

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2020-0450

Appeal of New Hampshire Department of Safety, Division of State Police

**MEMORANDUM OF LAW OF *AMICUS CURIAE* AMERICAN
CIVIL LIBERTIES UNION OF NEW HAMPSHIRE IN SUPPORT
OF APPELLANT NEW HAMPSHIRE DEPARTMENT OF SAFETY**

Pursuant to Supreme Court Rule 30, *amicus curiae* American Civil Liberties Union of New Hampshire (“ACLU-NH”) submits the following memorandum of law in support of the Appellant New Hampshire Department of Safety (hereinafter, “the Department”).

INTRODUCTION

This case concerns the narrow question of whether a law enforcement agency has the ability to maintain the termination of a police officer who has engaged in misconduct implicating the officer’s trustworthiness and credibility. New Hampshire law enforcement agencies must be able to hold their police officers to the highest ethical standards and terminate officers under these circumstances. However, under the Personnel Appeals Board (“PAB”) decision in this case, law enforcement agencies cannot effectively do so.

When a law enforcement agency cannot maintain the termination of an officer who has engaged in misconduct implicating the officer’s credibility or trustworthiness, not only does this impact whether the officer can meaningfully do his or her job as a testifying witness in criminal cases, but it also undermines the public’s faith and confidence in the criminal justice

system more broadly. This is because the public expects officers to be truthful and, if an officer lies, that the department will terminate the officer.

Here, the New Hampshire Department of Safety has tried to maintain the termination of Trooper Thomas Owens given his admission “that he adjusted the hours for October 30, 2018 to avoid a policy violation.” PAB Order, pp. 5-6. Despite this admission, the PAB took it upon itself to overrule the Department’s termination decision and reinstate the officer. But what the PAB failed to recognize is that this is not a garden-variety employment dispute, nor does this appear to be a case concerning mere sloppy recordkeeping. Rather, this is a unique situation where the misconduct at issue concerns the ability of an officer to effectively perform his or her job and serve the community.

It does not appear to be uncommon for arbitrators to reverse the termination decisions of police departments who are trying to fire officers who can no longer effectively serve the public due to misconduct. For example, on December 18, 2019, an arbitrator reversed the decision of the Manchester Police Department to terminate Officer Aaron Brown, despite the general rule that arbitrators should not “second guess” penalties imposed by police departments. *See* Addendum (“ADD”) 21-47 (PELRB, Case No. G-0103-12, Manchester Police Patrolman’s Association Dec. 18, 2019 Arbitration Decision re: Aaron Brown); *see also* ADD 44 (noting general rule).¹ In 2017, Mr. Brown sent text messages to his wife using his

¹ The Manchester Police Department released this arbitration decision after this Court’s decisions in *Union Leader Corp. v. Town of Salem*, 173 N.H. 345 (2020) and *Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325 (2020).

department-issued mobile phone during work hours in which he joked about shooting Black men and referred to them as “parking tickets.” He specifically texted: “[B]esides, I got this new fancy gun. Take out parking tickets no problem FYI ‘parking tickets’ = black fella.” ADD 31. In another text, he stated that he was “putting a stall on a parking ticket,” and “I am stalking him like a big jungle cat.” ADD 32, 43.² The arbitrator agreed that misconduct occurred, calling the texts “inappropriate and offensive.” ADD 44. However, despite acknowledging that “[z]ero tolerance for racially insensitive comments is clearly an appropriate response by the Manchester Police Department,” the arbitrator reversed the termination decision and suspended Mr. Brown for 30 days and reinstated him with back pay. *See* ADD 22, 45. As then Manchester Police Chief Carol Capano stated in a September 4, 2020 letter to the community, the Manchester Police Department was “extremely saddened and sickened to see that an arbitrator could rule in this manner after hearing this egregious case.” *See* ADD 49 (Sept. 4, 2020 Manchester Police Department). Following this incident, former Manchester Police Chief Nick Willard also noted: “That’s where we

