The State of New Hampshire

Supreme Court

No. 2017-0295

Appeal of James Cole

Appeal from a decision of the Personnel Appeals Board pursuant to RSA chapter 541

Brief for Appellee
New Hampshire Department of Information Technology

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Issues Presented

1. Appellant James Cole had 30 days to vest appellate jurisdiction in this Court, but he waited almost two months before trying to be added to this appeal. Does this Court lack subject-matter jurisdiction over the appeal?

2. Did the PAB reasonably find that the third Letter of Warning, which specifically referenced Cole's poor quality of work and untimely completion of assignments as detailed in his annual evaluation, was issued for unsatisfactory job performance?

Statement of the Case

After receiving three letters of warning, James Cole was terminated from his employment with the New Hampshire Department of Information Technology ("DOIT"). *See N.H. Admin. Rules*, Per 1002.08(c)(1). Cole appealed his termination to the Personnel Appeals Board ("PAB"). C.R. 1-4;[1] *see also* RSA 21-I:58, I. The PAB held an evidentiary hearing on February 1, 2017. App. br. at 17. Cole was represented at the hearing by The State Employees Association of New Hampshire/Service Employees International Union, Local 1984, ("SEA"). *Id.* Following the hearing, the PAB issued its decision, which denied Cole's appeal and upheld his termination. *Id.* at 30. Cole filed a motion for rehearing, which the PAB denied. C.R. 204, 320; *see* RSA 541:3.

SEA then petitioned this Court to accept this appeal. Pet. 1. DOIT moved to dismiss on the grounds that SEA was not a party and therefore lacked standing to appeal the PAB decision. Alternatively, DOIT moved for summary affirmance. Mot. Dismiss/Mot. Summ. Affirm. SEA objected and filed a motion to amend its petition to add Cole as an appellant. Pet.'s Obj./Resp. State's Mot. Dismiss/Mot. Summ. Affirm. This Court denied without prejudice DOIT's motion to dismiss and granted the motion to amend "subject to the New Hampshire Department of Information Technology's ability to present in its brief the arguments set forth in its motion to dismiss." Order, Sept. 20, 2017.

[1] In this brief: (1) "App. br." refers to Appellant James Cole's brief; (2) "C.R." refers to the certified record; (3) "Tr." refers to the transcript of the PAB hearing held on February 1, 2017.

Statement of Facts

On June 12, 2015, James Cole began working as a Systems Development Specialist IV with the New Hampshire Department of Information Technology ("DOIT"). Tr. 9-10, 13. In that role, Cole was assigned to work with the New Hampshire Department of Transportation ("DOT"). Tr. 8-9. Although Cole held this same technical title in a prior position, this new job differed in that it required Cole to perform IT project management. Tr. 12-13. The sort of projects that Cole would manage varied, but included updating software, creating and improving IT-related forms, and managing the installation of wireless internet access points. Tr. 16, 18, 23-24. Prior to accepting this position, Cole did not have any project-management experience. Tr. 12.

When Cole first began, Charles Burns, Cole's immediate supervisor, spent a lot of one-on-one time with him. Tr. 13. He described the process of how the IT projects are managed. Tr. 13. This includes holding initial or "kick-off" meetings, building a project schedule and execution plan, communicating with the customers, monitoring the progress of the project, etc. Tr. 16-17. Burns reviewed several past projects with Cole before Cole was assigned to one of his own. Tr. 13-14. Burns assigned Cole a simple first project, a sign-in sheet for their data center, which Cole performed successfully. Tr. 14-15.

However, eventually, Cole began to struggle. For instance, Cole was assigned to update the Account Security Form. Tr. 18. That form is used whenever someone requests access to a specific computer system, such as file sharing or remote log-in capability. Tr. 18. The purpose of the form is to create a trail so that DOIT can tell who received access to which systems and ensure that the proper authorizations had been obtained. Tr. 18. Cole was assigned to improve both the form itself and how the form was processed. Tr. 19.

Cole was supposed to work with other individuals who processed the Account Security Form. Tr. 19. Cole initially failed to reach out to these people for their input. Tr. 19. When he did get their input, Cole failed to adequately implement their requests for changes to the form. Tr. 19. The result was an unusable form with numerous errors, requiring Burns to spend a lot of time helping Cole and meeting with different persons to understand what had gone wrong. Tr. 20; C.R. 260. After numerous drafts, the form looked basically the same as when the process began. Tr. 23. Additionally, there were many incidents of Cole processing the form incorrectly, which were only discovered after access had already been granted. *See* C.R. 260.

