

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

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Case No. 2017-0449

APPEAL OF NEW HAMPSHIRE DIVISION OF STATE POLICE

BRIEF FOR APPELLEE
DAVID APPLEBY

RULE 10 APPEAL
FROM THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD

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RELEVANT STATUTES

21-I:58 Appeals. –

I. Any permanent employee who is affected by any application of the personnel rules, except for those rules enumerated in RSA 21-I:46, I and the application of rules in classification decisions appealable under RSA 21-I:57, may appeal to the personnel appeals board within 15 calendar days of the action giving rise to the appeal. The appeal shall be heard in accordance with the procedures provided for adjudicative proceedings in RSA 541-A. If the personnel appeals board finds that the action complained of was taken by the appointing authority for any reason related to politics, religion, age, sex, race, color, ethnic background, marital status, or disabling condition, or on account of the person's sexual orientation, or was taken in violation of a statute or of rules adopted by the director, the employee shall be reinstated to the employee's former position or a position of like seniority, status, and pay. The employee shall be reinstated without loss of pay, provided that the sum shall be equal to the salary loss suffered during the period of denied compensation less any amount of compensation earned or benefits received from any other source during the period. "Any other source" shall not include compensation earned from continued casual employment during the period if the employee held the position of casual employment prior to the period, except to the extent that the number of hours worked in such casual employment increases during the period. In all cases, the personnel appeals board 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.

II. Any action or decision taken or made under this section shall be subject to rehearing and appeal as provided in RSA 541.

III. In the event of an appeal from a decision of the personnel appeals board in accordance with the provisions of RSA 541, the fee for the copy of the record and such testimony and exhibits as shall be transferred, and the fee for manifold copies shall be established by the governor and council and collected by the director of personnel from the party making the appeal. Any fees collected by the director of personnel under the provisions of this section shall be credited to the appropriation for the division of personnel. The appeals board shall not be required to certify the record upon any such appeal, nor shall the appeal be considered until the fees for the copies have been paid.

Source. 1986, 12:1. 1988, 269:4. 1990, 140:2, XII. 1997, 108:5, eff. Jan. 1, 1998.

153-A:17-a Critical Incident Intervention and Management. –

I. In this section:

(a) "Critical incident" means an event or events that result in acute or cumulative psychological stress or trauma to an emergency service provider as a result of response to the incident.

(b) "Critical incident stress" means an unusually strong emotional, cognitive, or physical reaction that has the potential to interfere with normal functioning and that results from the response to a critical incident or long-term occupational exposure to a series of critical incident responses over a period of time that are believed to be causing debilitating stress that is affecting an emergency service provider and his or her work performance or family situation. This may include, but is not limited to, physical and emotional illness, failure of usual coping mechanisms, loss of interest in the job, personality changes, or loss of ability to function.

(c) "Critical incident stress management" means a process of crisis intervention designed to assist emergency service providers in coping with the psychological trauma resulting from response to a critical incident.

(d) "Critical incident stress management and crisis intervention services" means consultation, counseling, debriefing, defusing, intervention services, management, prevention, and referral provided by a critical incident stress management team member.

(e) "Critical incident stress management team" or "team" means the group of one or more trained volunteers, including members of peer support groups organized by a unit of state, local, or county government who offer critical incident stress management and crisis intervention services following a critical incident or long term or continued, debilitating stress being experienced by emergency services providers and affecting them or their family situation.

(f) "Critical incident stress management team member" or "team member" means an emergency services provider, including any law enforcement officer, sheriff or deputy sheriff, state police officer, civilian law enforcement employee, firefighter, civilian fire department employee, and emergency medical personnel, specially trained to provide critical incident stress management and crisis intervention services as a member of an organized and registered team.

II.

(a) Team members shall undergo and sustain certification standards set forth in guidelines established by the International Critical Incident Stress Foundation (ICISF) approved by the commissioner of the department of safety, or a similar organization for which the commissioner shall not unreasonably withhold approval. The team shall be registered with ICISF, or a similar organization, and maintain training standards to date as required.

(b) All critical incident stress management team members, sworn or civilian, shall be designated by the police chief, sheriff, commander of the state police, fire chief, or director of emergency services.

III. (a) Any information divulged to the team or a team member during the provision of critical incident stress management and crisis intervention services shall be kept confidential and shall not be disclosed to a third party or in a criminal, civil, or administrative proceeding. Records kept by critical incident stress management team members are not subject to subpoena, discovery, or introduction into evidence in a criminal, civil, or administrative action. Except as provided in subparagraph (c), no person, whether critical incident stress management team member or team leader providing or receiving critical incident stress management and crisis intervention services, shall be required to testify or divulge any information obtained solely through such crisis intervention.

(b) The purpose of this section is to provide a consistent framework for the operation of critical incident stress management teams and their members. In any civil action against any individual, agency, or government entity, including the state of New Hampshire, arising out of the conduct of a member of such team, this section is not intended and shall not be admissible to establish negligence in any instance where requirements herein are higher than the standard of care that would otherwise have been applicable in such action under state law.

(c) A communication shall not be deemed confidential pursuant to this section if:

(1) The communication indicates the existence of a danger to the individual who receives critical incident stress management and crisis intervention services or to any other person or persons.

(2) The communication indicates the existence of past child abuse or neglect of the individual, abuse of an adult as defined by law, or family violence as defined by law.

(3) The communication indicates the existence of past or present acts constituting an intentional tort or crime, provided the applicable statute of limitation has not expired on the act indicated.

Source. 2013, 74:1, eff. June 6, 2013.

541:13 Burden of Proof. – Upon the hearing the burden of proof shall be upon the party seeking to set aside any order or decision of the commission to show that the same is clearly unreasonable or unlawful, and all findings of the commission upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable.

Source. 1913, 145:18. PL 239:11. 1937, 107:24; 133:85. RL 414:13.

QUESTION PRESENTED FOR REVIEW BY THE STATE

1. Whether it was unjust and unreasonable for the Personnel Appeals Board to overturn the termination of a State Trooper where the board found that trooper's actions could have endangered the life or safety of the public, which is a terminable offense under the personnel rules, and where the board failed to consider the Division of State Police's reasoning for its disciplinary action.¹

STATEMENT OF THE CASE

On August 19, 2015, Trooper First Class David Appleby (hereinafter "David"), filed an appeal pursuant to RSA 21-I:58 with the New Hampshire Personnel Appeals Board (hereinafter "PAB") seeking to overturn his unlawful termination. CR at 1-11. The State of New Hampshire, Department of Safety, Division of State Police (hereinafter "State") terminated the employment of a decorated sixteen (16) year veteran of the State Police based primarily upon erroneous allegations of integrity issues. The termination was issued on August 5, 2015 and consisted of eight (8) separate alleged violations of the Professional Standards of Conduct and certain aspects of the administrative rules of the Division of Personnel. CR 6-11.

A prehearing conference was held on October 7, 2015. CR 27-29. A second prehearing was held on January 27, 2016. CR 52. Thereafter, this matter was scheduled for a two (2) day hearing on May 18 and 19, 2016. CR 100. On May 9, 2016, the State moved to continue the hearing based on discovery disputes. CR 102-104. The matter was rescheduled for August 8, 9 and 10, 2016. CR 130-131.

¹ The State requested the review of five (5) separate questions in their Notice of Appeal. Issues raised in a Notice of Appeal but not briefed are deemed waived. Brown v. Bonnin, 132 N.H. 488 (1989); Daboul v. Town of Hampton, 124 N.H. 307, 209 (1983).

