

**2018 Bradley F. Kidder  
Educational Law Conference**

**UPDATE: CONTRACTING OUT/PRIVATIZING  
BARGAINING UNIT WORK IN NEW HAMPSHIRE**

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*The material in this presentation is intended as reference material and to give general guidance only. The information is not intended as legal advice and given the rapidly changing nature of the law, you should be sure to consult with your own attorney regarding specific situations and for answers to specific legal questions.*

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- Introduction
- “Privatizing/Subcontracting/Contracting Out”
- Appeal of Nashua School District, 170 N.H. 386 (2017). Decided October 4, 2017.  
(Attachment 1)

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- RSA 273-A – NH Public Employee Collective Bargaining Law
  - Bargaining Unit Certifications
  - RSA 273-A:8
  - See Nashua School District unit certification (Attachment 3).

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- RSA 273-A – NH Public Employee Collective Bargaining Law
  - Obligation to Bargain
  - RSA 273-A:3,1
  - “It is the obligation of the public employer and employee organization certified by the board as exclusive representative of the bargaining unit to negotiate in good faith.”

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- RSA 273-A – NH Public Employee Collective Bargaining Law
  - Unfair Labor Practices Prohibited
  - RSA 273-A:5,1(e)
  - Prohibited practice for public employer “to refuse to negotiate in good faith with the representative of a bargaining unit...”

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- RSA 273-A – NH Public Employee Collective Bargaining Law
- RSA 273-A:1, XI
  - “The phrase ‘managerial policy with the exclusive prerogative of the public employer’ shall be construed to include but shall not be limited to the functions, programs and methods of the public employer, including the use of technology, the public employer’s organizational structure, and the selection, direction and number of its personnel, so as to continue public control of governmental functions.”

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- Negotiating for the contractual right to subcontract
  - “Notwithstanding any other provision in this Agreement, the School Board has sole jurisdiction, authority and discretion to contract with individuals, companies or agencies to provide \_\_\_\_\_ services that otherwise would be performed by persons employed in this bargaining unit, and to lay off the employees who previously performed those services.”

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- **PELRB Case Law**

- Lisbon Teachers Association, NEA-NH v. Lisbon Regional School District, PELRB Decision No. 1998-067 (August 12, 1998). (Attachment 2)

[I]t is apparent that there is an appropriate time when management may make changes in its organizational structure. If this were not the case and management was required to maintain a given organizational structure or category of employees indefinitely, it would lose control of its expenditures and its ability to ‘continue control of governmental functions.’

- Farmington Education Support Professional United, NEA-NH v. Farmington School District, PELRB Decision No. 2014-080 (Mar. 28, 2014).



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- NH Supreme Court Case Law
  - Appeal of City of Nashua Board of Education, 141 N.H. 768 (1997).
  - Appeal of Hillsboro-Deering School District, 144 N.H. 27 (1998).

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- Appeal of Nashua School District, 170 N.H. 386 (2017).
- Facts:
  - District notified the Union per the CBA that it did not wish to renew the CBA in its current form and that it intended, upon expiration of the CBA, and for financial reasons, to contract with a private company to provide custodial services.
  - Union demanded to commence negotiations for successor agreement for all unit employees, not just non-custodians.
  - Negotiations did not commence, ULP charge filed by Union.

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- Appeal of Nashua School District, 170 N.H. 386 (2017).
- PELRB decision:
  - District committed an unfair labor practice by refusing to negotiate over the custodial positions.
  - District unilaterally modifying the bargaining unit.
  - District ordered to bargain in good faith.
  - District appeals to Supreme Court.

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- Appeal of Nashua School District, 170 N.H. 386 (2017).
- Decision
  - Employer did not commit ULP by refusing to bargain with the Union concerning its plan to lay off custodial employees and replace them with subcontracted workers.
  - Court adopts PELRB’s reasoning in Lisbon Teachers Ass’n.
  - Distinguishes case from prior decisions in Appeal of City of Nashua Board of Ed. and Appeal of Hillsboro-Deering School District.
  - District still obligated to negotiate with the Union over the impact of its decision to subcontract.

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- Conclusion
- Per Nashua School District/Lisbon Teacher's Ass'n cases, School Districts may privatize bargaining unit work if:
  - Notice is given to Union before neg's begin of intent to privatize after CBA expires, and
  - Offer to negotiate impact of decision is made.
  - Do not attempt to subcontract unit work during term of CBA or after neg's have been ongoing.
  - See sample Notice of Intent to Privatize in materials.

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- Questions?
- Thank you for your attention!