In another project, Cole was assigned to manage the installation of a "wireless access point" or "WAP" to allow internet access in one of DOT's conference rooms. Tr. 24. It required mounting of the device, running wires, and setting up security protocols. Tr. 24. Cole did not hold the kick-off meeting, so the necessary parties to accomplish the task were not informed. Tr. 25. Cole failed to adequately communicate with the vendors working on the project. C.R. 261. The wrong funding process was used. C.R. 261. Communication with the customer was so poor that when the project was completed, no one at DOT knew how to use it, nor even that the project was finished and they were able to connect to the internet using the device. C.R. 261; Tr. 25-26.

On March 1, 2016, Burns issued Cole a "Memorandum of Counsel" instead of a more-formal "Letter of Warning." Tr. 21-22; C.R. 260-61. Burns felts that a Letter of Warning would be "too strong." Tr. 22. Burns also stated that the first draft of the memorandum contained five different projects that Cole had performed poorly, but Burns removed three, because it "just felt too harsh." Tr. 22. The memorandum described Cole's struggles in the Account Security Form

and WAP projects, and contained recommendations to correct his performance. C.R. 260-61. Burns went over the memorandum with Cole "line-for-line." Tr. 27.

After Cole was given the Memorandum of Counsel, his performance did not improve. Tr. 26. With regard to the Account Security Form, Burns noticed that the form was still not improving and now the process was moving slower than ever. Tr. 26-27. That project "wasn't intended to be a long-term project," but it was turning into one. Tr. 29. Customer complaints about the form caused Burns to conduct audits, whereby he and others were required to go through all requests and make sure each was filled out correctly. Tr. 29; C.R. 262 ("There have been multiple incidents in which incorrect processing has been discovered, significant enough that multiple audits have had to be performed on your work to ensure accuracy."). Burns discovered that roughly one out of every five of these forms had "significant problems." Tr. 29; C.R. 262.

As a result, on April 13, 2016, Burns issued Cole his first Letter of Warning, citing New Hampshire Administrative Rules, Per 1002.04(B)(1) and (2), "[f]ailure to meet any work standard" and "[f]ailure to take corrective action as directed." C.R. 262-63. It described Cole's continued struggles with the Account Security Form. It included an instance, after Cole received the Memorandum of Counsel, in which Burns discussed the audit findings with Cole and two additional problems were discovered in Cole's processing of the forms—one of which was shortly after he and Burns had just spoken about these problems. C.R. 262. Regarding improvements to the form itself, Burns stated that "it took 11 major revisions to achieve [the current form] and the end results are significantly similar to the original." C.R. 262. The Letter of Warning also noted that, although the focus of the letter was on the Account Security Form, it

was "just one example of the quality of work issue[s]" that pervaded Cole's performance. C.R. 262.

Afterward, Cole's work performance continued to be subpar. For instance, he had been assigned an "IMP" project, which involved updating software used by DOT. Tr. 31. Despite being a "relatively simple" project, Cole again failed to hold a kick-off meeting; therefore, he did not work out the necessary steps to complete the project, which employees would be on it, or who was responsible for which aspects of it. Tr. 31-32. The project's "PCD" documentation contained the wrong team members. Tr. 32-33. Cole had still not created a timeline for the project's completion. Tr. 33. Burns indicated that Cole's issues with the IMP project were "[f]undamentally . . . the same" as with the Account Security Form project. Tr. 34 ("It's just accuracy, quality of work.").

Burns issued Cole a second Letter of Warning on May 6, 2016, citing the same administrative rules regarding failure to follow any work standard and failure to take corrective action. C.R. 264-65. The letter cited the WAP project, in which Cole's problems continued. Tr. 34. Burns recounted Cole's failure to properly communicate with the customers, including responding to a customer's request by telling the customer "don't get your hopes up." C.R. 264; Tr. 34-35. The letter also discussed the IMP project, noting that, at the time of the letter, there was still "no usable time-line and the customers are still in the dark." C.R. 264; Tr. 33. It also described a project in which Cole was supposed to manage the setup of network access in one of DOT's buildings, which involved mostly customer interaction. C.R. 264. Again, Cole did not hold an initial kick-off meeting, and Cole's performance was so subpar that Burns eventually had to remove him from the project due to customer complaints. C.R. 264; Tr. 37-38.

Following the second Letter of Warning, at the end of May, Cole's annual performance evaluation was due. *See* C.R. 266-280; Tr. 39. It detailed specific instances of Cole's continued poor quality of work and inability to complete assignments in a timely manner. With regard to the IMP project, at the time of the evaluation: (1) it had taken four months to hold a kick-off meeting; (2) the PCD document was still "a work in progress"; and (3) the project "still didn't even have an appropriate timeline." Tr. 40; C.R. 267-68; *see also* C.R. 269 ("Timelines for projects remain an on-going issue with [Cole]. Even when one is produced it is incomplete, inaccurate or not communicated."). Cole also continued to struggle with the same problems regarding the Account Security Form project. Tr. 41; C.R. 267-68. Cole was still not getting assignments in on time. *See* C.R. 268 ("[Cole's] work tends to take a long time, in part due to the high number of reviews it takes to get things in a presentable form."). Cole had persistent problems effectively communicating with the customers. Tr. 42; C.R. 269 ("He finally did put together a comprehensive project timeline but has not communicated it.").

