

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS

SUPERIOR COURT

**OFFICER A.B.**

Plaintiff

v.

**LARA SAFFO, ESQ. IN HER CAPACITY AS GRAFTON COUNTY ATTORNEY**

Defendant

No. 215-2018-CV-437

**MOTION TO INTERVENE**

NOW COMES the American Civil Liberties Union of New Hampshire Foundation (“ACLU-NH”), and respectfully moves to intervene in this case pursuant to Superior Court Rule 15.

**I. INTRODUCTION**

1. This Motion is filed by the ACLU-NH, which is the New Hampshire affiliate of the American Civil Liberties Union—a nationwide, nonpartisan, public-interest organization with over 1.75 million members (including over 9,000 New Hampshire members and supporters). For the past 50 years, the ACLU-NH has been dedicated to preserving the individual rights and liberties guaranteed in the Bill of Rights and Constitution in New Hampshire. Part of ACLU-NH’s work focuses around advocating for public transparency and accountability for law enforcement. To that end, ACLU-NH is a party and lead counsel in *N.H. Center for Public Interest Journalism v. N.H. Dep’t of Justice*, No. 226-2018-CV-537 (Hillsborough County Superior Court South) (seeking access to the Exculpatory Evidence Schedule under Chapter 91-A) and *Union Leader Corp. v. Town of Salem*, No. 218-2018-CV-1406 (Rockingham Superior Court) (seeking access to an unredacted copy of an audit report detailing misdeeds in the Salem Police Department). ACLU-

NH seeks to intervene in this case to explain why this Court must deny Officer A.B.'s *Petition for Declaratory Judgment and Equitable Relief* and reject the proposed Stipulation of Judgment.

2. Pursuant to Superior Court Rule 15, "Any person shown to be interested may become a party to any civil action upon filing and service of an Appearance and pleading briefly setting forth his or her relation to the cause . . ." The New Hampshire Supreme Court has said: "The right of a party to intervene in pending litigation in this state has rather freely been allowed as a matter of practice. A trial court should grant a motion to intervene if the party seeking to intervene has a right involved in the trial and a direct and apparent interest therein. It is within the trial court's discretion to grant intervenor status." *Lamarche v. McCarthy*, 158 N.H. 197, 200 (2008) (citations and quotations omitted).

3. On December 26, 2018, Officer A.B. filed a petition seeking to be removed from the Exculpatory Evidence Schedule ("EES List"). The basis for his inclusion on the EES List involves, after drawing a weapon on a prisoner, inaccurately documenting in his report that the prisoner had had his hand in his pocket as if he were reaching for a weapon. *Petition* ¶¶ 10-20. This false statement was made as a justification for Officer A.B. drawing his weapon. An internal investigation resulted in a finding that A.B. falsified a police report and provided false testimony. *Id.* ¶ 21.

4. Crucially, A.B. does not argue that the finding of misconduct was unfounded or the result of insufficient due process—grounds that have caused two officers to seek declaratory judgment relief in the courts. *See Duchesne v. Hillsborough Cty. Atty.*, 167 N.H. 774, 780 (2015) (allowing officer to be removed from the EES List where the only conduct at issue was the officer's involvement in a single incident of alleged excessive use of force which had been determined to be unfounded.); *Gantert v. City of Rochester*, 168 N.H. 640 (2016) (denying officer removal from

the EES List because due process was sufficiently provided to the officer). In fact, A.B. admits that the charges leveled against him were founded in that he “documented the event inaccurately.” *Id.* ¶ 16. Moreover, A.B. does not contest the fact that this incident consists of “[a] deliberate lie during a court case” or the “falsification of ... evidence,” which would be required to be given to a defendant under the Department of Justice’s 2017 Memorandum. *See* Exhibit A, 2017 Foster Protocol, at p. 2. A.B.’s only claim for removal is that the official misconduct was so long ago that, essentially, it is “stale” and should not matter. But the EES protocols mandated by the Department of Justice in two memoranda dated March 21, 2017 and April 30, 2018 (i) only allow for removal from the EES List where the disciplinary finding “has been overturned,” and (ii) forbid removal from the EES List simply because of the passage of time. *See* Exhibit B, 2018 MacDonald Memo., at pp. 4-5; Exhibit A, 2017 Foster Protocol, at p. 5.

## **II. THE EXCULPATORY EVIDENCE SCHEDULE**

5. The EES List contains the names of nearly 260 New Hampshire law enforcement officers in which there have been sustained findings of misconduct. This List does not implicate just any conduct. It implicates misconduct concerning credibility and truthfulness that goes to the core of an officer’s ability to perform his or her duties. As the Attorney General’s March 21, 2017 memorandum explains, this misconduct that is exculpatory implicates (i) a deliberate lie during a court case, (ii) the falsification of records or evidence, (iii) any criminal conduct, and an (iv) egregious dereliction of duty among other things. Exhibit A, 2017 Foster Protocol, at p. 2. The incident at issue here clearly satisfies this criteria.