A hearing was held on those dates, in which the parties presented witnesses for examination and cross examination, produced exhibits to be entered into the evidence, and agreed to the filing of post hearing briefs to be part of the record. CR 184.

On January 11, 2017, the PAB issued a decision and voted unanimously to grant the appeal, and found that the decision to dismiss David was unjust in light of the facts in evidence. CR 207 The PAB further provided that the Board would hold a separate hearing so the parties could have the opportunity to argue damages, as the parties had requested on August 8, 2016. CR 207. On February 10, 2017, the State filed a Motion for Rehearing/Reconsideration arguing primarily that David had not been reinstated. CR 207. On March 8, 2017, the PAB unanimously denied the State's Motion for Rehearing/Reconsideration, provided that they would schedule a hearing when the docket permitted, and that the parties should work together to resolve their issues without need for intervention of the PAB, i.e. calculate damages. CR 239. Thereafter, a prehearing conference was scheduled and held on Wednesday, April 19, 2017. CR 224. At the prehearing conference, David informed the PAB, "[t]he State refused to discuss settlement, taking the position that the Appellant is not entitled to reinstatement, despite two orders to the contrary by this Honorable Board (see Order dated January 11, 2017 and March 8, 2017)" .CR 241.

As a result, on May 8, 2017, the PAB issued a Clarifying Order in which they provided,

Although the Board did not use the word "reinstatement" explicitly in its final order, the Board's intent was to reinstate the Appellant. Therefore, the Department of Safety, Division of State Police shall reinstate the Appellant to his former position, subject to a suspension of sixty (60) calendar days without pay, effective on the date of his termination. The sixty-day suspension is the result of the Appellant violating PSC Chapter 1 Section 1.4.0, Subsection 1.4.2 and the Appellant's actions could have endangered

the life, health of safety of the Jewell Transport employees as well as the general public. CR 245.

On June 2, 2017, the State filed a Motion for Rehearing/Reconsideration of the PAB's May 8, 2017 order and David filed a timely objection on June 7, 2017. CR 288-294. On June 29, 2017, the PAB denied the State's motion, holding that "the Board reiterates that its intent all along was to reinstate the Appellant." CR 310. On July 31, 2017, the State filed a Notice of Appeal pursuant to Supreme Court Rule 10. In its Notice of Appeal, the State presented five (5) questions for review. See, State's Notice of Appeal at 2.² This case was accepted by this Honorable Court and the parties were ordered to submit briefs in this matter. The State filed its brief on January 19, 2018. This Honorable Court ordered David to file his brief on or before February 20, 2018. See, Order dated January 16, 2018. This brief follows.

STATEMENT OF FACTS

This case concerns the struggle of a devoted and highly respected veteran Trooper First Class, David Appleby (hereinafter "David") to overturn the unlawful termination by the Department of Safety, Division of State Police (hereinafter "State"). In the process, David was able to vindicate his reputation and honor that was challenged by the termination letter of August 5, 2015. CR 184-207. The PAB voted unanimously to grant the appeal and found the decision to dismiss David was unjust in light of the facts in evidence. CR at 207. The State resisted reinstating David through a series of procedural arguments, until June 23, 2017, when he was reinstated by order of the appointing authority, Colonel Christopher Wagner effective June 23, 2017. CR at 282. The State

² Issues raised in a Notice of Appeal but not briefed are deemed waived. Brown v. Bonnin, 132 N.H. 488 (1989); Daboul v. Town of Hampton, 124 N.H. 307, 209 (1943).

seeks in this appeal to overturn the reinstatement and terminate David's employment again.

On or about August 5, 2015, David was terminated from his employment with the State primarily as a result of wrongful allegations of being untruthful during an internal investigation. The initial termination letter provided eight (8) different alleged violations by David. These included the following:

- (a) Chapter 1 Rules and Regulations; Section 1.4.0 Obligations, subsection 1.4.1 Patrol Availability;
- (b) Chapter 1 Rules and Regulations; Section 1.4.0 Obligations, subsection 1.4.8 Integrity;
- (c) Chapter 22-E Extra Duty Details, Section 22-E.1.2 A, Procedures, subsection 11;
- (d) Chapter 22-E Extra Duty Details, Section 22-E.1.2A. Procedures, subsection 17;
- (e) Per 1002.08(b)(10) Obstructing an internal investigation; and
- (f) Per 1002.08(b)(12) Falsification of any agency record received, maintained or utilized by the agency.
- (g) Per 1002.08(b)(9) Endangering the life, health or safety of another employee or individual served by the agency.
- (h) Per 1002.08(b)(7) (violation of a posted or published agency policy or procedure, the text of which warns that violation of same may result in dismissal) CR 9-10.

The facts disclosed that David was a victim of unfortunate events, beyond his control that forced him to make a Hobbesian choice. David was forced into the unenviable position of either violating the Rules of Professional Conduct by abandoning a detail before completion or disobeying an order to be at Twin Mountain barracks by 1300 hours on May 12, 2015. CR 186.

A. May 12, 2015

In early May, David accepted an extra duty detail transport for Jewell Transport, Inc. commencing at 0630 hours on May 12, 2015. Prior to the May 12th transport, David's regular shift was altered and his start time was changed to 1100 hours from 1600 hours, so that he could attend (and have travel time) to a Phase II Oral Board for a probationary trooper at 1300 hours at Twin Mountain. CR 191-192, 190 (Findings of Fact ¶17 and ¶22). David's immediate supervisor, Sergeant Terhune, provided, "Where TFC Appleby started his day was of minimal issue to the Troop. The Troop's primary objective was not that TFC Appleby be in patrol in Troop F, but rather he make it to Troop F in time for the Phase II Board at 1300." "The issue of David traveling on duty time was of little concern at the time." CR 192

When David arrived in Claremont on May 12, 2015, he was informed that the truck he was to escort had mechanical difficulties. The original start time for the transport was 0630 hours. David became increasingly nervous at the amount of time it was taking to repair the truck, as he had to be at Troop F at 1300 hours to report to the Phase II Oral Board for a probationary trooper. CR 188 (Findings of Fact ¶8). David attempted to telephone Troop F at 0625 hours and then again at 0635 hours in order to seek guidance from a supervisor, considering he was due back at Troop F headquarters at 1300 hours. He was told that a supervisor was not available. CR 188 (Findings of Fact ¶9).

David then contacted the detail desk at 0758 hours and 0810 hours in an attempt to get rid of the detail and provide it to another trooper. However, he was informed that the Extra Duty Detail Policy states that it is the trooper's responsibility

to find coverage if it is needed within twenty-four (24) hours of the detail. CR 188 (Findings of Fact ¶10). Soon thereafter, the escort left Claremont at 0830 hours. CR 188 (Findings of Fact ¶11).

While waiting for the transport to begin, Chip Powers, a Jewell Transport employee informed David that he could do what he needed to do in order to make his meeting up north. CR State Exhibit 32 at 147. During the escort, David was on the phone in his capacity as a peer-to-peer counselor. The record reflects that Dave provided peer to peer services, for fifty-nine (59) minutes. (From 0942 hours to 1042 hours) (CR 189 (Findings of Fact ¶13). The peer-to-peer calls are deemed confidential. See, RSA 153-A:17-a(III) and Professional Standards of Conduct Chapter 22 AB 3.2. CR Appleby Exhibit 2. Troopers seek support under the peer-to-peer team for emotional and psychological concerns, anxiety or depression, stress, substance abuse, grief, and loss, communication problems, relationship and family, parenting, relationship violence, jobs, stress and burnout, conflicts at work, and career issues. CR Appleby Exhibit 2 at 45. During the transport, David was increasingly nervous about not making it to Twin Mountain because of the delay, and was preoccupied with peer-to-peer calls. CR 191 (Findings of Fact ¶21); CR 202.