Burns met with Cole to discuss this performance evaluation on June 7, 2017. C.R. 280. Burns had waited a few weeks before meeting with Cole, because he "was trying to be nice to [Cole]." Tr. 43. Burns wanted to give Cole "a little bit more time to work on corrective actions." Tr. 43.

On the morning of June 9, Burns and Cole were discussing an overdue project. Tr. 44. When asked why the project was overdue, Cole stated that he felt that he did not have enough time to finish it. Tr. 44. About ten minutes later, Burns approached Cole at his desk and found him doing a crossword puzzle. Tr. 45. It was approximately 9:00 am, and when Burns stated that he could come back if Cole was on a break, Cole replied that he was not on a break. Tr. 45.

On or about June 26, 2016, Cole was given a third Letter of Warning, which referenced the same two administrative rules as the first two letters. C.R. 281. In the first bullet point recounting Cole's unsatisfactory job performance, the letter stated: "The quality of work expected for your position continues to be below expectations as detailed in your recent annual performance evaluation." C.R. 281. It stated, "[i]n addition," Cole was observed "engaged in unapproved activity during work hours; specifically doing crossword puzzles while not on break and at your desk." *Id.* Finally, the letter also noted numerous instances in which Cole worked unapproved overtime. *Id.* Based upon these three Letters of Warning, Cole was given a Notice of Dismissal and terminated. *See* C.R. 282-83.

Cole appealed his termination to the Personnel Appeals Board ("PAB"). C.R. 13-17. SEA represented Cole before the PAB. *See id.* The PAB held a merits hearing on February 1, 2017. App. br. at 17.

On March 6, 2017, the PAB issued a decision upholding Cole's termination. App. br. at 30. It specifically mentioned Cole's "continued mistakes" during the Account Security Form project. *Id.* It also found that Cole "continued to demonstrate poor quality of work" regarding the "'PCD' document with the wrong team members, no communication plan and [he] did not have a kickoff meeting scheduled. *Id.* "Lastly, [Cole] informed his supervisor that he did not have enough time to complete a project that was already overdue and was then found working on a crossword puzzle during work hours." *Id.* ("The fact that [Cole] did not complete the project on time demonstrates that this too, fits . . . into the category for failure to meet any work standard."). After the PAB denied Cole's request for rehearing, this appeal followed.

Summary of the Argument

This Court lacks subject-matter jurisdiction over this appeal because Cole did not timely appeal pursuant to RSA 541:6. Although SEA timely filed a petition on its own behalf, SEA lacks standing to bring this appeal, because it was not a party to the PAB proceeding and it has suffered no injury. By the time SEA tried to amend its petition to add Cole as a necessary party, the appeal period had lapsed. DOIT pointed out this fact, and this Court gave the parties the opportunity to fully address the issue in their briefs. Cole has failed to do so. Therefore, because Cole appealed late, this Court does not have subject-matter jurisdiction, and his appeal must be dismissed.

If the Court determines that it has jurisdiction, Cole's appeal only addresses two of three reasons for which DOIT issued the third Letter of Warning. He deliberately ignores the fact that the third Letter of Warning specifically references his performance evaluation, which is rife with instances of Cole's shoddy quality of work and inability to complete assignments on time. Therefore, Cole fails to satisfy his burden on appeal.

In addition, Cole was caught doing a crossword puzzle at his desk ten minutes after he complained to his boss that he did not have enough time to finish his an assignment. The nature and immediate proximity of these events simply provides perspective into why Cole could not complete his assignments accurately and on time. Thus, the PAB reasonably found that the third Letter of Warning was issued for the same or substantially similar conduct as the others.

Standard of Review

RSA chapter 541 governs this Court's review of PAB decisions. *See Appeal of Murdock*, 156 N.H. 732, 735 (2008). As petitioner, Cole "has the burden of demonstrating that the PAB's decision was clearly unreasonable or unlawful." *Id.*; RSA 541:13. "The PAB's findings of fact are deemed *prima facie* lawful and reasonable." *Murdock*, 156 N.H. at 735. "In reviewing the PAB's decision, this court may therefore reverse *only* if it is satisfied 'by a clear preponderance of the evidence before it, that such order is unjust or unreasonable.'" *Appeal of Armaganian*, 147 N.H. 158, 167 (2001) (quoting RSA 541:13). This Court reviews interpretation of administrative rules *de novo*, giving deference to an agency's interpretation if it is consistent with the rule's plain language and the purpose it is intended to serve. *Murdock*, 156 N.H. at 735.

