2000-

[1] Citations to the Certified Record shall hereafter be cited as "CR" followed by the page number.

097 (September 15, 2000). The State did not appeal the decision, and it stands as precedent. *See id.*

SUMMARY OF ARGUMENT

The State fails to meet its burden on appeal to overturn Public Employee Labor Relations Board's Decision No. 2021-028. The onus is on the State to prove the PELRB's order erred as a matter of law, and must demonstrate by a clear preponderance of the evidence the order is unjust or unreasonable. The PELRB's decision is correct and consistent with the application of RSA 273-A, as well as applicable case law. The Governor's email message to the employees violated RSA 273-A:5, I (a), (b), (c), (e), (g), and the Governor's subsequent refusal to submit the fact finder's recommendations to the executive council violated RSA 273-A:12 II, and constituted a ULP under RSA 273-A:5 I,(e) and (g).

The Governor's December 3, 2019 email constituted interference in violation of RSA 273-A:5 I,(a) and (b) because it was a collective bargaining communication containing proposals and fact finding information; it was sent directly to bargaining unit employees using work email and intranet; it contained several false and misleading statements, which misrepresented the positions of the parties and the fact finder; and it sought to influence the members in how they interacted with the union.

For similar reasons, the Governor's email also violated RSA 273-A:5 I,(e) and (g). The State has an obligation to bargain in good faith, and that includes bargaining with the union, not the employees. By emailing the

employees collective bargaining proposals with the intent to influence their vote on the fact finder's report, the Governor was bargaining with the employees directly. The parties were still actively bargaining at the time, and the email was sent just hours before a scheduled SEA presentation to employees on bargaining. Additionally, RSA 273-A:12 I(a) provides the Governor may, for a time after impasse is declared, request permission to present directly to employees, but the parties had passed that part of the process, and the Governor never requested to present directly to employees, nor was permission granted by the union. Thus, the Governor's email constituted direct dealing/bad faith bargaining and further violated RSA 273-A:12 I.

Last, the Governor's refusal to submit the fact finder's report to the executive council for a vote constituted a ULP in violation of RSA 273-A:5 I,(e) and (g). RSA 273-A:12 II requires that following either party's rejection of a fact finder report, the recommendations shall be submitted to the members of the union and the board of the public employer, which in this case is governor and council. The Governor refused to submit the report. Refusal by the Governor to submit the report constitutes a violation of RSA 273-A:12 II itself, and also violates RSA 273-A:3 which requires the parties to cooperate in the fact finding processes.

Therefore, the PELRB correctly determined the State committed multiple ULPs, and the State now fails to meet its burden on appeal to prove the board erred as a matter of law.

STANDARD OF REVIEW

Appeals from the PELRB are reviewed pursuant to the standards of RSA 541:13. Said statute provides as follows:

> "*Upon the hearing the burden of proof shall be upon the party seeking to set aside any order or decision of the commission to show that the same is clearly unreasonable or unlawful, and all findings of the commission upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable*." N.H. Rev. Stat. Ann. 541:13.

This appeal was brought forth by the State of New Hampshire and pertains to a final order rendered by the PELRB pursuant to RSA 273-A:15 and RSA 541:6. Past rulings of this court have provided the following guidance on the standard of review for appeals from the PELRB: "[w]e defer to the PELRB's findings of fact, and absent an erroneous ruling of law, we will not set aside the PELRB's decision unless the [employer] demonstrates by a clear preponderance of the evidence that the order is unjust or unreasonable." *Appeal of City of Nashua Bd. Of Educ.*, 141 N.H. 768, 772 (1997).

This court has stated "[e]ven if our interpretation of the PELRB's rationale is incorrect and the PELRB instead based its decision on other mistaken grounds, we will sustain the decision if there are valid alternative grounds to support it. *Id.* This court has held, "[a]n interpretation which preserves rights or benefits enjoyed under the common law is favored where the result avoids absurdity, retroactivity, unconstitutionality, is in keeping with

good policy, is consistent with the purpose of the legislation, or is evident from a consideration of the statute read as a whole and in conjunction with other statutes." *State v. Etienne*, 163 N.H. 57, 77 (2011).

The Court's review of PELRB rulings on issues of law are *de novo*. *Appeal of Professional Fire Fighters of Hudson, IAFF Local 3154*, 167 N.H. 46, 51 (2017).

ARGUMENT

I. The PELRB Properly Determined, as a Matter of Law, that the Communication by the Governor to State Employees Interfered with Union Member Rights and the Administration of Union Business in Violation of RSA 273-A:5, I(a) and (b).

The Governor's email, sent to all employees via work emails and intranet, which misrepresented and misled employees about proposals and the overall status of bargaining, interfered with employees' rights and the administration of union business in violation of RSA 273-A:5, I(a), and (b). *See* Rev. Stat. Ann. 273-A:5 I,(a) & (b); *see* CR at 107-11, 199, 241, 340. Pursuant to RSA 273-A:5 I,(a) and (b) an employer is prohibited "[t]o restrain, coerce, or otherwise interfere with its employees in the exercise of the rights conferred by this chapter" and/or "[t]o dominate or to interfere in the formation or administration of any employee organization." RSA 273-A:5 I,(a) & (b).

In *AFSCME, Council 93, Local 3657/Milford Police Employees v. Town of Milford*, the board provided the following description of rights under RSA 273-A:5 I,(a) & (b):

> *"The Union's and bargaining unit employee's self-determination rights protected under the statute[….]are an integral*

> *part of the right of public employees to organize and act collectively in the RSA 273-A bargaining process. They include the right of the Union and bargaining unit employees to conduct their internal affairs and administer and conduct Union business and operations without unsolicited advice, instruction, criticism or other intrusions by the [employer] designed to influence and change how such affairs are conducted. They include the right of bargaining unit employees to decide the nature and extent of their involvement in how the Union chooses to support the fact finder's recommendations and the extent to which they preview and approve specific Union activity [....] These are all prerogatives of the Union and bargaining unit employees." AFSCME, Council 93, Local 3657/Milford Police Employees v. Town of Milford*, PERLB Decision No. 2011-084 at *5 (March 23, 2011).