² He also sent his wife a video of a “crackbunny fight” and wrote: “I am certainly not a racist. I have my proclivities about people ... but those folks are straight up n’s ... no two ways about it. Serve no place in life or society. And yet they are completely taking over all parts of daily life.” *See* Mark Hayward, “Police Chief: ‘Saddened and Sickened’ by Ruling About Cop Texting Racist Statements,” *Union Leader* (Sept. 4, 2020), https://www.unionleader.com/news/politics/local/police-chief-saddened-and-sickened-by-ruling-about-cop-texting-racist-statements/article_97dc13f4-8336-55b8-a65a-1fc37eccfa50.html.

need serious consideration of police reform, but it hasn't been discussed. No one's talked about it.”³

In another arbitration decision that was released after this Court's ruling in *Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325 (2020), an arbitrator found that the Portsmouth Police Department wrongfully fired Portsmouth Police Officer Aaron Goodwin. *See* ADD 51-175 (City of Portsmouth/Aaron Goodwin Arbitration Decisions). The Portsmouth Police Department fired Officer Goodwin in June 2015 for several violations related to his accepting a \$2 million-plus inheritance from the late Geraldine Webber, an elderly Portsmouth resident with dementia. His inheritance was overturned the same year by Judge Gary Cassavechia, who found that Officer Goodwin had unduly influenced Webber. Officer Goodwin petitioned for his job back and/or back pay, which resulted in the arbitration decisions. *See Geraldine W. Webber Revocable Living Trust*, No. 318-2013-EQ-00694 (7th Cir. – Probate Div. – Dover Aug. 20, 2015), *available* *at*
<https://www.courts.state.nh.us/caseinfo/pdf/webber/08202015webber-order.pdf>.⁴ Despite Judge Cassavechia's finding, the arbitrator concluded that the Portsmouth Police Department improperly fired Officer Goodwin,

³ *See* Mark Hayward, “Manchester Chief Fighting Officer's Return to Force,” *Union Leader* (Sept. 6, 2020), https://www.unionleader.com/news/politics/local/manchester-chief-fighting-officers-return-to-force/article_b3114683-1fd1-5b04-a265-3d9627c581b2.html.

⁴ *See also* Elizabeth Dinan, “Fired Cop Loses \$2 Million Inheritance,” *Seacoast Online*, Aug. 20, 2015, <https://www.fosters.com/article/20150820/NEWS/150829878>.

and that Officer Goodwin was entitled to two years of back pay. There likely are more instances of arbitrators reversing decisions to terminate police officers, but—at least prior to this Court’s decisions in *Union Leader Corp. v. Town of Salem*, 173 N.H. 345 (2020) and *Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325 (2020)—government agencies often treated such arbitration decisions as confidential “personnel” matters.⁵

This case is important because it could have a significant impact on the ability of police departments to maintain the termination of officers who have engaged in misconduct affecting their credibility and trustworthiness. Here, the PAB did not appreciate the magnitude of the misconduct Owens engaged in. Instead, the PAB viewed such misconduct as essentially trivial in the context of a standard employment dispute. But when an officer engages in dishonest behavior, this behavior can never be viewed as trivial given their unique role in the criminal justice system. For these reasons, this Court should reverse the PAB’s decision.

QUESTION PRESENTED

Did the Personnel Appeals Board err by overturning the dismissal of a State Trooper who admitted “that he adjusted the hours for October 30, 2018 to avoid a policy violation” pursuant to the dominant public policy supporting the removal from service of law enforcement officers who have engaged in misconduct affecting their credibility.

⁵ Indeed, this case highlights the importance of transparency and this Court’s decisions in *Town of Salem* and *Seacoast Newspapers*. Disclosure of arbitration decisions is vital to not only inform the public about police misconduct and how arbitrators make decisions, but also about how police departments may be stymied in their efforts to terminate officers.