Argument

I Because Cole attempted to appeal after the 30-day deadline imposed by RSA 541:6, this Court lacks subject-matter jurisdiction, and his appeal must be dismissed.

The only recourse for a party who is unhappy with the PAB's decision is to appeal it pursuant to RSA chapter 541. *See* RSA 21-I:58, II ("Any action or decision taken or made under this section shall be subject to rehearing and appeal as provided in RSA 541."); *see also* RSA 541:22 ("Remedy Exclusive."). A party must first move for rehearing. RSA 541:3; *see also* *Appeal of New Hampshire Right to Life*, 166 N.H. 308, 311 (2014) ("The filing of such a motion is a prerequisite to seeking judicial review of [a] Board's decision."). After a decision on rehearing, "[w]ithin thirty days" the applicant for rehearing "may appeal to the supreme court." RSA 541:6.

This Court has "held that compliance with a statutory appeal period is a *necessary prerequisite* to establishing jurisdiction in the appellate body." *Appeal of Carreau*, 157 N.H. 122, 123 (2008) (quotation omitted). "[A] petitioner's failure to comply with the appeal period set forth in RSA 541:6 . . . deprives this court of jurisdiction to hear his appeal." *Id.* Referring to RSA 541:6, this Court has stated that "[t]he legislature could not have more clearly expressed its intent to require appeals to be filed by a date certain." *Carreau*, 157 N.H. at 124. In *Carreau*, this Court dismissed an appeal that was one day late, for lack of jurisdiction. *Id.*

In this case, the PAB denied Cole's request for rehearing on April 26, 2017. C.R. 320-21. As explained more fully below, the SEA—who was not a party in the PAB proceeding—filed an appeal at the thirty-day mark, instead of Cole. *See generally* Pet. and Appdx. (May 26, 2017). After DOIT challenged SEA's standing, it sought to add Cole as an appellant on June 23, 2017. *See* Pet.'s Mot. Amend Pet. Thus, Cole himself did not attempt to appeal until fifty-eight

days after the decision on rehearing. Because he only had thirty days to do so, Cole's appeal was late, and appellate jurisdiction never vested in this Court.

As a procedural matter, after DOIT raised this issue in its motion to dismiss, this Court denied the motion "without prejudice" and "subject to [DOIT's] ability to present in its brief the arguments set forth in its motion to dismiss." Order, Sept. 20, 2017. It explicitly stated that "[t]he parties may address the issues presented in that motion in their respective briefs." *Id.* Despite this, in his brief, Cole glosses over his failure to timely appeal, relegating it to a footnote, remarking only that the appeal document contained "an error." App. br. at 5 n.2. Additionally, in the objection to the motion to dismiss, SEA never disputed its lack of standing. Pet.'s Obj./Resp. State's Mot. Dismiss/Mot. Summ. Affirm. at 1. Because he was on notice of the issue, and chose not to address it, Cole should be prohibited from raising new arguments not previously made in his objection to DOIT's motion to dismiss. *See Panas v. Harakis*, 129 N.H. 591, 617 (1987) ("If we held otherwise, we would be faced with either of two equally unacceptable results: the opposing party's inability to respond in writing to the new issues raised by the reply brief, or the submission of a series of reply briefs until oral argument date as the parties scramble to respond to a sequence of *de novo* arguments and issues.").

Given Cole's failure to address the issue, DOIT, despite being the appellee, is left to guess what arguments, if any, Cole may make in his reply brief to assert that this Court has subject-matter jurisdiction over his appeal. He might argue that: (1) Cole was really the appellant all along;[2] (2) SEA had independent standing to bring this appeal without Cole; or (3) this Court has the power to allow an amendment to a jurisdictional document to add a party after

the appeal period has passed. Because all of these are incorrect, DOIT will address each in turn.