David does not remember whether he made radio contact and accepts responsibility that he did not make radio contact in violation of Chapter 22-E, Section 1.2(a)(11). A short period of time after reaching Route 125 off of Exit 7 off of Route 101, David left the detail. He was unsure of where he turned around and left the detail but is willing to accept that he turned around at the bottom of the ramp of Exit 7 leading onto Route 125. CR 192-194 (Findings of Fact ¶31). David proceeded back to Twin

Mountain and was able to make it to the Troop F barracks at Twin Mountain by 1300 and successfully completed the probationary boards, allowing the probationary trooper to move forward on his career. David did not deny that he did not complete the Jewell Transport detail. CR 193 (Findings of Fact ¶30). At the time, David was faced with a Hobbesian choice, between only two alternatives. He could disobey a direct order to report to Twin Mountain by 1300 hour. This would be, a direct violation of the willful insubordination policy which provides that, “Any Division Member who deliberately and/or intentionally disobeys a lawful order shall be subject to disciplinary action, up to and including dismissal”. In the alternative, he could abandon the transport, which he believed was almost complete and that he had been waived off by Jewell Transport. CR 193 David chose the latter, based, in part, upon his training and experience that direct orders took precedence over extra duty details. CR 203.

While David did leave the Jewell Transport prior to completion, he did not intentionally attempt to endanger the life, health or safety of another employee or individual served by the agency. David accepted responsibility for abandoning the detail and provided that if he had the opportunity, he would have made a different decision. CR 193 (Findings of Fact ¶30). The PAB took this into consideration. Id. It is clear that David felt that being at the Phase II Oral Board in Twin Mountain at 1300 hours was an order he had to obey. He was nervous throughout the transport and expressed his anxiousness to Jewell Transport. Fresh in his memory was the admonition by the Colonel, in 2012, that he was required to perform his Troop F activities and not ancillary duties such as details. In the weighing test, made in a split second, David chose to obey the order to be at Twin Mountain at 1300 hours.

B. David's Background

The PAB recognized that David was not an ordinary and standard Trooper. David was initially hired by the State as a probationary trooper in June of 1999. After serving one year in this capacity, David was promoted to Trooper I. After ten (10) years, he was promoted to Trooper First Class, which was his rank and position on August 5, 2015. CR 187 (Findings of Fact ¶1). In addition to his regular duties, David served the State in the position of a Special Weapons and Tactical Unit Operator (SWAT); Special Weapons and Tactical Unit Sniper Team Leader; Peer to Peer Counselor; Field Training Officer; Fire Arms Instructor; Troop Armorer; and Intoxicator and PBT Instructor. CR 187 (Findings of Fact ¶2).

During his professional career with the State, he had received numerous letters of appreciation, and official commendations for his outstanding service. CR 187 (Findings of Fact ¶4). By way of illustration, as opposed to exhaustion, David was named Trooper of the Year in 2006. Testimony Appleby; CR Appleby Exhibit 4. David received letters of appreciation for his work in the peer-to-peer program in February 2015. CR Appleby Exhibit 4 at p. 5. On January 29, 2015, the Colonel of the Maine State Police, Colonel Robert A. Williams, submitted a letter of appreciation concerning a homicide investigation. CR Appleby Exhibit 4 at 4. In January of 2013, David received an official commendation for his work on the Special Weapons and Tactical Unit. CR Appleby Exhibit 4 at 10. In December of 2012, David received a letter of appreciation from Colonel Robert Quinn for his work as a State Trooper. CR Appleby Exhibit 4 at 11. In September of 2012, David received a Letter of Appreciation from Colonel Robert Quinn for his performance in the search for an armed subject. CR Appleby Exhibit 4 at 1. In

April of 2012, David received a Letter of Appreciation for his assistance with a homicide investigation. CR Appleby Exhibit 4 at 15 and 16. In April of 2012, David received a commendation for his assistance at the Greenland Tragedy. CR Appleby Exhibit 4 at 2. David received additional letters of commendations and awards dating back to the start of his career in 1999, consisting of over ninety (90) pages. CR Joint Exhibit 4. Colonel Quinn described David's accomplishments as a Trooper as, "quite impressive". See, Excerpt of Hearing Testimony of Colonel Robert Quinn – 8/9/16 Transcript p. 82 Lines 3-4; Addendum ("Add.")15.³

David was described by his peers and commanding officers as being an excellent trooper, possessing a strong work ethic, being highly motivated and dedicated. He was described as the go-to-guy with his fellow troopers entrusting him with their lives. CR 187 (Findings of Fact ¶5). Colonel Quinn described him with the following statements, "good reputation", "Good worker", "high performer" and "over achiever". See, Excerpt of Hearing Testimony of Colonel Robert Quinn – 8/9/16 Transcript p. 51 Lines 8-12; Add. 9.

C. The Orders of the PAB

The PAB ultimately found that David did not commit any of the integrity allegations proffered against him on August 5, 2015. The PAB found that David did not violate Per 102.08(b)(7) [violation of a posted or published agency policy or procedure, the text of which warns that violation of the same may result in dismissal] CR 204; that David did not obstruct an internal investigation (Per 1002.08(b)(10)) CR 206; and that

³ The State failed to provide a transcript. David provides excerpts of the transcript provided by Avicore Reporting based on recordings provided by the PAB. This is contained in the Addendum attached hereto.

David did not falsify agency records maintained, received or utilized by the agency (Per 1002.08(b)(12). CR 204. The PAB specifically found that David did not violate the integrity provisions of the Professional Standards of Conduct, Subsection 1.4.8 (Integrity). CR 205.

The PAB did find that David violated the Chapter 22-E, Extra Duty Detail. CR 200. This was not contested by David. CR 200. Further, the PAB did find that, "The Appellant was not available for duty when he was traveling back from an extra duty detail. As a result, the PAB finds that he was not available for duty and violated subsection 1.4.2." CR 201. The PAB did not directly find that David violated Per 1002.08(b)(9) ("Endangering the life, health or safety of another employee or individual served by the agency"). Rather, the PAB found, "As a result, the Board finds the Appellant's actions could have endangered the life, health or safety of the Jewell transport employees as well as the general public." CR 206. (emphasis supplied) The PAB held that, "Having carefully considered the evidence and argument presented, the Board voted unanimously to GRANT the appeal and found that the decision to dismiss the Appellant was unjust in light of the facts in evidence" CR 207.

The PAB provided, in its May 8, 2017 clarifying order,

Although the Board did not use the word "reinstatement" explicitly in its final order, the Board's intent was to reinstate the Appellant. Therefore, the Department of Safety, Division of State Police shall reinstate the Appellant to his former position, subject to a suspension of sixty (60) calendar days without pay, effective on the date of his termination. The sixty (60) day suspension is the result of the Appellant violating PSC Chapter I Section 1.4.0, Subsection 1.4.2 and that the Appellant's actions could have endangered the life, health or safety of the Jewell Transport employees as well as the general public. CR 245.

In addition, as punishment for violation of the Extra Duty Detail Policy, the PAB deferred consideration of the numbers of extra duty details David could perform to the

appointing authority. CR 246. Colonel Wagner provided that, “As a result of the Board’s modified discipline, you are also suspended from Extra Duty Details for a minimum period of 12 months. Following the 12-month period, I will entertain a request to modify this restriction based on your disciplinary record; performance; successful administrative record keeping, as reported in random audits.” CR 295.