INTEREST OF AMICUS CURIAE

The ACLU-NH is the New Hampshire affiliate of the ACLU—a nationwide, nonpartisan, public-interest civil liberties organization with over 1.75 million members (including over 9,000 New Hampshire members and supporters). The ACLU-NH regularly participates before this court through direct representation or as *amicus* in cases involving police accountability. *See e.g., Union Leader Corp. v. Town of Salem*, 173 N.H. 345 (2020); *Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325 (2020); *N.H. Center for Pub. Interest Journalism v. N.H. D.O.J.*, 173 NH. 648 (2020).

SUMMARY OF ARGUMENT

This memorandum raises two arguments. *First*, this Court should reverse the Personnel Appeal Board’s decision because it violates the dominant public policy supporting the removal from service of law enforcement officers who have engaged in misconduct affecting their credibility. Here, the State Police terminated Owens for, in part, intentionally falsifying his timecard to avoid a policy violation. As the PAB noted, Owens admitted “that he adjusted the hours for October 30, 2018 to avoid a policy violation.” PAB Order, pp. 5-6. Indeed, the PAB had to have found misconduct, as it (i) suspended Owens for 20 days, and (ii) recommended that Owens not work on details for the first 60 days following his return to duty. The PAB’s decision to reinstate Owens despite his admission undermines the State Police and its general public policy that its troopers must be credible, honest, and trustworthy.

Second, PAB decisions to reinstate sworn officers despite evidence of dishonesty and untrustworthiness should be more closely scrutinized than those concerning unsworn officers as in cases like *In Re Town of Pelham*,

154 N.H. 125 (2006). Unlike unsworn officers, sworn officers have the power to deprive Granite Staters of their liberty in the regular course of their employment.

ARGUMENT

The Personnel Appeals Board hears and decides appeals of adverse employment actions concerning state employees which arise out of the personnel rules. RSA 21-I:46, I. The PAB consists of 3 members appointed by the Governor with at least 2 members possessing at least 5 years of experience in labor relations or as a personnel professional. *See* N.H. Admin Code Per-A 103.01; Per-A 103.03. PAB members are not required to have law enforcement experience.

In reviewing a disciplinary action like termination, the PAB holds an evidentiary hearing to determine the propriety of the disciplinary action. At these hearings, the appellant/employee must show by a preponderance of the evidence that the disciplinary action was unlawful, the appointing authority violated the rules of the division of personnel by imposing the disciplinary action under appeal, the disciplinary action was unwarranted by the alleged conduct or failure to meet the work standard in light of the facts in evidence, or the disciplinary action was unjust in light of the facts in evidence. Per-A 207.12 (b)(1)-(4).

Following a PAB order, any party to the action can apply for a rehearing subject to PAB discretion. RSA 541:3. The applicant may appeal the PAB decision to the New Hampshire Supreme Court upon the PAB's denial of application for rehearing or, if it was granted, upon the PAB's order following the rehearing. RSA 541:6.

The appealing party has the burden of proof to show that the PAB's decision is "clearly unreasonable or unlawful." RSA 541:13. This Court will not vacate or set aside the PAB's decision except for errors of law, unless there is a clear preponderance of the evidence that the PAB's order is unjust or unreasonable. *Appeal of N.H. Div. of State Police*, 171 N.H. 262, 266 (2018) (citing *Appeal of Alexander*, 163 N.H. 397, 401 (2012)).

I. The PAB's decision contradicts the dominant public policy supporting the removal from service of law enforcement officers who have engaged in misconduct affecting their credibility.

The PAB, as a quasi-judicial agency, must adhere to "strong and dominant public policy" in issuing its decisions. *In Re Appeal of Amalgamated Transit Union*, 144 N.H. 325, 327-28 (1999). In deciding whether the PAB erred as a matter of law by issuing a decision in contravention of public policy, this Court must assess whether the PAB's order contravenes a "strong and dominant public policy as expressed in controlling statutes, regulations, common law, and other applicable authority." *In re Town of Pelham*, 154 N.H. 125, 129 (2006) (quoting *In Re Appeal of Amalgamated Transit Union*, 144 N.H. 325, 327-28 (1999)). Here, the PAB's decision contradicts the dominant public policy supporting the removal from service of law enforcement officers who have engaged in misconduct affecting their credibility. This is not an abstract or general public interest, but rather is grounded in law and policy.