In *AFSCME*, the PELRB determined the employer committed interference in violation of RSA 273-A:5 I,(a) and (b) when the Town Administrator confronted employees at a mandatory meeting about the content of a flier the union created, which advocated for funding of a tentative agreement and which also criticized the way the Town Administrator had testified at recent deliberative sessions. *Id.* at *5-7. At said meeting, the Town Administrator admonished the union and the flier, instructed bargaining unit members how they should engage with the union, and misrepresented how the union must make public statements and further misrepresented employees' rights pursuant to RSA 273-A, suggesting the internal conduct codes superseded such statutory rights. *Id.* at *6.

The PELRB determined the Town Administrator's actions constituted interference with the unit employees in the exercise of their rights, including how to exercise their rights to engage in union activity as well as to participate in union business. *Id.* at *7. The PELRB reasoned it was coercive and interfering for the Town Administrator to attack the union

directly to unit employees at a mandatory meeting, and reasoned the Town dominated and interfered with the administration of the union regarding how the union and unit employees determine to interact and administer the business of the Union. *Id.* The board also found the employer has no right to convene a mandatory meeting to lecture and instruct unit employees about such matters. *Id*.

The PELRB in *AFSCME* also distinguished its facts and conclusions of law from those in *Appeal of City of Portsmouth, Bd. Of Fire Comm'rs*, which had found that speech by an employer that lacked "intimidation, coercion, or misrepresentation" did not amount to interference. *Id.* at *5-6. The Board reasoned the Town Administrator's conduct was distinguishable from the employer in *Appeal of City of Portsmouth* where there were no elements of intimidation, coercion, or misrepresentation, and where the conduct in question was merely an opinion of a fire commissioner made to local press rather than a presentation made directly to unit employees at a workplace meeting. *Id.*

In applying the above standards, it is clear the Governor's email constituted interference in violation of RSA 273-A:5 I(a) and (b). The Governor's email was sent directly to employees, rather than a general statement to the press like in *Appeal of City of Portsmouth. Appeal of City of Portsmouth*, 140 N.H. 435, 438-39 (1995); CR at 241. Additionally, the email was not simply a broad criticism of the union, but rather sought to influence how members interacted with the union hoping the members would exert pressure on the union regarding its position in bargaining by providing proposals directly to employees. *See* CR at 212-23, 241. Perhaps most importantly the Governor misrepresented facts regarding proposals and positions of the fact finder, the State, and the union. *See id.*

Here, the Governor's comments were at minimum a misrepresentation. *See id.* Said email materially misrepresented the difference between the State's final offer, and the fact finder's recommendation. *See id.* In the email, the Governor stated in relevant part that he had put forward a proposal that was "nearly identical to the fact finder's conclusions and heavily favored the union leadership's requests", and further provided "[w]e have proposed nearly all of the fact-finder's recommendations, with the exception of a single recommendation to re-open an old contract that had previously been agreed upon in good faith by all parties". CR at 241. These statements misrepresent the facts in several important ways. The email severely downplays the value and significance of the State's wage proposals compared to what the fact finder recommended. *See* CR at 213, 241. The fact finder recommended a cost of living adjustment of 2.86% in the first year, while the Governor's offer was only 1.16%. *Id.* The PELRB took note of the mischaracterization by the Governor of this distinction stating, "[i]t is difficult to reconcile this characterization with the fact that the fact finder recommended a wage increase of 2.86 in year 1 and 1.16 in year 2 whereas the proposal outlined in the Governor's email offers 1.16% in year 1 and 1.16 in year 2." CR at 340.

The difference of 1.7% between the Governor's offer and the fact finder's higher recommendation represents a value more than <u>double</u> the raise the Governor offered in the first year. CR at 213, 241. For an employee making $50,000.00 per year, that amounts to an additional $850.00 annually, which is almost equivalent to another full week of pay annually. *See id.* While 1.7% may on the surface appear insignificant, the reality is this is no minor difference as it amounts to significant sums of money, especially when

considering its value over time and across thousands of State employees. *See id.* For the Governor to state that his team's proposal was "nearly identical to the fact finder's conclusions and heavily favored the union leadership's requests" while not expressly stating this major exception regarding the differences in wages can be considered nothing other than a misrepresentation. *See id.*

The email exacerbates this misrepresentation by further describing the fact finder's recommendation as to "re-open and old contract", which makes it sounds like the fact finder was recommending the parties reopen the previous contract. CR at 246. This plainly was not the case. The fact finder did determine that wages had not kept up with cost of living because of insufficient adjustments in previous years, and so she reasoned that in order to make the cost of living adjustment truly reflective of the actual increases to the cost of living in that year, it needed to be higher than the CPI was at that time. CR at 213. At no point was the fact finder recommending previous contracts be re-opened, and only made recommendations for cost of living adjustments in the then present round of negotiations. *Id.*

The Governor's use of the word "re-open" is further confusing and misrepresentative of the facts because the collective bargaining agreement (CBA) contains a provision for "Re-Opening" and it is distinct and separate from the act of "Renegotiation" of a subsequent agreement. CR at 199. In the CBA, the "Re-opening" section of Article 21.5 provides as follows:

> "*In the event that the Employer agrees to grant a general wages increase, agrees to a different health plan design, or agrees to less contributions to the health plan working rates with any other bargaining*

> *unit, during the term of the Agreement, the Parties shall reopen negotiations within thirty (30) days after the Association makes a written demand upon the Employer to exercise this reopener."* CR at 199.