6. The EES List is maintained by the Department of Justice and was created by Attorney General Foster on March 21, 2017 by issuance of a memorandum, attached as Exhibit A. Before the Department’s issuance of this March 2017 Memorandum, the List—then called the



“*Laurie*” List—was maintained by individual County Attorney Offices. The Foster memo, and a supplemental memorandum issued by Attorney General MacDonald attached as Exhibit B, further expounded on the protocol for the maintenance of the EES List and the removal of officers.

7. The New Hampshire Department of Justice created the EES List and its predecessor, the *Laurie* List, to help prosecutors comply with their obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and *State v. Laurie*, 139 N.H. 325 (1995) to disclose exculpatory evidence, including impeachment evidence, to criminal defendants in their cases. In the context of police officers’ personnel files that may include impeachment evidence, the EES List threads the needle by reconciling two conflicting principles: (i) that knowledge of exculpatory evidence by the police is imputed to prosecutors and must be disclosed to defendants to comply with a defendants’ right to due process, *e.g. In re State (Theodosopoulos)*, 153 N.H. 218, 320 (2006), and (ii) law enforcement’s view that the legislature has provided confidentiality protections to police officer personnel files, RSA 105:13-b. The ACLU-NH is separately challenging this interpretation of RSA 105:13-b in a lawsuit arguing that the EES List is a public document pursuant to Chapter 91-A, though this question is outside the scope of Officer A.B.’s petition. *See N.H. Center for Public Interest Journalism v. N.H. Dep’t of Justice*, No. 226-2018-CV-537 (Hillsborough County Superior Court South)

8. Under the protocol developed by the Department of Justice, an officer’s name is placed on the EES List when (i) an investigation by a local police department into allegations of misconduct is “sustained,” and (ii) the head of the local police department concludes that the misconduct is “exculpatory” using the criteria above. Exhibit B, at p. 1. If the head of the local police department determines that the information is exculpatory, “the officer will be notified and afforded the opportunity to present evidence which the officer believes demonstrates the conduct

is not EES conduct.” *Id.* If, after providing the officer this due process, the head of the local police department continues to conclude that this information is exculpatory, the head issues a notification placing the officer on the EES List. *Id.* The notification of a sustained finding includes the officer’s date of birth, name of the law enforcement agency, date on which the misconduct occurred, and a short description of the EES conduct. *Id.* n. 1. When a criminal case is brought, the prosecutor is supposed to check the EES List for the names of officers who may be witnesses, and if one of the witnesses is on the list, the prosecutor is to review the officers’ personnel file, and either disclose the information to the defendant or seek *in camera* review. *See* Exhibit A, p.4; RSA 105:13-b.

9. Importantly, because a prosecutor’s obligations to disclose exculpatory information spring from the Constitution and not the EES, removing an officer from the EES List *does not* abrogate the prosecutor’s obligation to produce the exculpatory conduct to the defense. Even if A.B.’s name were removed from the County Attorney’s list, prosecutors would still be required to turn over the underlying material in his personnel file. *See Union Leader*, “ACLU seeks investigation into effort to remove officer from ‘Laurie List,’ March 12, 2019 attached as Exhibit C (quoting Senior Assistant Attorney General Geoffrey Ward: “Moreover, in any matter, whether or not an officer’s name appears on the EES (list), prosecutors nevertheless have an affirmative duty to disclose potentially exculpatory evidence which is contained in an officer’s personnel file under the Brady and Laurie cases.”).

10. The Department’s 2018 EES protocol for removal only allows for removal of an officer from the schedule when a sustained finding has been overturned. *See* Exhibit B, p. 4-5 (“the removal protocol requires removal when a sustained finding has been overturned.”). Moreover, Attorney General Foster’s 2017 memorandum explicitly removed the ability for an



officer's name to be removed from EES due to the passage of time. *See* Exhibit A, 2017 Foster Protocol, at p. 5 (“To the extent that institutional knowledge permits, an officer who was taken off the Laurie list because the conduct was more than ten years old should be placed back on the EES. Hereafter, no officer will be taken of the EES without approval of the Attorney General or designee.”). This makes sense: the passage of time does not, by itself, make evidence of police misconduct any less exculpatory or inadmissible.

11. Indeed, a finding that an officer such as A.B. previously gave false testimony and falsified a report is likely exculpatory, and therefore subject to mandatory disclosure, regardless of the passage of time. “The application of the rule [of mandated disclosure] to exculpatory evidence is justified by the fact that the jury’s estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest in testifying falsely that a defendant’s life or liberty may depend.” *Laurie*, 139 N.H. at 327 (citation and quotation omitted). And evidence may be admissible regardless of the passage of time. *Compare* N.H. R. Evid. 608(b) (permitting specific instances of conduct to be asked about to attack or support witness’s character for truthfulness without time bar) *with* N.H. R. Evid. 609(b) (imposing time bar on introduction of evidence of some criminal convictions).