SUMMARY OF ARGUMENT

On August 5, 2015, the State unlawfully and unjustly terminated the employment of David Appleby, a Trooper First Class, a decorated and well respected sixteen-year veteran with the State. At the conclusion of a adjudicative process, the PAB found that David’s termination was, “unjust in light of the facts in evidence”. The PAB appropriately exercised their statutory authority when it reinstated David, subject to a sixty calendar day suspension without pay.

The clear and unambiguous language of the enabling statute, RSA 21-I:58(I) provides in relevant part, “In all cases, the personnel appeals board 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.” The PAB, having found that the termination of David was unjust in light of the evidence, was well within their authority to reinstate David and modify the discipline of the appointing authority.

The State, as the appealing party, had the obligation to this Honorable Court to provide a transcript of the underlying proceedings. Sup. Ct. Rule 10(2). However, the State did not provide a transcript of the hearing dates of August 8, 9 and 10, 2016. As the State has failed to provide a transcript in accordance with this Honorable Court’s rules, the appeal should be limited to legal arguments. Assuming arguendo, that this Honorable

Court wishes to hear factual argument, the PAB's reinstatement of David was just, reasonable and supported by the evidence. The PAB reviewed the record as a whole and took into consideration all of the facts in evidence when it reinstated David and modified the discipline of the appointing authority. The PAB considered external factors outside of the control of David, as well as the internal processing of David while he struggled to make the best decision in a bad circumstance. The PAB realized David was faced with a Hobbesian choice of either abandoning a detail before completion or disobeying a direct order to be an oral board at Twin Mountain at 1300 hours on the same day. The PAB correctly determined that this circumstance was created in large part by the policies of the State, as well as, unforeseen circumstances outside of the control of David. The PAB also found that the decision to leave not complete a detail was based, in large part, on the lasting impression the State placed upon David concerning his primary duty of a trooper over ancillary duties, such as details.

In addition, the PAB considered the evidence proffered by the appointing authority in favor of mitigating the discipline issued by the appointing authority. The PAB properly assessed the gravity of the violation; reviewed David's outstanding reputation and integrity; reviewed his previous disciplinary history and considered the amount of work and dedication David had provided to the State for over a decade and a half. When these factors were considered by the PAB and placed into context of the entire circumstance, the PAB correctly found that the decision to terminate David was unjust in light of these facts in evidence. The record supports the decision of the PAB to reinstate David and modify the discipline.

Lastly, the issue of reinstatement is moot, as David has been performing the duties of a Trooper First Class since June 23, 2017. David's reinstatement by the State renders this appeal moot.

STANDARD OF REVIEW

Our review in this case is governed by RSA 541:13 (2007). As the appealing party, the Appellant has the burden of proof to show that the PAB decision is clearly unreasonable or unlawful. RSA 541:13. The PAB decision will not be set aside or vacated except for errors of law, unless we are satisfied, by a clear preponderance of the evidence before us, that such order is unjust or unreasonable. *Id.*

We review the PAB's interpretation of statutes and administrative rules *de novo*. N.H. Dep't of Env'tl. Servs. v. Marino, 155 N.H. 709, 713, 928 A.2d 818 (2007); State v. Elementis Chem., 152 N.H. 794, 803, 887 A.2d 1133 (2005). In both instances, we ascribe the plain and ordinary meanings to words used, Appeal of Flynn, 145 N.H. 422, 423, 764 A.2d 881 (2000), looking at the rule or statutory scheme as a whole, and not piecemeal. See Appeal of Alley, 137 N.H. 40, 42, 623 A.2d 223 (1993). Although we accord deference to the PAB's interpretation, that deference is not absolute. We still examine its interpretation to determine if it is consistent with the language of the regulation and with the purpose the regulation is intended to serve. Appeal of Vicki Morton, 150 N.H. 76 (2008).

ARGUMENT

- A. **The PAB is authorized by statute to reinstate an employee, change or modify an order of the appointing authority or make such other order as it may deem just**

The enabling statute for the power of the PAB is codified in RSA 21-I:58. This statute provides,

...If the personnel appeals board finds that the action complained of was taken by the appointing authority for any reason related to politics, religion, age, sex, race, color, ethnic background, marital status, or disabling condition, or on account of the person's sexual orientation, or was taken in violation of a statute or of rules adopted by the director, the employee shall be reinstated to the employee's former position or a position of like seniority, status, and pay. The employee shall be reinstated without loss of pay, provided that the sum shall be equal to the salary loss suffered during the period of denied compensation less any amount of compensation earned or benefits received from any other source during the period. "Any other source" shall not include compensation earned from continued casual employment during the period if the employee held the position of casual employment prior to the period, except to the extent that the number of hours worked in such casual employment increases during the period. In all cases, the personnel appeals board **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.** (emphasis supplied)

II. Any action or decision taken or made under this section shall be subject to rehearing and appeal as provided in RSA 541.

III. In the event of an appeal from a decision of the personnel appeals board in accordance with the provisions of RSA 541, the fee for the copy of the record and such testimony and exhibits as shall be transferred, and the fee for manifold copies shall be established by the governor and council and collected by the director of personnel from the party making the appeal. Any fees collected by the director of personnel under the provisions of this section shall be credited to the appropriation for the division of personnel. The appeals board shall not be required to certify the record upon any such appeal, nor shall the appeal be considered until the fees for the copies have been paid.

Resolution of this petition requires statutory interpretation, which is a question of law that the Court reviews *de novo*. Hudson v. Director, N.H. Div. of Motor Vehicles, 155 N.H. 197, 198 (2007) "We are the final arbiter of the intent of the

legislature as expressed in the words of a statute considered as a whole.” McDonald v. Town of Effingham Zoning Bd. Of Adjustment, 152 N.H. 171, 174, (2005) (quotation omitted). “When examining the language of a statute, we ascribe the plain and ordinary meaning to the words used.” Bennett v. Town of Hampstead, 157 N.H. 477, 483, (2008) “We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. We interpret a statute in the context of the overall statutory scheme and not in isolation.” *Id.* (citation omitted) When a statute's language is plain and unambiguous, we need not look beyond it for further indications of legislative intent. Appeal of Garrison Place, 159 N.H. at 542 (2009).

The PAB is statutorily authorized to “...reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just.” See, RSA 21-I :58(I). It is axiomatic that the remedial authority of an administrative authority is governed by statute. Appeal of Campaign for Repair Rights, et al 162 N.H. 245, 255 (2011) citing Appeal of Land Acquisitions, 145 N.H. 492, 498 (2000). The legislature chose to empower the PAB to allow the PAB broad discretion in adjusting a decision of the appointing authority. Further, in this case, the PAB properly applied their standard and found that the PAB “...voted unanimously to GRANT the appeal and found the decision to dismiss the Appellant was unjust in light of the facts in evidence.” CR 207. The PAB properly applied the standards set forth in their rules and regulations, codified in Per-A 207.12(b).

The State attempts to argue, in its brief, that the actions of the PAB constitute an unbridled exercise of discretion and is merely a “substitute of judgment” for the opinion

of the appointing authority, Colonel Quinn. The State argues that if the PAB finds a violation of any provision of Per 1002.08 the analysis of the PAB terminates and the State prevails. However, the State is wrong and the plain reading of RSA 21-I:58 provides that the review of the decision of the PAB is governed by RSA 541. See, RSA 21-I:58, II. As such, the PAB was statutorily authorized to reinstate David and modify the termination to a sixty (60) calendar day suspension.