The facts show that at the time the Governor sent his email, the CBA had expired June 30, 2019, and so the December 3, 2019 email was not sent during the term of the contract, which would be required for a "re-opening". CR at 199, 241. The State also did not give an additional general wage increase to other units during the term of the contract. *See* CR Generally. Last, the Association never made written demand to re-open bargaining pursuant to the re-opener clause, which would be required for negotiations resulting from reopening negotiations. *See* CR generally. Instead the parties were clearly bargaining under Article 21.1, as well as the bargaining law and rules pursuant to RSA 273-A for the negotiation of a successor agreement. *See* RSA 273-A; *see* CR at 199.

The Governor also stated in the email, "*[l]ast week, the negotiations reached a new phase when both parties received a report from an independent fact-finder who worked to help us reach a compromise".* CR at 241. However, at the time of sending the email, no compromise had been reached, and the parties were still at impasse. CR at 107-108.

The Governor's email further provided a detailed description of the State's wage proposals from the November 21, 2019 bargaining session, but portrayed them in a misleading manner stating:

> "*Our proposal includes the following items totaling $11 million in enhanced benefits:"*
> *·1.16% wage increase in 2020 and another 1.16% wage increase in 2021*

> *·An average of 6.4% increased costs associated with health care benefits and 2.5% increase in dental plan rates absorbed by the State with no increase to employees*
> *·Increase hazardous duty pay by 20% (from $25 to $30)*
> *·Double direct care pay ($5 to $10) for those working in 24 hour facilities*
> *·Increase longevity payments 17% by $50 from $300 to a new amount of $350*
> *·Expand insurance coverage to cover developmental disorders for children ·Expand employee discounts at State recreational areas to allow a discount for one guest."* CR at 241.

Under the fact finder's recommendations, the State was not absorbing the full cost of increases in the cost of healthcare benefits. CR at 213. The fact finder's report takes into account the employee share of the insurance increase, and accordingly lowered the wage recommendation by .5%. *Id.* Therefore, if the SEA had accepted the State's offer, the unit employees would effectively have incurred an increase in their insurance cost because the total compensation package was reduced in acknowledgement of the increased cost of insurance. *See* CR at 213, 241. Thus, it was misleading to suggest the proposal did not increase insurance cost sharing to the employees, because that cost was in fact reflected in the form of a reduced cost of living adjustment to the employees. *See id.*

The Governor's email closes with the statement "*[i]t is my hope that the remaining unions will reconsider the many valuable benefits that the state's proposal offers to state employees. It is my hope that we can deliver a new contract soon based upon our proposal that reflects our state's priorities and the hard work of our state employees.*" CR at 241. Contrary

to the State's argument, this clause exerts influence to persuade unit employees, through this direct presentation, to accept the State's offer based upon misrepresented facts. *See* CR at 213, 241. The fact that the clause references the union does not negate the fact the actual audience of this email was the employees, not the union representatives, and so the only conclusion can be that the email's purpose was to influence the employees directly about how they should interact with their union. *See id.*

When taken together, the actions of the Governor in his email amount to interference because the Governor contacted employees directly, avoided the exclusive representative, and used a means of communication employees cannot avoid (i.e. their work email and intranet). *See AFSCME, Council 93, Local 3657/Milford Police Employees*, PERLB Decision No. 2011-084 at *5-7; CR at 241. Once he had his captive audience, the Governor provided a slew of misinformation to the employees, which grossly misrepresented the proposals by the State, the fact finder's recommendations, and the SEA team's position. *See id*; *see also Appeal of City of Portsmouth, Bd. Of Fire Comm'rs*, 140 N.H. 435, 438-39 (1995); CR at 213, 241.

He closed the email by making an appeal to the employees to reconsider the position the SEA bargaining team had taken, thereby instructing the employees about how they should interact or conduct business with the union. *See id.* Based upon these facts, the State has violated RSA 273-A:5 I,(a) and (b) by interfering with the unit employees in the exercise of their rights, including how to exercise their rights to engage in union activity as well as how to participate in Union business,

and further dominated and interfered with the administration of the Union. *See id*; *see* RSA 273-A:5 I,(a) & (b).

In its brief, the State relies on *Appeal of City of Portsmouth, Bd. Of Fire Comm'rs*, but this case is distinguishable from the present circumstances, just as it was in *AFSCME*. *See Appeal of City of Portsmouth, Bd. Of Fire Comm'rs*, 140 N.H. at 438-39; *see AFSCME, Council 93, Local 3657/Milford Police Employees*, PERLB Decision No. 2011-084 at *5-7; CR at 213, 241, 331-35. In *Appeal of City of Portsmouth, Bd. Of Fire Comm'rs*, the Court determined the fire commissioner did not interfere with the administration of the union after making statements criticizing actions of the union to a reporter, who then published the statements in a newspaper. 140 N.H. at 437-39. While the court in *City of Portsmouth* failed to establish any specific test for determining interference, it placed emphasis on how the free flow of information between the parties was important, that there was an element of free speech that must be considered, and that interference must generally contain an element coercion such as "threat of reprisal or force or promise of benefit" or "intimidation, […] or misrepresentation." *Id.* at 438-39.

Ultimately, the court reasoned the commissioner's comments did not rise to interference because it lacked elements of "intimidation, coercion, or misrepresentation". *Id.* Here though, as established above, there was interference because there was substantial misrepresentation by the State in the Governor's email, and the Governor further exacerbated matters by attempting to exert influence over unit employees' interaction with the union by sending correspondence to them directly through work email and intranet. *See* 140 N.H. at 438-39; *see* PERLB Decision No. 2011-084 at *5-7; CR at

213, 241, 331-35. For the above reasons, the State has failed to meet its burden to prove the PELRB erred as a matter of law or that its order was unjust or unreasonable by finding the State violated RSA 273-A:5 I,(a) and/or (b).

II. The Governor's Email Constituted Direct Dealing in Violation of RSA 273-A:5, I(e) and (g), Which Constitutes Bargaining in Bad Faith.