A. *SEA admits that it filed the initial petition and then sought to add Cole; therefore, Cole was not the appellant all along.*

Initially, any reasonable interpretation of the appeal documents compels the conclusion that SEA filed this appeal on its own behalf, not Cole's. The SEA lists "SEA/SEIU, LOCAL 1984" as the appellant on the cover page to the appeal petition. Pet. The cover page's title is: "APPEAL BY PETITION OF THE SEA/SEIU, LOCAL 1984." *Id.* Both are also true of the cover page to SEA's appendix. *See* Appdx. Pet. The petition states "[n]ow comes the State Employees Association of New Hampshire/Service Employees International Union, Local 1984 . . . and hereby appeals the Decision of the NH Personnel Appeals Board." Pet. 1. It further states that "[t]he Petitioner in the instant case is the SEA." *Id.* "The SEA seeks an appeal by timely petition to the Supreme Court." Pet. 12. The petition clearly distinguishes between the SEA and Cole. *See* Pet. 8 ("The SEA and Mr. Cole agree with the State . . . ."). Thus, it is not reasonable to view them as interchangeable. Finally, the petition concludes stating that the "SEA respectfully urges" the Court to accept the petition, and the signature line lists the appealing party as "SEA/SEIU, Local 1984." Pet. 13-14. Therefore, the nine instances of SEA affirmatively stating that it was the only appealing party render any claim that all were mere drafting errors meritless.[3]

However, if that were not enough, SEA admits that Cole was not the original appellant. In its objection to DOIT's motion to dismiss, it stated that "the SEA concurrently files a Motion

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[2] This appears to be Cole's claim now, *see* App. br. at 5 ("Mr. Cole then filed a timely appeal to this Court on May 26, 2016."), despite the fact that SEA made no such claim in its objection to the State's motion to dismiss or its motion to amend.

[3] Not to mention the fact that this Court found it necessary to issue an order changing the name of this case from "Appeal of State Employees' Association/Service Employees' International Union, Local 1984" to "Appeal of James Cole." *See* Order, Sept. 20, 2017.

to Amend *to add James Cole as a Petitioner in this instant case.*" Pet.'s Obj./Resp. State's Mot. Dismiss/Mot. Summ. Affirm. at 1 (emphasis added). If SEA actually intended to bring this appeal on Cole's behalf, it would have explained that in its objection and would not have believed it necessary to move to add him as a party. Thus, it is beyond question that SEA filed the initial petition on its own behalf, and when its standing was questioned, it attempted to add Cole late in an effort to salvage this appeal. However, by that time, Cole's appeal period had expired, so this Court lacked subject-matter jurisdiction to permit the amendment.

B. *SEA does not have standing to file an appeal in this case, because it was an agent of a party, not a party itself, and it suffered no injury.*

If SEA argues that it has standing to bring this appeal on its own behalf, it does not. This Court has recently reaffirmed that "[t]o establish standing under section 541:3, [an entity] must show that it has suffered or will suffer an injury in fact." *Appeal of New Hampshire Right to Life*, 166 N.H. 308, 314 (quotation omitted). "To show an injury in fact, the alleged harm cannot be speculative." *Id.* "Nor can the injury be a mere potential harm." *Id.* "The requirement that a party demonstrate harm to maintain a legal challenge rests upon the constitutional principle that the judicial power ordinarily does not include the power to issue advisory opinions." *Libertarian Party of N.H. v. Sec'y of State*, 158 N.H. 194, 195-96 (2008).

SEA was not a party before the PAB. As stated by the PAB in its order, James Cole was the appellant, who was "*represented* at the hearing by SEA Union Representative, Charles McMahon." App. br. 17 (emphasis added). Indeed, McMahon's correspondence confirms that SEA was only acting as Cole's representative and not a party in the PAB appeal. C.R. 13 (naming Cole as "Appealing Party" and McMahon as "Representative"), 17 ("[O]n behalf of Mr. James Cole, I request a full hearing before the Personnel Appeals Board on this termination.").

SEA was only a representative and, as such, has no ability outside of its representative capacity to bring this appeal. *See* Restatement (Third), Agency § 2.02 cmt. d (2006) ("If an agent knows that the principal's reason for previously authorizing the agent to do an act is no longer operative, the agent does not have actual authority to do the act."). SEA cannot appeal to assert Cole's rights any more than an attorney can appeal an adverse decision to a client without the client's consent.[4]

Further, SEA suffered no injury in fact as a result of the PAB's decision. Neither the petition nor the brief allege sufficient basis from which this Court could conclude that SEA itself suffered any injury. The PAB's decision was specific to Cole and in no way "directly affected" SEA as required by RSA 541:3. The decision was unique to the circumstances involving Cole's poor work performance and involved only his employment status.