The finding by the PAB that David **could have** endangered the life, health or safety of Jewell Transport employees as well as the general public (CR 206), does not require that the matter be reversed. First, the regulation is written in current tense, it requires a finding that David did in fact endanger the life, health or safety of another employee or individual served by the agency. See, Per 1002.08(b)(9). After close review, the PAB did not specifically find a violation of Per 1002.08(b)(9). CR 206. Further, in the PAB's clarifying order, it provided the sixty (60) calendar day suspension is a result of the Appellant violating PSC Chapter 1, Section 1.4.0, Subsection 1.4.2 and that the Appellant's actions **could have** endangered the the life, health or safety of Jewell Transport employees as well as the general public. CR 245. This was after David had explained to the PAB that speculation of harm does not constitute a violation. Per 1002.08(b)(9). CR 234-235.

However, assuming *arguendo*, that the PAB's order is read to have found a violation of Per 1002.08(b)(9), the clear and unambiguous language of RSA 21-I:58 authorizes the PAB to reinstate David, change or modify the order, or make such other order as it deems just. The PAB found that the termination was unjust in light of the facts in evidence and had a statutory right to reinstate and modify the discipline of the

appointing authority. Even assuming the PAB found a violation of Per 1002.08(b)(9), the PAB in conformance with the rule, could modify the State's discipline to a suspension without pay (see, Per 1002.06(a)(3)(h) or written warning (see Per 1002.04(b)).

As a practical matter, the argument of the State is illogical, as the authority of the PAB to modify or make such orders as it deems just would be unnecessary if the PAB's jurisdiction terminated with a factual finding of a violation. The PAB would not impose a sanction on an employee that did not commit the offense alleged by the appointing authority. The PAB is statutorily authorized to reinstate, modify or issue an order they deem just in the matter.

. B. The State should be precluded from asserting factual arguments

The State request that this Honorable Court substitute its judgment on factual matters decided by the PAB that are well supported by the evidence. The weight of the evidence should be reserved for the PAB, unless unreasonable or unjust. The PAB, as factfinder, reviewed specific evidence, assessed witness creditability and determined the importance of factors all of which is supported by the record. See, RSA 541:13. In this matter, the State was the appealing party. As the appealing party, the State had the obligation to provide this Honorable Court with a transcript of the underlying proceeding. Sup. Ct. Rule 10 (2) In the absence of a transcript, this Honorable Court will generally assume the evidence was sufficient to support the result reached below.

It is a long-standing rule that parties may not have judicial review of matters not raised in the forum of trial. N. Country Env'tl. Servs. v. Town of Bethlehem, 150 N.H. 606, 619 (2004). Furthermore, absent a transcript of the hearing, we must assume that the evidence was sufficient to support the result reached by the trial court. See Atwood v. Owens, 142 N.H. 396, 396 (1997). It is the burden of the appealing party, here the plaintiff, to provide this court with a record sufficient to decide her issues on appeal,

as well as to demonstrate that she raised her issues before the trial court. See Rix v. Kinderworks Corp., 136 N.H. 548, 553 (1992); Reynolds v. Cunningham, Warden, 131 N.H. 312, 314-15 (1988). Because our rules affirmatively require the moving party both to provide a sufficient record on appeal and to demonstrate where each question presented on appeal was raised below, *see* SUP. CT. RS. 13, 16(3)(b), failure of the moving party to comply with these requirements may be considered by the court regardless of whether the opposing party objects on those grounds.

Beane v. Red Oak Property Management, 151 NH 248 (2004); *see also* Sup. Ct. Rule 10(2).

It is undisputed that the State did not provide or request a transcript of the hearing dates on August 8, 9 and 10, 2017. As the State has failed to provide a transcript in accordance with this Honorable Court's rules and RSA 541-A:31, the appeal should be limited to legal argument.

C. The PAB's Reinstatement of David was just, reasonable and supported by the evidence

This Court has granted much deference to an administrative agency in making factual determinations and assessing witness credibility. The PAB role is similar to a trial court in which this Honorable Court has previously recognized. "It is not our role to calculate how much weight the trial court should afford specific evidence, second guess its decision on matters of witness credibility or substitute our judgment for the trial court in discretionary rulings" In the Matter of Kurowski and Kurowski, 161 N.H. 578, 600 (2011) Although, this appeal is governed by RSA 541, the adjudicative role of the PAB is analogous to a trial court, especially in light of the broad, almost equitable powers, bestowed by the legislature in RSA 21-I:58 (I). The PAB correctly found that the termination of David was unjust in light of the facts in evidence. In reaching this conclusion, the PAB considered all of the information considered by the appointing authority and certain information not available to the

appointing authority.

In reinstating Dave, with a sixty (calendar day suspension) the PAB reviewed the record as a whole and took into consideration all of the facts in evidence when it modified the termination to a sixty (60) calendar day suspension. See Per-A 207. 12 (b)(4) What the State did not do, but the PAB did is place this matter in perspective. The PAB adjudicated this matter as an objective factfinder who reviewed the content of hundreds of pages of exhibits, the examination and cross examination of witnesses over a three-day period and heard argument from two parties in an adversarial process in order to divine the truth in this matter.

The PAB considered both external factors outside of the control of David as well as the internal processing of David while he struggled to make the best decision in a bad circumstance. It should be remembered that David was employed by the State when this Honorable Court affirmed the decision of the PAB in upholding the termination of a Trooper for a violation of insubordination (Professional Standards of Conduct 1.3.4) in 2006. See Appeal of Waterman, 154 N.H. 437 (2006)

There was a multitude of mitigating factors that thrust Dave into this no win situation on May 12, 2015. The PAB considered the following mitigating external factors, some of which were created by the State itself, in determining that the termination of Dave was unjust in light of the facts in evidence.

- A) David's regular shift start time was downwardly adjusted by 5 hours. CR 190;
- B) The detail started 2 hours late. CR 188;
- C) David was prohibited by policy from attempting to get coverage for the detail. CR 188;

- D) David could not contact with a supervisor to get further instructions, but tried twice (2x). CR 188;
- E) Dispatch provided no assistance, though he requested assistance twice (2x). CR 188;
- F) David was assisting other troopers as a peer to peer counselor for almost the entire trip to exit 7 on 101. CR 189;
- G) Adam Jewell had testified that other troopers had left details for "more important" matters. See, Excerpt of Hearing Testimony of Adam Jewell – 8/8/16 Transcript p. 18, lines 12-16; Add. 2;
- H) David had spent his entire career in Troop F which is the northernmost part of the State and was unfamiliar with the Plaistow area. CR 187;

The Board also considered the following internal influences that assisted Dave in making his decision on May 12, 2015 to attend the Oral Board as opposed to completing the detail. These were also, in part, created by the State. They are as follows:

- A) David's previous discipline impressed upon him that his duties as a trooper were more important than ancillary duties, such as details. CR 196, 203;
- B) Sergeant Terhune enforced the importance of being at Twin Mountain by 1300 hours. Sergeant Terhune provided, "TFC Appleby was one of the PRTR Randall's FTO and was required to attend the Phase II Board. The time for the Board had been set for 1300 hours that day." (emphasis provided). "What was of importance was that he be at Troop F no later than 1300 hours for a PRTR Randall's Phase II Board. CR State Exhibit 35 at 159;
- C) He had grown increasingly nervous and anxious during the delay and transport. CR 188;
- D) Chip Powers had stated, "I kind of told the trooper to do what he needed to do in order to make his meeting up north." CR State Exhibit 32 at 144;
- E) David thought he was in Plaistow when he turned off exit 7 on Route 101 and that the border was close. CR 193;
- F) Dave worked an inordinate amount of details, by permission of the State, and it may have affect his memory. CR 198, 204;
- G) The driver waived at David, which he interpreted as a waive off. Chris Jewell verified that, "...he advised me that the truck drivers would

clear the troopers and stated that they may give a thumbs up to the troopers, but that would be it.” CR State Exhibit 32 at 147;

As a result of all of these factors, the PAB concluded that, “The Board considered the level of stress and anxiety the Appellant was under as he feared he’d either be late or miss the Phase II Oral Board and that he was required to attend and made a mistake.” CR 207.