RSA 273-A:5 I,(e), along with RSA 273-A:3, create the obligation for a public employer to bargain in good faith with the employees' exclusive representative, and requires employers refrain from negotiating with parties other than the exclusive representative, including dealing directly with employees. RSA 273-A:3; RSA 273-A:5 I,(e). RSA 273-A:12 I,(a) provides further guidance on bargaining teams communicating directly with the constituents of the opposing side, and limits the ability to present directly to the other team's members or executive board, except when impasse has been reached and permission has been gained from the opposing bargaining agent. RSA 273-A:12 I,(a).

The State now argues the Governor's email was a permissible communication between the State and its employees because an employer is not entirely prohibited from communicating with employees on topics of negotiations, and argues the content of the Governor's email simply does not rise to the level of direct dealing. In support of this argument, the State largely relies on foreign jurisdiction case law pursuant to the NLRA, but ignores precedent by the PELRB regarding New Hampshire's statute, which was the

case law relied upon by the Board in the present case. It further contrasted the present circumstances with *Appeal of Franklin Educ. Assoc.*, and while the SEA might acknowledge that the act of the employer in *Appeal of Franklin Educ. Assoc.* to send contracts directly to bargaining unit employees with the order to sign them within eleven days or be terminated was a more egregious act of direct dealing than the Governor's email, it does not negate the PELRB's conclusion the Governor's email was a violation of its obligation to bargain in good faith directly with the SEA. *See American Association of University Professors UNH Chapter v. University System of New Hampshire*, PELRB Decision No. 2007-039 at *5 (March 30, 2007).

When considering the correct interpretation of what it means to direct deal or bargain in bad faith under New Hampshire law, the reasoning adopted by the PELRB in the present case is more authoritative and rational in comparison to the arguments being urged by the State given the larger statutory scheme of RSA 273-A. *See* RSA 273-A; CR at 338-39. Said conclusion is especially true in consideration of the relatively new addition of RSA 273-A:12, I,(a), which places specific constraints around bargaining agents presenting directly to employees of the bargaining unit. RSA 273-A:12, I,(a).

The PELRB, in the decision below, applied the standard adopted in *American Association of University Professors UNH Chapter v. University System of New Hampshire*, which considers several factors when seeking to determine if direct dealing occurred. CR at 339. Under that standard, the PELRB first divided the issue into the communication itself and the dealing aspect. CR at 338. With regard to the communication, the PELRB considers the following factors: "(1) the medium used; (2) the frequency of communication;

(3) the timing of the communication; and (4) the intent of the party generating the communication, to the extent it can be ascertained." *American Association of University Professors UNH Chapter*, PELRB Decision No. 2007-039 at *5. With regard to the "dealing" part, the PELRB considers the following factors non-exclusively: (1) the contents of the communication; (2) the audience to whom the communication is directed; (3) the extent to which the contents express an intent to interfere with the representative's right to exclusively represent the unit members; and (4) the effect of the communication upon members of the bargaining unit. *Id.*

In the present case, nearly all, if not all, of these factors establish the Governor's email constituted direct dealing. *See id*; CR at 106-110, 241. The medium used was work email and then was later circulated further on the State's intranet, both of which are intended for internal work communications. *See id.* This can easily be distinguished from cases like *Appeal of City of Portsmouth, Bd. Of Fire Comm'rs* where the medium used was a general, local news publication, not exclusively used for or directed toward employees. *See* 140 N.H. at 438-39. The timing of the communication was also suspect as it occurred during active negotiations and was sent just hours before an SEA sponsored meeting to present and discuss the fact finder's recommendations. *See* PELRB Decision No. 2007-039 at *5; CR at 106-10, 241.

This timing creates a distinction with cases like *Town of Hampton* where statements at issue were made after bargaining was completed, as opposed to during bargaining like the present case. *See Appeal of Town of Hampton,* 154 N.H. 132 (2006); CR at 107-10, 241. As previously established above, and as determined by the PELRB as a matter of fact, the intent of the email was to

present bargaining proposals directly to the employees "in an effort to convince employees to pressure the unions to accept the state's bargaining proposal, reject the fact finder's report, and reject any contrary recommendations from the unions." *See* PELRB Decision No. 2007-039 at *5; CR at 241, 340. For these reasons, the Governor's email constituted the type of communication that violates the rule against direct dealing.

With regard to the "dealing" aspect, the facts in consideration of the factors show the Governor's email did in fact "deal" directly with the employees. *See id.* The contents of the communication dealt entirely with negotiations and specifically outlined proposals, the fact finder's recommendations, the SEA's positions, and sought to influence support for the State's proposals. *See id.* The audience of the email was the employees, not the union, and there is nothing in the record to show SEA's Chief Spokesperson, Randy Hunneyman, was even copied on the correspondence. *See id*. As previously mentioned, the content of the email expresses the intent to interfere because the email was sent during active bargaining, and just before a scheduled SEA sponsored information session. *See* PELRB Decision No. 2007-039 at *5; CR 107-10, 241, 340.

The intent to interfere is further illustrated by the content because it provides the details of the parties' positions and proposals, albeit in a misleading manner, and asks the audience to "reconsider the many valuable benefits that the state's proposal offers to state employees." *See id*. Last, the email had a documented effect upon members of the bargaining unit. *See* PELRB Decision No. 2007-039 at *5; CR at 128-33. Union leaders such as President Gulla, steward Laurie Aucoin, and bargaining team member Daniel

Brennan all provided statements that immediately following the Governor's email, they received numerous inquiries from members who were substantially confused by the email. *Id.* This forced the SEA to go on an information campaign to set the record straight, which included the creation and posting of a video, as well as numerous phone calls and meetings with members. *Id.* For all of these reasons, the Governor's email constituted direct dealing pursuant to established test used by the PELRB. *See* PELRB Decision No. 2007-039 at *5; CR 107-10, 128-33, 241, 340.