SEA argues that allowing the PAB's decision to stand "violates, or at least endangers, the rights of all *current and future employees* of the State." Pet. 13 (emphasis added). This argument is not an assertion of injury to SEA, but, rather, an assertion of injury to the future interests of any current employee who might appear before the PAB, as well as any member of the public who may someday become an employee and then be disciplined in the future. As such, this argument raises nearly every hallmark of a party that lacks standing. This generalized injury, allegedly shared by every current and future State employee, is not sufficient to confer standing on SEA. *See Right to Life*, 166 N.H. at 314 ("No individual or group of individuals has

[4] Additionally, as a matter of statutory construction, SEA could not be the appealing party, because only "the applicant" for rehearing can appeal pursuant to RSA 541:6, and SEA only requested rehearing on Cole's behalf. *See* C.R. 308 ("Therefore, the Appellant, James Cole requests that the Honorable Board reconsider their denial of his appeal . . . ."). Thus, in addition to the fact that it does not have standing, even if it did, SEA's appeal does not satisfy the requirements of RSA chapter 541.

standing to appeal when the alleged injury caused by an administrative agency's action affects the public in general."). Additionally, the hypothetical "endanger[ment]" of unspecified "rights" of unknown future persons is the exact kind of abstract harm which is fatal to a standing claim. *Id.* ("To show injury in fact the alleged harm cannot be speculative."). Further, a request to obtain a ruling that may be beneficial to SEA's other members going forward is no different than a prohibited request for an advisory opinion. *See Libertarian Party of N.H.*, 158 N.H. at 195-96. Thus, although SEA certainly may be interested in getting the ruling reversed, it suffered no injury, and "an association has no standing to challenge an administrative agency's action based upon a mere interest in a problem." *Right to Life*, 166 N.H. at 314.

Finally, if SEA claims that it, solely by virtue of the status as a union, may bring this appeal on behalf of any SEA member, it is wrong. This Court has rejected the notion that a representative organization has standing to enforce the legal rights of its members. *See Benson v. N.H. Ins. Guar. Ass'n*, 151 N.H. 590, 591-93 (2004). In *Benson*, the New Hampshire Medical Society sought a declaratory judgment that an insurance guarantor was obligated to provide coverage to its members. *Id.* at 592. This Court held that "[d]espite the Medical Society's assertion, its status as the 'representative membership organization for medical practitioners statewide' does not give it a 'clear and direct interest in the litigation.'" *Id.* at 593. Because the society itself had no insurance policy, it had no enforceable rights, and it "lack[ed] standing as a matter of law." *Id.* The *Benson* reasoning applies with equal force to SEA. Although Cole may have had the right to appeal, SEA does not. Its status as a representative organization does not change that fact, as it cannot assert the rights of its members. Thus, because the only entity who appealed in time has no standing, the petition must be dismissed.

C. *This Court cannot "create jurisdiction" by allowing the amendment to a jurisdictional document to add another party after the appeal period has lapsed.*

After DOIT moved to dismiss SEA's petition, SEA sought to amend its petition to add Cole as a party to this appeal several weeks late. *See* Pet.'s Obj./Resp. State's Mot. Dismiss/Mot. Summ. Affirm. at 1 ("[T]he SEA concurrently files a Motion to Amend to add James Cole as a Petitioner in this instant case."). However, Cole cannot be added as a party to this appeal after the statutory appeal period has lapsed, because it would be creating jurisdiction to hear an appeal outside of the 30-day limit imposed by RSA 541:6. In addition, such a holding would directly contradict the legislature's express intent in setting that time limit.

Importantly, a late amendment to the appeal document to add a party is more than the mere correction of a procedural oversight. As this Court has recognized "[s]tatutory time requirements relative to the vesting of jurisdiction must be distinguished from [this Court's] own procedural rules." *Carreau*, 157 N.H. at 123 (quotation and ellipses omitted). "While [this Court has] the discretion to waive [its] own procedural requirements 'for good cause shown' *Sup. Ct. R. 1*, [the Court] cannot use this concept to establish jurisdiction in the first instance." *Id.* (quotation and ellipses omitted). Thus, because "[t]he legislature could not have more clearly expressed its intent to require appeals to be filed by a date certain," *Carreau*, 157 N.H. at 124, strict compliance with that date is required for an appellant to establish jurisdiction in this Court.

Moreover, as stated in DOIT's motion to dismiss, other jurisdictions have held that adding a party through an amendment after the appeal period has lapsed is prohibited. The United States Supreme Court has held that "[t]he failure to name a party in a notice of appeal is more than excusable 'informality'; it constitutes a failure of that party to appeal." *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314 (1988) (decided under prior rule); *see also Hackett v.*

Bd. of Adjustment, 794 A.2d 596, 598 (Del. 2002) ("[T]he failure to name an indispensable party to an appeal from an administrative agency to the Superior Court is not an amendable defect."); *Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990) ("The record shows that the movant attempted to amend the jurisdictional document to add the two names some 55 days after it filed its notice of appeal—well after the time for naming parties to an appeal had passed. We believe that the substantial compliance policy cannot be applied to retroactively create jurisdiction."); *Crofton v. Amoco Chem. Co.*, 2003 Tex. App. LEXIS 4825, at *10 (Tex. App. May 30, 2003) ("Although appellants' counsel has represented to this Court that [appellant's] name was 'inadvertently omitted or mistakenly omitted' from the original notice of appeal, we do not consider this omission a 'clerical defect' susceptible to correction by amendment."); *Schloseer & Dennis, LLC v. City of Newark Bd. of Adjustment*, 2016 Del. Super. LEXIS 199, at *13 (Del. Super. Ct. May 9, 2016) ("The notice of appeal cannot be amended to add a party after the appeal period has lapsed because the time period for perfecting an appeal is jurisdictional."). Therefore, Cole cannot be added to this appeal late, and this appeal must be dismissed.