12. Nor does the New Hampshire Constitution require officers be removed from EES List after a period of time. Contrary to A.B.’s suggestion, *Gantert v. Rochester*, 168 N.H. 640, 650 (2016), only requires “some *post-placement* mechanism available to an officer to seek removal from [EES] *if the grounds for placement on the list are thereafter shown to be lacking in substance.*” (first italics in original; second italics added). Here, the grounds for placement on the EES List are clearly not “lacking in substance” where the officer admits that he engaged in

misconduct. As A.B. does not allege that the initial finding he engaged in official misconduct was wrong, the Constitution obviously does not require that he be removed from EES List.

13. The petitioner's request to be removed from the EES List not only violates the Department of Justice's protocols, but it undermines the criminal justice system. If Officer A.B. has something in his file that is exculpatory (and it appears he may), that information needs to be turned over in a criminal case to comply with the Constitution regardless of whether he is on the List. Removing Officer A.B. from the List presumably held by the County Attorney's Office will make it harder for prosecutors to make necessary disclosures to defendants in future cases in which Officer A.B. is a testifying witness.

14. The petition also suggests that there is some blanket constitutional right to be removed from the EES List based on a perceived "stale" incident because of a concern about "stigma," despite the fact that the petitioner does not challenge the fact that he committed misconduct. However, when a police officer charges a citizen with a crime, that person too suffers stigma. The charge and the person's name are made public, even before the person has received a hint of due process. This information will remain public even if the police later drop the charge or the person is acquitted. With this publicity comes stigma to the accused. (Meanwhile, officers on the EES List are—incorrectly—given the right of anonymity by the Department of Justice). Here, the petitioner's effort to be removed from the EES List because of perceived "stigma" seeks to grant him more rights as a police officer than the rights of criminal defendants who routinely suffer stigma as a result of arrests and prosecutions, even those that result in dismissals and acquittals.

### **III. ACLU-NH SHOULD BE PERMITTED TO INTERVENE**

15. After the Petition was filed, rather than answering or moving to dismiss, the County Attorney entered into a Stipulation asking the Court to order the County Attorney to remove A.B.



from the County Attorney's list. Entering into this stipulation was contrary to the Attorney General's protocols governing EES. *See* Exhibit C (quoting Senior Assistant Attorney General Ward: "The protocol clearly states that removal of an officer's name may only occur if there is an order or other determination which overturns the disciplinary finding which had caused the officer to be added. . . The Grafton County Attorney's actions in entering a stipulation agreeing to remove Officer AB's name from the EES did not conform with this protocol." ).<sup>1</sup>

16. The current parties before this Court have agreed to ask this Court to remove A.B.'s name from EES.<sup>2</sup> They done this despite their being no legal basis to remove A.B. from the list; despite the fact that the result of such a decision would just make it more difficult for prosecutors to comply with their *Brady* and *Laurie* obligations; and despite the absence before this Court of any party to explain how such a decision would make it more difficult for the constitutional rights of criminal defendants to be protected.

17. As a result, ACLU-NH should be permitted to intervene, so it may file a brief in opposition to the joint stipulation for the reasons expressed above. Moreover, intervention by the ACLU-NH is necessary because there exists no party in this case that is equipped to zealously defend the rights of defendants in criminal cases to receive exculpatory information—a right that would be harmed by the granting of the relief that petitioner seeks. Given the current parties' inadequate ability to represent the rights of criminal defendants in this case, this Court must allow the ACLU-NH to intervene.

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<sup>1</sup> Upon information and belief, the County Attorney has moved to withdraw from the stipulation. Undersigned counsel has not had the opportunity to review that pleading.

<sup>2</sup> EES is maintained by the Department of Justice, not the County Attorney's office. The Department of Justice is not a party to this case and so cannot be bound by the stipulation.



18. ACLU-NH certifies that it made a good faith attempt to obtain the concurrence of the relief sought. Petitioner does not assent. ACLU-NH has not been able to determine the position of the Respondent as of the time of this filing.

WHEREFORE, the American Civil Liberties Union of New Hampshire Foundation respectfully prays that this Honorable Court:

- A. Permit the American Civil Liberties Union of New Hampshire Foundation to intervene in this matter; and
- B. Award such other relief as may be equitable.

Respectfully submitted,

THE AMERICAN CIVIL LIBERTIES UNION OF  
NEW HAMPSHIRE FOUNDATION,

By its attorneys,

Date: March 14, 2019

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**Certificate of Service**

I hereby certify that a copy of the foregoing was sent to all counsel of record pursuant to the State's court's e-filing system.

/s/ Henry Klementowicz  
Henry Klementowicz

March 14, 2019