Based on the facts and the record, a mistake should not be terminable. The PAB’s decision was just and reasonable. David may have rationalized his decision and in retrospect, he may have made a bad choice, but based on all the circumstances he did what he thought was correct. But he did not intentionally endanger any lives David acknowledged that if he had been provided to make the decision again he would have made a different decision. CR 193.

D. The PAB did Consider the Appointing Authorities evidence and correctly interpreted the evidence to support David’s reinstatement

Despite the original argument that the PAB is without authority to reinstate David, the State seems to reluctantly concede that the PAB, based upon its statutory authority, may reinstate David and modify the discipline imposed by the appointing authority. See Brief at 13. However, the State proffers a weight of the evidence argument that the PAB is required to review the facts considered by the appointing authority in making their determination to dismiss an employee. Brief at 13. The State asserts the that the PAB is required to review the factors considered by the appointing authority when deciding to modify discipline. The State does not provide any direct support for this proposition. The State relies upon Per 1002.03(b) for this proposition. However, the clear language of this regulation provides that it applies only to appointing authority and is permissive as opposed to mandatory. Nonetheless, this is of no moment because the

PAB did consider these factors reviewed by the Colonel, as is demonstrated by the record, in finding that the dismissal was unjust.

The State further offers in support of their argument that the PAB did not provide any sanction for David's admission to violations of the Extra Duty Detail Policy (Brief at 16). The State asserts that the PAB disregarded the gravity of the violation (Brief at 4-5); David had brought disrepute on the Division (Brief 15-16); a prior disciplinary history (Brief at 16-17); and the inordinate amount of details worked by David (Brief at 17). However, the State is incorrect, all of these factor were considered by the PAB and when taken into context of the entire circumstance, the PAB correctly found that the decision to terminate David was unjust in light of the facts in evidence. As will be demonstrated below, the record supports the decision of the PAB to reinstate David and modify the discipline.

i. The PAB provided a sanction in compliance with the State's Professional Standards of Conduct

As a factfinding tribunal, the [board] was at liberty to resolve any conflict in the evidence and to accept or reject such protionso f the testimony as it saw fit. The [board's] findings and conclusions are entitled to great weight and cannot be set aside lightly." Desmarais v. State Personnel Comm'n, 177 N.H. 582,586 378 A.2d 1361 (1977). Appeal of Alexander, 163 N.H. 397, 404 (2012).

The PAB found, and David acknowledged, that he had violated Chapter 22-E, Section 1.2(A)(11) and (17) of the Extra Duty Detail Policy. CR 200. The PAB issued a sanction in conformance with the requirements of Chapter 22-E. Chapter 22-E provides, in relevant part, "If at any time the director, or his designee determines the employee is not following this PSC, employee may lose the privilege of working extra duty details. See, Chapter 22-E, Extra Duty Details, Section 1.2(A)(6); CR State Exhibit 43 at 175.

In the PAB's clarifying order, it provided, "the Board considered restricting the number of extra duty details the Appellant could perform, however, after consideration, it was determined that this decision should be made by the appointing authority." CR 246. In fact, the appointing authority, Colonel Wagner, provided in his reinstatement letter of May 23, 2017, "As a result of the Board's modified discipline, you are also suspended from any extra duty details for a minimum period of twelve months. Following the 12-month period, I will entertain a request to modify this restriction based upon your disciplinary record, performance and successful administrative record keeping as reported in random audits." CR 295.

The PAB was also aware in regards to his two violations of the Extra Duty Detail Policy, that his two superior officers, Lieutenant Landry and Sergeant Terhune had concurred that no discipline was necessary. On June 11, Lieutenant Landry provides, in regards to Sergeant Terhune's investigation, "After a review of the facts in this case, I concur with Sergeant Terhune's findings. TFC Appleby's errors were based on mitigating circumstances and no further action is necessary." CR State Exhibit 34 at 157.

The PAB was aware that other cases have been presented in which individuals did not receive any discipline for multiple violations of Chapter 22-E, Extra Duty Details, and dismissed the claims as the employee only received a non-disciplinary "counseling" and loss of extra duty detail privileges. See, Appeal of Patrick Curran, (PAB Docket No. 2015-D-006, March 12, 2015). It should also be noted that when David violated the Extra Duty Details in the past, he lost his privileges to work extra duty details. On October 1, 2012, for violating the Extra Duty Detail Policy, David was restricted to working 20 hours of extra duty details per week. See, CR State Exhibit 17 at 38. On

August 20, 2013, David's ability to work extra duty details increased to 25 hours per week. CR 197 (Findings of Fact ¶44). As of January 27, 2014, David was unrestricted in the number of extra duty details hours he could work. CR 197 (Findings of Fact ¶45)⁴. As a result, the record supports the sanction imposed by the PAB concerning the violation of the Extra Duty Detail Policy and is neither unjust nor unreasonable.

ii. The PAB recognized the Gravity of the situation.

The PAB provided, "Therefore, the Department of Safety, Division of State Police shall reinstate the Appellant to his former position, subject to a suspension of sixty (60) calendar days without pay, effective on the date of his termination. The sixty (60) day suspension is the result of the Appellant violating PSC Chapter 1 Section 1.4.0, Subsection 1.4.2 and that the Appellant's actions could have endangered the life, health or safety of the Jewell Transport employees as well as the general public." CR 245.

A sixty-day suspension without pay is a serious discipline and demonstrates the seriousness by which the PAB approached the issue. This discipline is approximately two (2) times the discipline an appointing authority is allowed to administer which is limited to 20 work days, with certain exceptions (Per. 1002.06 (c)) SEE Per 1002.06 (b) In addition, the rules allow an appointing authority to administer a suspension without pay rather than a termination for all violations of Per 1002.08. See per 1002.06 (a)(3)(h). These rules compliment the authority that the PAB has to modify an order of an appointing authority. RSA 21-I:58 (I).

Leaving a detail is not acceptable and David has not appealed his punishment of a sixty (60) calendar day suspension. He regrets the decision and in retrospect would

⁴ The Memo of Counsel is not addressed as they are non disciplinary and not contemplated as discipline under the Personnel Rules. See, Per 1002.01.

have made another decision on that date. CR 193. This was a mistake not an intentional act of attempting to cause a dangerous situation. The termination was unjust in light of the facts in evidence when this matter is placed into perspective. When placed into proper context a termination would be unjust as the transport felt safe to proceed without Dave; no individual or property was harmed; the transporter assumed all of the risk; Jewell was not cited or penalized; and the State learned that this was not the first time a trooper had left a transport.

Jewell Transport could have stopped and obtained another State Trooper, however, they continued on and assumed all of the risk and responsibility by continuing on. CR State Exhibit 31. In fact, the transport made it to the Massachusetts line without incident and no individuals or property being damaged or harmed by the transport. Testimony Jewell; See, Excerpt of Hearing Testimony of Adam Jewell – 8/8/16 Transcript p. 34, lines 5-7; Add. 4.