The State asserts this Court should adopt a standard regarding direct dealing that federal courts and the NLRB have adopted pursuant to the NLRA, but there is a meaningful distinction between the statutory construction under the NLRA and the applicable PELRA with regard to permissible communications during negotiations. *See* 29 U.S.C. § 158; *see* RSA 273-A. RSA 273-A:12, I(a), shows the legislature chose to limit direct presentations to employees and prohibited them generally, choosing instead to only permit direct presentation to employees under specific limited circumstance described below. RSA 273-A:12, I(a), provides as follows:

> *"(a) Whenever the parties request the board's assistance or have bargained to impasse, or if the parties have not reached agreement on a contract within 60 days, or in the case of state employees 90 days, prior to the budget submission date, and if not otherwise governed by ground rules:*
>
> > *(1) The chief negotiator for the bargaining unit may request to make a presentation directly to the board of the public employer. If this request is approved by the board of the public employer, the chief negotiator for the board of the public employer shall in turn have the right to make a presentation*

> *directly to the bargaining unit. The cost of the respective presentations shall be borne by the party making the presentation.*
>
> *(2) The chief negotiator for the board of the public employer may request to make a presentation directly to the bargaining unit. If this request is approved by the bargaining unit, the chief negotiator for the bargaining unit shall in turn have the right to make a presentation directly to the board of the public employer. The cost of the respective presentations shall be borne by the party making the presentation.* RSA 273-A:12 I,(a).

This provision is the only section of the RSA 273-A that expressly permits an avenue for the Governor to directly present to the bargaining unit employees. *See* RSA 273-A Generally. Under the rules of statutory interpretation this court has held, "[w]e must give effect to all words in a statute, and presume that the legislature did not enact superfluous or redundant words." *State v. Milner*, 159 N.H. 456, 457 (2009). Further, "we interpret a statute in the context of the overall statutory scheme and not in isolation." *State v. Thiel*, 160 N.H. 462 (2010).

In viewing RSA 273-A:12 I,(a) in the context of the overall statutory scheme, if direct presentation is permitted under these limited circumstances, but nowhere else, then it must be presumed direct presentation of bargaining proposals and issues is otherwise prohibited. *See id*; *see* RSA 273-A Generally. To draw any other conclusion, including the conclusion argued by the State, would essentially render RSA 273-A:12, I(a) superfluous because parties would be permitted to present directly to the constituents of bargaining agents at virtually all other times during the

bargaining process, and could do so without needing permission from the opposing party. *See id.* Such an interpretation would render meaningless significant portions of RSA 273-A, which violates this Court's rules of statutory interpretation. *See* RSA 273-A; *see* 159 N.H. at 457; *see also Appeal of Murdock*, 156 N.H. 732, 736 (2008) (Finding "we will not interpret the rule in such a way as to render a significant portion of it meaningless").

Additionally, this Court has held, "[w]e construe all parts of the statute together to effectuate its overall purpose and avoid an absurd or unjust result". *Appeal of Local Gov't Ctr.*, 165 N.H. 790, 804 (2014). The State's argument would lead to such an absurd result where the negotiating agent for the State can directly present to the bargaining unit employees at any time, without consequence, and without requiring permission from the exclusive representative, except immediately following impasse when RSA 273-A:12, I,(a) might be invoked. *See id.* Such a conclusion would contradict not only the specific language in question, but also the larger statutory scheme, which again, requires that bargaining occur between the Governor and the employees' exclusive representative, not the employees themselves. *See id.*

It is also worth noting that under the NLRA Section 8(c), it is expressly permitted for an employer to freely express "any views, arguments, or opinion" so long as the expression does not contain "threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). Not only has the State legislature not adopted a like provision in the PELRA, it has since adopted RSA 273-A:12 I(a), which as noted above, provides for the exact

opposite protection with regard to speech during bargaining. *See id*; RSA 273-A:12 I,(a).

When considering the facts in consideration of the tests set forth in *American Association of University Professors UNH Chapter*, and further construing the meaning of RSA 273-A:12 I(a) in the broader context of the entire chapter, it is clear the Governor's email constituted direct dealing. *See* PELRB Decision No. 2007-039 at *5; CR 107-10, 128-33, 241, 340. Thus, the PELRB properly reasoned and determined the Governor's email constituted direct dealing in accordance with the appropriate applicable tests developed pursuant to case law, and the State is unable to meet its burden to prove the PELRB erred as a matter of law. *See id.*

III. The Governor's December 3, 2019 Email Violated RSA 273-A:12 I,(a) and Thus Constituted a ULP Pursuant to RSA 273-A:5 I,(e) and (g).

The State argues the Governor's email did not violate RSA 273-A:12 I,(a) because that provision provides only an optional path to present directly to members, and only applies if the parties are in the temporal window immediately following impasse, but before the Parties have moved on to the mediation phase of impasse resolution described in RSA 273-A:12 I,(b). As the State points out, the statute contains the word "may" which indicates this is a permissive provision for the parties to utilize, and the SEA agrees that neither party was required to invoke this means of impasse resolution, nor did either party invoke this provision. RSA 273-A:12 I,(a); CR at 107-10. However, the

SEA and State disagree how the word "may" affects the bargaining agents' rights to communicate directly to the executive board or members outside of this provision. The State argues if the communication is not made pursuant to this provision, then it cannot be a violation of this provision. Said argument is flawed.

As provided above, this language is permissive. The rule under RSA 273-A, generally, is not that employers can present directly to employees, as that constitutes bad faith bargaining, but rather employers are generally prohibited from dealing directly with employees. *See* RSA 273-A:3; RSA 273-A:12; *Appeal of Franklin Educ. Assoc.*, 136 N.H. 332, 335 (1992). This provision was created, as a limited exception to the general rule of prohibiting direct presentations. CR at 341. The use of the word "may" supports that conclusion because if the employer "may" present directly to the employees pursuant to this provision of the statute, then it must be presumed the employer may not present directly to the employees under other circumstances, unless such other options are indicated by the statute. *See* RSA 273-A; *see Appeal of* Cover, 168 N.H. 614, 618 (2016). To find otherwise would render the provision meaningless and superfluous because if the State is correct, then the Governor may always present directly to employees, and thus no party would ever need to invoke this provision. *See* RSA 273-A; *see* 159 N.H. at 457; *see also* 156 N.H. at 736.