First, under RSA 21-1:58, I, the PAB may "... reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just." RSA 21-1:58, I (emphasis added). This

statute specifically identifies impermissible bases for termination, such as reasons related to politics, religion, age, sex, gender identity, and others. *Id.* But when, as here, the PAB overturns a disciplinary action in a manner that is clearly unjust or unreasonable, this Court reverses the PAB's determination. In this case, the PAB's decision was clearly unjust, as it would allow an officer who admitted "that he adjusted the hours for October 30, 2018 to avoid a policy violation," *see* PAB Order, pp. 5-6, to remain on the State Police.

Sworn police officers are empowered with significant authority. They can make arrests and deprive people of liberty based largely on the officers' words. But with this tremendous power comes a need for integrity. The state and federal constitutions require that prosecutors turn over exculpatory evidence to defendants, including evidence that tends to diminish a police officer witness's credibility. *See Brady v. Maryland*, 373 U.S. 83 (1963), *State v. Laurie*, 139 N.H. 325 (1995). The Attorney General's Office accordingly maintains a schedule of officers with potential credibility problems, *see N.H. Ctr. For Pub. Interest Journalism v. N.H. D.O.J.*, 173 N.H. 648, 651 (2020) (describing "Exculpatory Evidence Schedule"), and an officer who has admitted to falsifying records while on the job may never be able to be credible in the courtroom. Arguably more important, the public expects the highest levels of integrity in law enforcement and demands that law enforcement agencies do everything they can to promote that end. In short, the New Hampshire State Police—like other police departments in New Hampshire—must be able to ensure that it employs officers who have not engaged in dishonesty.

Second, the New Hampshire State Police Professional Standards of Conduct contain a written policy that explicitly includes an integrity requirement. The requirement states: “No Division Member shall, under any circumstances, make any false official statement or intentional misrepresentation of facts.” ADD 178 (New Hampshire State Police Professional Standards of Conduct, Chapter 1: Rules and Regulations, p. 7, 1.4.8). A violation of the integrity requirement is a terminable offense according to the New Hampshire Administrative Code. Similarly, personnel rules 1002.08(b)(10) and (12) state the following: “An appointing authority may dismiss an employee” for “(10) [o]bstructing an internal investigation” and “(12) [f]alsification of any agency records received, maintained or utilized by the agency.” N.H. Code Admin. R. Per 1002.08(10), (12).

Third, state and local leaders have recognized the need to only employ police officers whose honesty cannot reasonably be questioned. Reports of those completed by commissions like the New Hampshire Commission on Law Enforcement, Accountability, Community and Transparency⁶ (“LEACT”) and organizations like the International Association of Chiefs of Police (“IACP”) have concluded that maintaining the integrity of the police force and individual officers plays a critical role in creating public trust in the police.

Following the May 25, 2020 murder of George Floyd, Governor Chris T. Sununu created the LEACT Commission on June 16, 2020 to examine, in part, “training curriculum, procedures and policies throughout the State; procedures related to the reporting and investigation of police misconduct;

⁶ *Amicus* ACLU-NH served on LEACT.

the current state of relationships between law enforcement and the communities they serve; and any other subject matter the Commission deemed relevant” to the overall mission of enhancing transparency, accountability, and community relations in law enforcement. N.H. Aug. 31, 2020 LEACT Final Report, p. 1.⁷ In an extensive 10-week investigation into New Hampshire police reforms, the Commission heard from 24 subject matter experts, including Commission members and 25 members of the public. In addition, the Commission received more than 50 written submissions. *Id.* After considering the community needs and expert opinions, the Commission concluded that “there was [...] unequivocal agreement that law enforcement has no room or tolerance for officers who engage in unethical, abusive, or oppressive conduct. There was no stronger voice for this sentiment than those in law enforcement who strive each and every day to do the best job possible.” LEACT Final Report, p. 28.⁸