The transporting agency assumed all risk and liability. The permit at issue stated, “The Applicant agrees to move at risk and assumes all responsibility for injury to persons or damages to public or private property caused directly or indirectly by the transportation of the vehicle or load under the permit.” CR State Exhibit 31 at 141-145.

Despite David leaving the transport, Jewell Transport was not cited or found in violation of any law or regulation for the continuation of the transport on May 12, 2015. See, Excerpt of Hearing Testimony of Adam Jewell – 8/8/16 Transcript p. 34, lines 2-4 Add. 4. The State chose not to cite Jewell for continuing on the road without an escort. See, Excerpt of Hearing Testimony of Adam Jewell – 8/8/16

Transcript p. 34, lines 2-4 Add. 4. The penalty for traveling without an escort in this case would have been a violation, not a crime. RSA 266:24 (I) and TRA 304.19 On May 12, 2015, the transport made it to the Massachusetts/New Hampshire state line without incident.

Jewell provided that troopers sometimes leave transports for “more important” things. See, Excerpt of Hearing Testimony of Adam Jewell – 8/8/16 Transcript p. 18 line 12-16 Add. 2. Jewell admitted that troopers had left before an he continued driving. See, Excerpt of Hearing Testimony of Adam Jewell – 8/8/16 Transcript at p. 33 Lines 15-18 The Colonel even admitted that the integrity issues were the more serious of the issues and his primary concern, See, Excerpt of Hearing Testimony of Colonel Robert Quinn – 8/9/16 Transcript p. 63 lines 6-8 Add. 14. He opined that if it was just the detail issue he would have gotten through that and it would have been a mere performance issue. Transcript p. 45 lines 21-23 p. 46, lines 1-3; Add. 9.

While leaving the detail was not appropriate Dave did not harm any person or property and the possibility of the harm was not as great as the State attempts to portray. When viewed in the light of facts in evidence the PAB decision was just, reasonable and supported by the record.

iii. The PAB also considered David’s past history and record of performance, as well as his prior discipline

The PAB recognized that David worked above and beyond the call of duty and engaged in special teams for the benefit of the Division and the public he served. David was member of the Special Weapons and Tactical Unit; Special Weapons and Tactical Unit Sniper Team Leader; Peer to Peer Counselor; Field Training Officer; Fire Arms

Instructor; and Troop Armorer. CR 187 (Findings of Fact ¶2). During David's career as a trooper, he received numerous letters of appreciation and official commendations for his outstanding service. CR 187 (Findings of Fact ¶4). In fact, David's letters of appreciation and commendations consisted of over ninety (90) pages. The Colonel referred to this a "quite impressive". See, Excerpt of Hearing Testimony of Colonel Robert Quinn – 8/9/16 Transcript p. 82, lines 1-4; Add. 17. Between the time period of 2012 to 2015, David received over a half dozen letters of appreciation and official commendations, some issued by Colonel Robert Quinn. See, CR Appleby Exhibit 4 at 1-16.

Until August of 2015, David was annually reviewed and received either "meeting expectations" or "exceeding expectations" in all performance criteria. CR Appleby Exhibit 3 (January 2010-January 2011 at 1-16; January 2011-January 2012 at 17-30; January 2012-January 2013 at 31-53; February 2014-January 2015 at 53-64). This included the performance criteria of SAFETY.

The PAB found that David was so dedicated that, "In fact, in or around the same time as the violations being investigated, the Appellant worked a detail and did not submit the appropriate paperwork to be paid for working the detail." CR 196 (Findings of Fact ¶39).

The PAB did consider that on October 1, 2012, Colonel Quinn issued a letter of warning to David, which included eight (8) separate violations, which included obedience to orders, division reports, performance expectations and extra duty details. CR 195-196 (Findings of Fact ¶39). The PAB assessed that, "The Colonel believed that the Appellant simply made mistakes because he had been working so much, including extra duty details." CR 196 (Findings of Fact ¶39).

The Division made it clear to David that his primary function was a trooper and that it held more importance than ancillary duties. CR 196 (Findings of Fact ¶42). As a result, David voluntarily withdrew from the Field Training Officer program and peer-to-peer program. CR 196 (Findings of Fact ¶49). David improved himself and modified his behavior to the point, where as of January 27, 2014, David was working his regular schedule was on the SWAT Team, was a Field Training Officer and was back to being a peer-to-peer counselor with unrestricted access to extra duty details. CR 197 (Findings of Fact ¶46). It is clear that David took this matter to heart.

In fact, the PAB was aware that Lieutenant Landry provided, "In review of TFC Appleby's most recent personal issues with details and a review of his habits since that, I feel that he has improved greatly since then and this incident is out of the norm for how it has currently been." CR State Exhibit 41 at 170. David's immediate supervisor echoed this, "...TFC Appleby has made significant and notable improvements and this incident is an anomaly as to how TFC Appleby has been." CR State Exhibit 35 at BS 161.

Interestingly enough, it is this previous discipline which the PAB found weighed heavily upon David when he was faced with the Hobbesian choice of either abandoning the detail before completion or obeying the direct order to be at the Phase II Oral Board in Twin Mountain at 1300 hours. In a split second decision, David remembered the admonishment that his ancillary duties were subordinate to his primary duties, which included attending the Phase II Oral Board with his superiors.

The Board also considered the Appellant's argument that he believed, on May 12, 2015, that he had to be back at Troop Fat 1300 hours. In SSG Terhune's report he wrote, "TFC Appleby was one of PRTR Randall's FTOs and was required to attend the Phase II Board." The Appellant acknowledged in his January 1, 2013 letter to Colonel Quinn that it had been made clear to him that as a road

Trooper his primary function was his patrol functions. Although the Phase II Oral Board is not a patrol function, the Board can see how the Appellant, at the time, considered a meeting with the Troop Commander paramount and the thought of missing it or even being late created a lot of stress and anxiety for the Appellant. CR 203.

The PAB appropriately found that David's work performance and prior disciplinary history supported their decision that dismissal was unjust in light of the evidence.

iv. David's volume of details worked was a mitigating factor

The State attempts to argue that the inordinate or excessive amount of details worked by David was not considered by the PAB in rendering their decision. However, the PAB's decision references the amount of details worked by David and considered it a mitigating factor in favor of modifying the discipline. The PAB found that David worked an inordinate amount of details in 2015, averaging two to three details per week, not including annual and sick leave. CR 203-204. The PAB also found that due to the number of extra duty details performed in 2014-2015, the level of nervousness the Appellant was experiencing, and other circumstances, may have clouded his judgment and memory. CR 204; see also CR 190 (Findings of Fact ¶46); CR 198 (Findings of Fact ¶51 and 52). The PAB did consider the amount of details David worked, but it was a positive mitigating factor, not a negative one.

v. The integrity of David, as well as the Division, remains intact

It must be remembered that the gravamen of the charges against David on August 5, 2015 concerned integrity issues. Three of the four potentially terminable offenses alleged against David were in regards to truthfulness. CR 9-10. In fact, the

Colonel admitted that the primary reason for his termination was the integrity charges.

Q. I sense, sir. Now, one of the the things that you said, and sir, I paraphrase, I don't have every transcript but it seemed to me that you had said, look the real big issue here is the integrity issue. The other things we could probably move beyond but it's the integrity issue that is really weighing on you when made your decision. Would that be accurate?