The State raises the case of *Appeal of Cover* to support its conclusion that "may" in this context does not preclude other avenues for direct presentation, but the statute in question in *Cover*, RSA 541-A:24, is distinguishable from RSA 273-A. *See* RSA 273-A; *see Appeal of* Cover, 168 N.H. at 618. In *Cover*

the relevant portion of RSA 541-A:24 not only included the word "may", but also alluded to alternative methods by which the appellant could have sought relief. *See* 168 N.H. at 618. The Court thus determined the word "may", in this context, did not create an exclusive right or requirement. *See id.* In the present case though, the opposite is true. RSA 273-A:12 I,(a) does not allude to alternate mechanisms for direct presentations, and in fact, the remaining statutory scheme indicates the employer may not otherwise present directly to employees. *See* RSA 273-A.

Therefore, the PELRB was correct in determining the State violated RSA 273-A:12 I,(a) because this provision establishes the only scenario in which the State may present directly to the employees, and so by presenting directly to the employees in a manner inconsistent with this statutory provision, the State violated RSA 273-A:12 I(a), and committed a ULP pursuant to RSA 273-A:5 I,(e). *See* RSA 273-A generally.

IV. The PELRB did not Create a New Category of ULP nor has It Added Language to the Statute by Determining the State's Actions Violated RSA 273-A:12.

The State asserts the PELRB created a new form of ULP and added language to RSA 273-A:5 by determining the Governor's email violated RSA 273-A:12 I,(a). However, in making said assertion, the State entirely ignores the language of RSA 273-A:5 I,(g), which states "[i]t shall be a prohibited practice for any public employer to fail to comply with this chapter or any rule adopted under this chapter." RSA 273-A:5 I,(g). In other words, the legislature has expressly made any action by a public employer that violates any provision of

RSA 273-A to be a ULP under RSA 273-A:5 I,(g). Thus, when the PELRB determined the Governor's email violated RSA 273-A:12 I,(a), it also properly concluded that said violation constituted a ULP pursuant to RSA 273-A:5 I,(g).

V. Prohibiting the Governor from Violating his Obligations Pursuant to RSA 273-A in the Manner Prescribed by the Board does not Violate his or the State's Rights to Free Speech.

Although the State broadly alludes to free speech rights, the State has failed to meet its burden to prove the PELRB's ruling, in any way, 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. Although the State relies heavily on *Appeal of City of Portsmouth, Bd. Of Fire Comm'rs*, that case does not purport to provide the level of free speech asserted by the State. *See* 140 N.H. at 438-39. While the court in that case did acknowledge there needed to be a balance of rights based in part on free speech, the court also acknowledged there is a stark difference in the rights under the PELRA and that of the protections under the NLRA, specifically section 8(c). Said section specifically provides:

> *"The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit."* 29 U.S.C. § 158(c).

This court, in acknowledging there is no like provision in the PELRA has stated, "[we] decline, however, to impute the requirements of section 8(c) of the NLRA to RSA chapter 273-A." 140 N.H. at 438. Additionally, and as

recognized by the PELRB in its decision, the requirements of a public employer to refrain from interference with the rights of the union or the employees, and to further refrain from direct dealing with employees within the confines of RSA 273-A "does not implicate First Amendment issues or other constitutional provisions which somehow operate to shield the State from the unfair labor practice charges that have been filed." CR at 341.

Moreover, the Governor and State officials "were acting in their official capacities and were required to discharge their bargaining obligations in accordance with the provisions of the Act." *Id.* This was not like the commissioner in *Appeal of City of Portsmouth, Bd. Of Fire Comm'rs* who made an errant comment to a reporter, but rather this was the Governor speaking directly to his employees while in the statutory bargaining process pursuant to efforts to reach a contract. *See* 140 N.H. at 436; CR at 107-10; 241. Additionally, 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. *See* CR at 341. For the above reasons, the State has failed to meet its burden to show the Governor's email was protected speech and/or that the PELRB erred as a matter of law in determining said email constituted a ULP.

VI. The State Fails to Establish the PELRB Erred as a Matter of Law When it Determined The State Committed a ULP by Refusing to Submit the Fact Finder's Report to the Executive Council.

The State fails to prove the PELRB erred as a matter of law or otherwise acted unreasonably in determining the State violated RSA 273-A:12 II, and further committed a ULP in violation of RSA 273-A:5 I,(e) and (g) when the Governor refused to submit the fact finder report to the council for a vote. The requirement of RSA 273-A:12, II is clear, and plainly requires:

> *"If either negotiating team rejects the neutral party's recommendations, his findings and recommendations shall be submitted to the full membership of the employee organization and to the board of the public employer, which shall vote to accept or reject so much of his recommendations as is otherwise permitted by law."* RSA 273-A:12, II.

RSA 273-A:1 II,(a)(1) provides that "[t]he board of the public employer for executive branch state employees means the governor and council." RSA 273-A:1 II,(a)(1). Read together this means that while in impasse proceedings, and following the rejection of a fact finder's recommendations by either party, the fact finder's recommendations "*shall"* be submitted to "the governor and council" which "*shall* vote to accept or reject so much of his recommendations, as is otherwise permitted by law." (Emphasis added) RSA 273-A:1 II,(a)(1); RSA 273-A:12, II.