The IACP has also expressed the paramount importance of integrity in policing. The organization is a group dedicated to advancing the police profession worldwide. The New Hampshire Police Standards and Training Council (“PSTC”) often looks to the IACP for best practices. LEACT Final Report, p. 9. After conducting listening sessions with communities across the country, the IACP found common concerns communities had regarding

⁷ <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/2020-09/accountability-final-report.pdf>; *see also* Gov. Exec. Order 2020-11, *available at* <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/2020-11.pdf>.

⁸ <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/2020-09/accountability-final-report.pdf>

their local and state police departments. As detailed in IACP's 2018 Trust Initiative Report, two of those concerns were transparency and accountability.⁹ The IACP found that "a large source of frustration for communities is when their loved ones or associates experience poor treatment by a police officer or when something systemic occurs within the department and no apparent action is taken to hold those parties accountable." This lack of accountability can make the community feel "at the mercy of a police department with unlimited power." *Id.* at 6.

In this case, Owens admitted "that he adjusted the hours for October 30, 2018 to avoid a policy violation," PAB Order, pp. 5-6, and the PAB ultimately imposed a sanction. However, later in its order, the PAB incorrectly minimized this dishonesty as "an example of inattention to detail and poor time management." *Id.* at p. 6. Owens' admission highlights how this was not an issue of mere sloppy recordkeeping; rather, this misconduct implicated a deliberate lie. *See* Notice of Appeal 25-44 (describing the record below). As a result, the PAB's decision to reinstate Owens disregards the State Police's Professional Standards of Conduct for integrity and, furthermore, contravenes public policy by ignoring evidence of dishonesty and untrustworthiness.

In this case, the New Hampshire State Police is attempting to hold both itself and Trooper Owens accountable by terminating an officer who has been found to falsify his timecard. The PAB's decision to overturn Owens' termination is preventing the State Police from following its own explicit

⁹ <https://www.theiacp.org/sites/default/files/2018-10/Final%20Trust%20Initiative%20Report.pdf>

policies of ensuring that their officers are trustworthy and credible. In doing so, the PAB also puts the community and State Police's relationship at risk. The aforementioned reports from IACP and LEACT shine a light on the importance of the State Police's standards for integrity and trustworthiness found in positive law documents like the State Police Standards of Professional Conduct. The State Police recognizes the importance of community trust and the credibility of their officers as indicated by their internal policies and procedures, which is why this Court must reverse the PAB's decision. If, despite its best efforts, the State Police cannot hold its own officers accountable for dishonesty and misconduct, one cannot expect the community to trust the State Police as a department, as well as law enforcement at large.

Beyond the police/community relationship, the PAB's decision casts a shadow over the justice system as a whole. State Troopers are sworn officers who often find themselves testifying in criminal prosecutions. The involvement of an officer in a criminal case who has engaged in dishonesty potentially jeopardizes the integrity of that prosecution. If this Court upholds the PAB's decision, every case in which Owens is involved may be questioned due to his admitted dishonesty. By seeking Owens' termination based on his dishonesty—and by appealing the decision to reinstate him—the State Police is attempting to protect the integrity of criminal prosecutions.

II. *In Re Town of Pelham* is distinguishable because it did not concern a sworn police officer.

In *In Re Town of Pelham*, the New Hampshire Public Employee Labor Relations Board (“PELRB”) ordered the Town of Pelham to comply with an arbitrator's award ordering the town to reinstate a terminated police union

member to the force. 154 N.H. 125, 126-27 (2006). The employee in question was a police dispatcher who was found to have solicited and accepted police discounts at McDonalds. *Id.* at 127. The Pelham Police Department (“PPD”) launched an investigation into these allegations and found that her testimonies did not match those of McDonalds employees. *Id.* at 127-28. PPD subsequently launched another investigation into whether the dispatcher had lied during the investigation. *Id.* During the investigation, PPD found that the dispatcher had violated the PPD’s General Rules of Conduct, which require PPD employees not to make knowingly false statements, and terminated her. *Id.* at 128.

