

[REDACTED]

from challenging the composition of the bargaining unit because of laches or any other reason, *see* Laws 1975, 490:3; *State Employees Ass'n v. N.H. Pub. Employee Labor Relations Bd.*, 116 N.H. 653 (1976).

Alternatively, the city argues that the PELRB erroneously found that preparing written, as opposed to oral, evaluations was not a material "change in circumstances" warranting modification of the bargaining unit. We disagree. The PELRB's finding was neither contrary to law nor clearly against the weight of the evidence. *See* RSA 541:13. As the PELRB noted, witnesses for both sides testified that both lieutenants and captains had evaluated firefighters orally since the bargaining unit was originally certified in 1976. The record supports the PELRB's conclusion that the written evaluations have little or no more effect than the oral evaluations. That the evaluations must now be written does not materially change the responsibility.

In light of our ruling, we need not address the city's remaining arguments.

Affirmed in part; vacated in part; and remanded.

BROCK, C.J., and BRODERICK, NADEAU and DUGGAN, JJ., concurred.

[REDACTED]

Belknap
No. 2000-164

THE STATE OF NEW HAMPSHIRE

v.

GARY M. PORTER

Submitted: March 8, 2002
Opinion Issued: April 2, 2002

[REDACTED]

Philip T. McLaughlin, attorney general (*Stephen D. Fuller*, assistant attorney general, on the brief), for the State.

David M. Rothstein, chief appellate defender, of Concord, by brief, for the defendant.

Gary M. Porter, by brief, *pro se*.

MEMORANDUM OPINION

BROCK, C.J. The defendant, Gary Porter, appeals orders of the Superior Court (*Perkins, J.*) denying his *pro se* motions. We affirm.

The defendant was convicted by a jury of aggravated felonious sexual assault and kidnapping. *See* RSA 632-A:2, I(a) (1996); RSA 633:1, I (1996). We affirmed his convictions in *State v. Porter*, 144 N.H. 96 (1999), but remanded to superior court for resentencing. *Id.* at 97, 102.

On remand, although the defendant was represented by counsel, he sought to vacate his sentence, secure a new trial, dismiss the kidnapping indictments, and set aside the jury verdicts through a series of *pro se* motions. The trial court declined to address the merits of these *pro se* motions because the defendant was represented by counsel. The court rejected the motions "without prejudice to the defendant's ability to file such Motions or other posttrial [*sic*] motions as appropriate through counsel," stating that if the motions were presented by defense counsel, the court would address their merits.

■ The trial court's decision not to rule upon the merits of the defendant's *pro se* motions was a sustainable exercise of its discretion. *See State v. Lambert*, 147 N.H. 295, 296 (2001). "The New Hampshire and Federal Constitutions guarantee a defendant facing criminal prosecution both the right to counsel and the right to proceed *pro se*. Yet these entitlements are antithetical, and the exercise of one right nullifies the other." *State v. Panzera*, 139 N.H. 235, 237-38 (1994) (citations omitted). On remand, the defendant elected to be represented by counsel. Thus, the court's denial of his *pro se* motions, without prejudice to their being submitted by his counsel, was sustainable on the record.

Having concluded that the trial court's decision was appropriate, we decline to address the merits of the defendant's various *pro se* motions for the first time on appeal.

Affirmed.

BRODERICK, NADEAU and DALIANIS, JJ., concurred.