II. Because Cole fails to address all the reasons he received the third Letter of Warning, it is impossible for him to carry his burden on appeal.

As the appealing party, Cole has "the burden of demonstrating reversible error." *Gallo v. Traina*, 166 N.H. 737, 740 (2014); RSA 541:13. In his brief, Cole only challenges the third Letter of Warning, arguing that he received it for conduct that was not the same or substantially similar as the other two Letters of Warning. *See* App. br. 9-16. However, the third Letter of Warning lists three specific reasons for its issuance: (1) his work quality continued to be below expectation as detailed in his annual evaluation; (2) he was observed doing crossword puzzles at his desk; and (3) working unauthorized overtime. C.R. 281. Cole rests his argument

exclusively on the latter two reasons. App. br. 9-15, 16 ("It is thus clear that the final letter of warning has nothing in common with the preceding first two letters because the violations of doing a crossword puzzle and performing unauthorized overtime fit into different categories of violations, and constitute an entirely different kind of offense than performing untimely or inadequate work."). Cole wholly ignores the fact that the letter incorporates by reference his performance issues as discussed in his recent evaluation. As such, he fails to make any argument that the reasons contained in that evaluation differ from the reasons he was issued the first two Letters or Warning. Because he does not address all the reasons the third letter was issued, he cannot possibly satisfy his burden of demonstrating that the third Letter of Warning was not for the same or substantially similar conduct. Therefore, this Court should not expend judicial resources doing it for him. *See Gallo*, 166 N.H. at 740.

III. The third Letter of Warning cites Cole's poor performance evaluation, which included numerous instances of his subpar work product and late projects.

Under the personnel rules, a permanent employee may be given a written letter of warning for unsatisfactory work performance or conduct, including "[f]ailure to meet any work standard" and "[f]ailure to take corrective action as directed." *See N.H. Admin. Rules*, Per 1002.04(b)(1)-(2). Further, "[a]n appointing authority may dismiss an employee . . . when the employee has previously received 2 written warnings for the same or substantially similar type of conduct or offense within a period of 5 years, by issuing a final written warning and notice of dismissal." *N.H. Admin. Rules*, Per. 1002.08(c)(1). Cole concedes that the first two Letters of Warning were for "the same or substantially similar type of conduct" per the rule. Pet. 8 ("The SEA and Mr. Cole agree . . . that the behavior in [Letter of Warning] 1 and [Letter of Warning] 2 are the same or substantially similar in that they are both concerned with the quality of his work

which includes error rates and timeliness of completion . . . ."). Thus, the only question raised by this appeal concerns the third Letter of Warning, and whether it was also issued for Cole's quality of work including errors and timeliness of completion of work assignments. *See id.*

Initially, the third Letter of Warning informed Cole that "[t]he quality of work expected for your position continues to be below expectations *as detailed in your recent annual performance evaluation.*" C.R. 81 (emphasis added). To that end, Cole's performance evaluation, given several weeks after the second Letter of Warning, notes numerous instances in which Cole failed to accurately complete his assignments and on time:

- [Cole's] work on technical documents such as the VPN process documentation (10 versions), IMP exception request (4 versions), Account Security form (11 versions) require extensive amounts of review and updates before a usable product is produced. C.R. 267.

- Even after pointing out missing items multiple times, the timeline remains incomplete with important dependencies left unaccounted. C.R. 267-68.

- The account security form project has multiple incidents in which incorrect processing has been discovered, significant enough that audits have had to be performed on his work to ensure accuracy. C.R. 268.

- [Cole's] work tends to take a long time, in part due to the high number of reviews it takes to get things in a presentable form. C.R. 268.

- Timelines for projects remain an ongoing issue with [Cole]. Even when one is produced it is incomplete, inaccurate or not communicated. C.R. 269.

- Although the task has been requested and a [completion] date provided, the date went by without any acknowledgment from [Cole]. C.R. 269.

- [Cole] finally did put together a comprehensive project timeline but has not communicated it. C.R. 269.

- [Cole's] work on technical documents requires extensive amounts of review and updates before a usable product is produced. C.R. 270.