On November 21, 2019, the State and union bargaining teams met following the receipt of a fact finder's report. CR at 107. During that meeting, the SEA and NEPBA adopted proposals aligning with the fact finder's recommendations and the State offered differing proposals from the fact finder's recommendations. *Id.* The Parties failed to reach agreement, and because the State rejected the proposals as recommended by fact finder's report, the SEA and NEPBA notified the State that each would

move forward with a vote of the membership on the fact finder report as is required by RSA 273-A:12, II. CR at 107-08. The State responded by telling the unions the Governor was never going to submit the fact finder report to the executive council, and in fact never did submit the report to the council for vote. CR at 108.

Based on the above facts and law, the PELRB correctly determined the Governor's refusal to submit the fact finder report to the council was a violation of RSA 273-A:12, II(a)(1) and RSA 273-A:3, and thus constituted a ULP under RSA 273-A:5 I,(e) and (g). The State now argues the PELRB erred and relies heavily on *Sunapee Difference, LLC v. State of New Hampshire*. However, that case is easily distinguishable from the present circumstances. *Sunapee Difference* was, among other things, a land-lease contract dispute case where the plaintiff alleged breach of contract for failing to submit a proposed amendment to the executive council. *Sunapee Difference, LLC v. State of New Hampshire*, 164 N.H. 778 (2013). The relevant contractual provision stated the following:

> *"This agreement may be amended, waived or discharged only by an instrument in writing signed by the parties hereto and only after approval of such amendment, waiver or discharge by the Governor and Executive Council of the State of New Hampshire". Id.* at 790.

The court found the clause contained ambiguity and so sought to determine what the ambiguous language meant. *Id.* The court determined the intent was the same as that described in RSA 4:40, because that statute controls the process for disposal of state owned real estate, and requires that

all such requests be submitted to governor and council for approval. *Id.* at 790-91. The court next reasoned RSA 21:31-a generally defines governor and council to mean "the governor with advice and consent of the council." *Id.* at 791. Based on these definitions, as well as guidance from foreign authority, the court determined that "RSA 4:40 would not require the governor to put before the Executive Council proposed lease of state lands that the Governor does not approve." *Id.* at 791-92.

The State argues the same conclusion and rationale in *Sunapee Difference* should apply to the present case, arguing the Governor cannot be required to submit a fact finder's report to the Council that he disagrees with. However, the State fails to acknowledge important distinctions between the two cases, and the statutes at issue, and further fails to perform any statutory interpretation analysis of the meaning of "governor and council" in the context of RSA 273-A, and how it differs from the use in RSA 4:40.

As alluded to above, the present case and statute being interpreted are distinguishable from *Sunapee Difference.* RSA 273-A and RSA 4:40 are substantially different in content and purpose and so to adopt the State's arguments while ignoring the analysis of the statutory interpretation of what "governor and council" means within the statutory scheme of RSA 273-A would amount to an error of law, rather than a correction as the State argues. *See* RSA 273-A; *see* 164 N.H. at 790-92. It is further worth noting the definition of governor and council relied upon in *Sunapee Difference* was based upon the standard definition pursuant to RSA 21:31-a, but that definition is not definitive for all statutes, especially when adopting the

standard definition would be inconsistent with the intent of the legislature. *See* 164 N.H. at 790-92; *see* RSA 21:1. RSA 21:1 provides the following:

> *"Application- In the construction of all statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the same."* RSA 21:1.

"Governor and council" therefore must be interpreted with the overall statutory scheme of RSA 273-A and in consideration of the intent of the legislature, and not merely blindly interpreted in accordance with other sources of authority such as RSA 4:40; RSA 21:31-a, or specific contractual language pertaining to issues outside of the scope of public sector collective bargaining law. *See id*; *see* RSA 273-A.

In this case, expanding the *Sunapee Difference* ruling and the definition under RSA 21:31-a would be "inconsistent with the manifest intent of the legislature [and/or] would be repugnant to the context of the same." *See* RSA 21:1; *see* RSA 273-A; *see* 164 N.H. at 790-92. Pursuant to the rules of determining legislative intent under the rules of statutory interpretation this court has held, "[w]e must give effect to all words in a statute, and presume that the legislature did not enact superfluous or redundant words." *State v. Milner*, 159 N.H. at 457. Further, "we interpret a statute in the context of the overall statutory scheme and not in isolation." *State v. Thiel*, 160 N.H. at 465. When looking at the total statutory scheme of RSA 273-A, bargaining starts with the bargaining teams of the parties meeting and negotiating in good faith until they reach agreement or impasse. *See* RSA 273-A:3. If impasse is reached, the parties may request to present directly to the other parties' constituency. RSA 273-A:12 I,(a).

If impasse is still not resolved, the parties must enter mediation. RSA 273-A:12 I,(b). If mediation does not resolve impasse, the parties must seek recommendations from a fact finder. RSA 273-A:12 I,(b). If the teams do not agree to the fact finder's recommendations, then the audience is expanded to the members of the union and executive board of employer for a vote on the recommendations. RSA 273-A:12 II. If these votes do not resolve impasse, then the report must be submitted to the legislative body of the employer, who must vote to accept or reject the report. RSA 273-A:12 III.

This statutory scheme plainly shows that as the parties proceed further into impasse, the legislature sought to expand the exposure of the participants in the process. *See* RSA 273-A generally; *see also Appeal of Derry Education Association, NEA-NH*, 138 N.H. 69, 73 (1993). In fact, this Court in *Appeal of Derry Education Association* has already determined that "part of the purpose" of RSA 273-A:12 "is 'to broaden participation in impasse negotiations' and to make the parties vulnerable to 'the publicity that will no doubt attend an impasse.'" *Id.* In that case, the public employer refused to submit the fact finder's recommendations on non-cost items to the legislative body, and was found to have committed a ULP for violating RSA 273-A:12 III. *Id.* As a result, the court required all bargaining items, cost and non-cost items, be submitted to the legislative body for a vote, even if the vote may not be binding, so the parties might be pressured by the body and the public, which may be watching. *Id.*