In support of this termination, upon appeal of the PELRB’s decision to reinstate the officer, the Town of Pelham argued that there is a “‘strong and dominant public policy’ against the reinstatement of police department employees who are found to be untruthful and who may, however unlikely the possibility, be required to testify in future criminal matters.” *Id.* at 129. This Court rejected this argument noting, “We do not mean to suggest that the town’s assertion of a ‘public policy’ against the reinstatement of police department employees whom as a result of certain misconduct, are deemed to be untrustworthy is, on an intuitive level, incorrect.” *Id.* at 131. This Court, however, ruled that the public policy needed to be something more persuasive than arguing that the employee may be required to testify regardless of the likelihood of that possibility. *See id.* In its holding, this Court ruled that the PELRB did not err as a matter of law by ordering the Town to comply with the arbitrator’s award to reinstate the dispatcher. *Id.*

In re Town of Pelham is distinguishable in one crucial respect. The employee at issue in the case was a dispatcher, rather than a sworn police

officer. As a sworn officer and State Trooper, Owens is much more likely to testify in a judicial proceeding than a non-sworn dispatcher like the one in *In Re Town of Pelham*. According to the 2020 New Hampshire Law Enforcement Manual,¹⁰ “police officers are often called upon to appear as witnesses at depositions, pre-trial hearings, and trials.” p. 376. Furthermore, the manual states that the most important rule for presenting effective testimony is “that law enforcement officers must tell the truth.” *Id.* at p. 378.

An officer’s ability to tell the truth and remain credible is predicated on that officer’s history of truthfulness. An officer’s history of falsification of documents raises serious questions as to that officer’s ability to tell the truth and the stability of the cases with which he is involved. As a non-sworn officer, the dispatcher in *In Re Town of Pelham* is unlikely to ever provide such testimony, which is why the Court found that there was no strong or dominant policy to support her termination. With the increased probability of testifying that comes with the job description of a sworn State Police officer—testimony that can, by itself, deprive persons of their liberty—there is strong dominant public policy based on *In Re Town of Pelham*’s reasoning.

Indeed, as a sworn state trooper, Owens has the authority to deprive people of their liberty during the course of carrying out his duties. A dispatcher does not have such power. The authority to deprive someone of their liberty is powerful, and, as a result, a police officer should not (and cannot) be subjected to the same standard as a non-sworn officer who lacks this authority. Dishonesty and untrustworthiness in an officer with such

¹⁰ <https://www.doj.nh.gov/criminal/documents/law-enforcement-manual.pdf>

capabilities must be scrutinized at a higher standard, and therefore the consequences for untrustworthiness must be more severe.

CONCLUSION

For these reasons, this Court should reverse the PAB's decision.

Respectfully Submitted,

American Civil Liberties Union of New
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By and through its attorneys¹¹,

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¹¹ Amicus and its counsel wish to acknowledge the contributions to the memorandum of Teresa Farley, a law student at the University of New Hampshire School of Law and legal extern at ACLU-NH.

STATEMENT OF COMPLIANCE

Counsel hereby certifies that pursuant to New Hampshire Supreme Court Rule 26(7), this brief complies with New Hampshire Supreme Court Rule 26(2)-(4). Further, this memorandum complies with New Hampshire Supreme Court Rule 16(4)(b), which states that memoranda of law may not exceed 4,000 words. Counsel certifies that the memorandum contains 3,893 words (including footnotes).

/s/ Gilles Bissonnette
Gilles Bissonnette, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing was served this 26th day of April, 2021 through the electronic-filing system on all counsel of record.

/s/ Gilles Bissonnette
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