- The account security form project has [Cole] discuss potential changes and improvements with backups and users. There were some communications issues which lead to making changes to the document that were not desirable. C.R. 271.

- Although [Cole] helped change and document the process for using the account security form, the project had multiple incidents in which incorrect processing was discovered, significant enough that audits have had to be performed on his work to ensure accuracy. C.R. 271.

- One of the multiple issues found by auditing the account security form processed by [Cole] was a form that was processed without proper approvals. C.R. 273.

Thus, the third Letter of Warning, which incorporates his evaluation by reference, also concerns Cole's quality of work and late completion of assignments.

To be clear, the problems with Cole's performance were ongoing, and the evaluation was not just rehashing failures that lead to the first two Letters of Warning. At the hearing, Burns specifically testified that, as of the date of the evaluation, Cole was "continuing" to have problems with the IMP project, and Burns had been asking him every week when Cole was going to have the kickoff meeting for it. Tr. 40. He called the PCD documents "a work in progress." Tr. 40. As of the evaluation, "it still didn't even have an appropriate timeline." Tr. 40 (Q: "As of May 20th?" A: "Yes."). The Account Security Form project was "slowing down even more because [Cole was] trying to very hard to do an accurate job and still not quite getting there." Tr. 41. Burns had continuing concerns with the accuracy of Cole's work on technical documents across several projects. Tr. 42-43. Cole even admits that this annual evaluation details his continuing problems as of that date. App. br. 4 ("Mr. Cole's evaluator and supervisor, Mr. Burns made note of *ongoing concerns* regarding Mr. Cole's quality of work, his timeliness of complete projects, and other related work quality issues." (emphasis added)).

The only case cited by Cole in his entire brief is *Appeal of Murdock*, 156 N.H. 732 (2008). App. br. ii. Importantly, however, the administrative rule at issue in *Murdock* has been

amended. When *Murdock* was decided, an employee could only be terminated after three letters of warning for the "same offense." *Appeal of Murdock*, 156 N.H. at 735-36. After *Murdock*, the rule was changed so that an employee could be terminated for three letters of warning for "the same or substantially similar type of conduct or offense." *N.H. Admin. Rules*, Per 1002.08(c)(1). Thus, the current rule encompasses a broader scope of conduct than the rule interpreted in *Murdock*. Further, Cole admits that issues concerning Cole's quality of work, including rampant errors and untimely completion of assignments, fall under the scope of the current rule. Pet. 8. Thus, because the final Letter of Warning incorporates his performance evaluation, which details Cole's continued poor work quality and inability to complete assignments on time, the PAB reasonably found that it was issued for the same or substantially similar conduct as the first two.

Even if the evaluation was ignored, the PAB still properly upheld Cole's termination. Cole fixates on the letter's mention of him being caught doing a crossword puzzle at his desk during work hours. He argues that "[t]he State never alleged, nor did the PAB conclude that working on a crossword puzzle had any impact on Mr. Cole's work product, nor did the PAB conclude that working on a crossword puzzle had any impact on Mr. Cole's work product, nor was he ever counseled not to work on crossword puzzles at his desk." App. br. at 10. However, specific to the crossword-puzzle incident, the PAB also found that the third Letter of Warning was issued because Cole was still not completing his assignments on time. In finding that the three letters were for the same or substantially similar conduct, it unambiguously stated that Cole "informed his supervisor that he did not have *enough time to complete a project that was already overdue* and was then found working on a crossword puzzle during work hours." App. br. 30 (emphasis added). It concluded "[t]he fact that [Cole] did not complete the project on time demonstrates that this, too, fits only into the category of failure to meet any work standard." *Id.*

Cole's preoccupation with other activities simply provides perspective into why he could not complete his assignments accurately and on time. For these reasons, the PAB reasonably concluded that the third Letter of Warning was also issued for Cole's poor quality of work and late completion of assignments.

Conclusion

This Court should dismiss the instant appeal for lack of subject-matter jurisdiction. Alternatively, the Court should affirm the decision of the PAB upholding Cole's termination, because the third Letter of Warning also involved Cole's continued poor work performance, just like the other two.

Due to the limited issues raised in this appeal, DOIT believes oral argument is not necessary. However, should the Court determine otherwise, Assistant Attorney General Scott Sakowski will appear for oral argument on behalf of DOIT.

Respectfully submitted,

New Hampshire Department of Information Technology

By its attorney,

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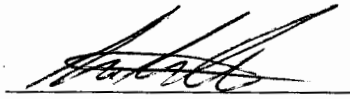
Attorney General



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I hereby certify that two copies of the foregoing were mailed this 8th day of March 2018, postage prepaid, to:

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