The same rationale in *Derry Educ. Assoc.* for requiring the submission of the fact finder's report to the legislative body applies in the

present case with regard to the obligation of the Governor to submit the fact finder's report to the council. *See id.* At the very least, the statutory intent of the impasse procedures is to "broaden participation in impasse negotiations" and that goal is not met if the Governor can simply choose to not submit the fact finder's report to the council for a vote. *See id*; *see* RSA 273-A:12 II. Even if the vote by the council is merely advisory, the purpose of the legislation would be met by putting pressure on the parties because of the publicity the vote might receive. *See id.*

This legislative scheme and purpose provides a significant distinction from *Sunapee Difference* because there was no reason for the Governor to submit the proposed lease amendment to the council if he did not agree with the proposal. *See* 164 N.H. at 790-92. Here the opposite is true. It is because the Governor does not agree with the fact finder's recommendation that RSA 273-A:12 requires him to submit the matter to the executive council, so that at minimum, there may be pressure to try to reach an agreement during impasse negotiations. *See* RSA 273-A:12 II; *see* 138 N.H. at 73. To find otherwise would be inconsistent with the manifest intent of the legislature and would even be repugnant to the context of the same, as allowing the governor to avoid this step completely undermines and in fact "strikes down an important aspect of this statutory scheme intended to address and assist in the resolution of a bargaining impasse involving executive branch bargaining units." *See* RSA 21:1; *see* RSA 273-A:12; 138 N.H. at 73; CR at 344.

Another distinction worth noting is the Governor is required to enter into good faith negotiations with the exclusive representative of the

employees, but the same is not true of parties wishing to enter into lease agreements. *See* RSA 273-A:3; *see* RSA 4:40. The Governor has no obligation to entertain lease agreement offers. *See* RSA 4:40; *see* 164 N.H. at 790-92. However, the Governor is obligated to engage in collective bargaining. RSA 273-A:3, RSA 273-A:9, and RSA 273-A:12 all create an obligation for the parties to meet and bargain in good faith in an effort to reach agreement, including during fact finding, and the impasse procedure states the fact finder's recommendations "shall" be submitted to the board of the public employer, and the board of the public employer "shall" vote. RSA 273-A:3; RSA 273-A:9; RSA 273-A:12.

The fact RSA 273-A:12 II requires not only the submission of the report to body, but also requires that the body "shall" vote further highlights the distinction with *Sunapee Difference*, because the statute at issue in that case merely provided "all requests for the disposal or leasing of state-owned properties shall be…[submitted] to the governor and council for approval." *See* RSA 273-A:12 II; 164 N.H. at 790-91. This language falls short of requiring an actual vote, while the language in RSA 273-A:12 II specifically requires it, thus indicating the Governor does not have the same level of discretion granted to him pursuant to RSA 4:40. *See id.*

Good faith bargaining in the New Hampshire public sector requires the Governor meet at reasonable times and places in an effort to reach agreement on the terms and conditions of employment, but he is not compelled to agree to any terms or proposals. RSA 273-A:3. The same is true of impasse proceedings, as it is the obligation of the Governor to cooperate in mediation and fact finding as required by RSA 273-A, and this

would include the processes required under RSA 273-A:12 II. RSA 273-A:3; RSA 273-A:12 II.

Regarding the State's Constitutional, separation of powers arguments, requiring the Governor to submit a fact finder's recommendations to the executive council for a vote does not violate or unlawfully limit his power or authority under the constitution. The State cites Part II, Article 62 of the New Hampshire Constitution as the primary authority it believes grants the Governor "full power and authority to convene the council." *See* N.H. CONST. pt. II, art. 62. However, when looking at the relevant provision in its entirety, it is clear the Governor's discretion on convening the council is still subject to relevant statutes such as RSA 273-A. *See id.* The full sentence states as follows:

> *"And the Governor shall have full power and authority to convene the council, from time to time, at his discretion; and, with them, or the majority of them, may and shall, from time to time hold a council, for ordering and directing the affairs of the state,* ***according to the laws of the land.*** *Id.*(Emphasis added).

It is simply untrue the Governor's discretion to convene the council is completely unfettered, and that no law passed by the legislature can ever place procedural requirements around the Governor's discretion to convene the council. *See* N.H. CONST. pt. II, art. 62. Part II, Article 62 of the New Hampshire Constitution plainly states this discretion is subject to "the laws of the land." *Id.* RSA 273-A:12 II, in this case, is "the law of the land" and the Governor must adhere to the requirements of that statute, including the obligation to submit the matter to the executive council, which in turn must hold a vote. *See id*; RSA 273-A:12 II. Said requirement does not violate the

Governor's Constitutional rights, and is not a violation of separation of powers. *See id.*

Additionally, it is worth noting the rule of separation of powers "is not absolute, but rather permits an overlapping of powers among branches in certain areas." *In re Opinion of the* Justices, 129 N.H. 714, 717 (1987). The State has failed to establish the Governor's Constitutional authority was infringed, and further failed to establish any alleged infringement of separation of powers rises beyond the level commonly permitted among branches of government. *See id.* For the above reasons, the State has failed to meet its burden to prove the PELRB erred as a matter of law, and its decision should be upheld.

CONCLUSION

For the reasons set forth above, the Appellee requests this Honorable Court uphold the decision of the NH Public Employee Labor Relations Board.

CERTIFICATE OF COMPLIANCE

I, Gary Snyder, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9497 words, excluding pages containing the table of contents, table of citations, pertinent statutes, and certifications.

Counsel relied upon the word count of the computer program used to prepare this brief.

Dated: February 11, 2022

Gary Snyder
Gary Snyder, General Counsel
NH Bar ID# 265339

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Appellee's brief shall be served on Laura Lombardi, counsel for the State of New Hampshire, through the New Hampshire Supreme Court's electronic filing system.

Date: February 11, 2022

Gary Snyder
Gary Snyder, General Counsel