A. Well, and the – and the fact that the 2012, but if you asked me what is the most serious issue is the integrity.

See, Excerpt of Hearing Testimony of Colonel Robert Quinn – 8/9/16

Transcript at p. 62 lines 21-23 and Transcript at p. 63, lines 1-10; Add. at p. 13.

However, these integrity allegations were not sustained and were dismissed by the PAB. The State did not appeal that aspect of the decision, and it is final.

The PAB did find, that David was described by his peers and commanding officers as being an excellent trooper, possessing a strong work ethic and being highly motivated and dedicated. He had been described as a “go to guy” and his fellow troopers would trust him with their life. CR 187 (Findings of Fact ¶5).

Q. Okay. And working with Dave on the, with the SWAT team, you'd agree with me, wouldn't you, that Dave was go to guy on the SWAT team?

A. I'd -- he protected me, he protected me and my life, yes.

Q. Do you need a minute?

A. No, I'm good, thanks, I depend on him a lot.

Q. Okay. And he's somebody that you could depend on?

A. Yes.

Q. And you do, too, today?

A. If there is an incident I'd want him there.

See, Excerpt of Hearing Testimony of Lieutenant Michael Commerford –

8/9/16 Transcript at p. 34, lines 20-23 and Transcript at p. 35, lines 1-9; Add. 6. The State provides no evidence, at the time of the hearing or thereafter, that David's integrity and the reputation of the State Police do not remain in high regard. It relies solely upon speculation and the fact that something negative could have happened.

E. The issue of reinstatement is moot

The doctrine of mootness is designed to avoid deciding issues that "have become academic or dead." Petition of Brooks, 140 N.H. 813, 816, 678 A.2d 140 (1996).

However, the question of mootness is not subject to rigid rules, but is regarded as one of convenience and discretion. Herron v. Northwood, 111 N.H. 324, 327, 282 A.2d 661 (1971). A decision upon the merits may be justified where there is a pressing public interest involved, or future litigation may be avoided. *Id*

In this matter the issue of reinstatement has become moot. David has been performing his duties as a Trooper First Class since June 23, 2017. CR 282. As of the drafting of this brief it is approximately eight (8) months since he has been reinstated by order of the appointing authority. It should be noted that the road to reinstatement took approximately two (2) years. (August 5, 2017-June 23, 2017)

It would be an injustice to David, his family and the State to deprive him of his livelihood and profession. This issue was raised below to the PAB (CR 289). However, the PAB did not rule on this issue in it's final order dated June 29, 2017.

David's reinstatement by the State renders this appeal moot.

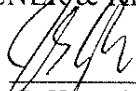
CONCLUSION

For the reasons set forth above, the PAB should be affirmed.

Respectfully submitted,
David Appleby
By and through their attorneys,

MILNER & KRUPSKI, PLLC

February 20, 2018

By: 

John S. Krupski, Esq.
NH Bar #11309
109 North State Street, Suite 9
Concord, NH 03301
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CERTIFICATE OF COMPLIANCE

In accordance with New Hampshire Supreme Court Rule 16(7), the undersigned hereby certifies that an original and eight (8) copies of Brief of the Appellee has been hand-delivered to the Clerk of the Supreme Court on this 20th day of February, 2018.

In accordance with New Hampshire Supreme Court Rule 16(10), the undersigned hereby certifies that two (2) copies of Brief of Appellees have been forwarded, via first class mail, postage prepaid, to Karen A. Schlitzer, Esq.

In accordance with New Hampshire Supreme Court Rule 16(10), the undersigned hereby requests that this matter be heard on oral argument and, further, that John S. Krupski, Esquire be designated as the attorney to argue its merits on behalf of the Appellees. Counsel respectfully requests fifteen (15) minutes for argument.

February 20, 2018



John S. Krupski, Esq.

ADDENDUM

Excerpt of Hearing Testimony of Adam Jewell – 8/8/16 1

Excerpt of Hearing Testimony of Lieutenant Michael Commerford – 8/8/16 5

Excerpt of Hearing Testimony of Colonel Robert Quinn – 8/9/16 8

STATE OF NEW HAMPSHIRE
PERSONNEL APPEALS BOARD

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IN RE: *
*
APPEAL OF DAVID APPLEBY *
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* * * * *

Docket No. 2016-T-002



EXCERPT OF HEARING
TESTIMONY OF ADAM JEWEL - 8/8/16

For Mr. Appleby: John Krupski, Esquire
Milner & Krupski, PLLC
109 North State Street, Suite 9
Concord, NH 03301

For Department of
Safety, Division of
State Police: Marta Modigliani, Esquire
Department of Safety
Office of the Commissioner
33 Hazen Drive
Concord, NH 03305

Chairperson: Charla Stevens

Commissioners: Christopher Nicolopoulos
Norman Patenaude
David Goldstein

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Fax (603) 666-4145

1 A. Yes.

2 Q. Okay. And then what do you recall?

3 A. I recall, we left, a Trooper was in front of
4 me and then behind me on the interstate like always,
5 I got to Route 125. We unlocked the steer on the
6 turn and I'm, I'm not focused on the cop at all ever.
7 We made our turn, we got locked back up to go
8 straight and I kept going. And I happened to look in
9 my mirror and I saw the cop go left, or go the other
10 way.

11 Q. Okay.

12 A. And but with that, though, there's -- back
13 then it hadn't happened but in the last month or so
14 it had, a couple of Troopers go, you know, take off
15 for 15, 20 minutes for a different call which is, you
16 know, it's more important I guess.

17 Q. Okay. And so, so you turned right at the, at
18 the bottom --

19 A. Yeah.

20 Q. -- of the exit after you -- I'm sorry if I
21 don't get the wording right.

22 A. That's fine.

23 Q. The steering dolly is operated and then --

1 A. Um-hum.

2 Q. And to?

3 A. Exit 7.

4 Q. And to Exit 7, right?

5 A. Yeah.

6 Q. And onto 125, correct?

7 A. Yeah.

8 Q. And you saw the Trooper waiting, correct?

9 A. Yes.

10 Q. Okay. But you didn't stop the truck, did
11 you?

12 A. No.

13 Q. You didn't cancel the detail, did you?

14 A. No.

15 Q. And in fact you said in your direct testimony
16 that Troopers have left before and you continued to
17 drive, correct?

18 A. Yes.

19 Q. Okay. And when he left, you didn't file a
20 complaint against Trooper Arthur Lee?

21 A. No.

22 Q. You didn't contact the State and say somebody
23 left the detail, correct?

1 A. No.

2 Q. And in fact you were never fined or violated
3 for that trip, correct?

4 A. Right.

5 Q. And in fact when you did that trip, no bad
6 thing happened, correct?

7 A. No.

8 Q. And you've done that trip many times,
9 correct?

10 A. Um-hum.

11 Q. And you said the distance from 125 -- from
12 101 to the Mass. pull area is somewhere between 10 to
13 15 miles?

14 A. Yeah.

15 Q. Okay. It's give or take, right?

16 A. Right.

17 Q. Okay. Did you, did you speak with Mr. Wood a
18 second time, Captain Wood a second time? Do you
19 remember that?

20 A. I think, I think so.

21 Q. Okay. Do you remember what the conversation
22 was?

23 A. I'm assuming it's the same conversation.

STATE OF NEW HAMPSHIRE
PERSONNEL APPEALS BOARD

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IN RE: *
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APPEAL OF DAVID APPLEBY *
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Docket No. 2016-T-002



EXCERPT OF HEARING
TESTIMONY OF LIEUTENANT MICHAEL COMMERFORD - 8/8/16

For Mr. Appleby: John Krupski, Esquire
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Concord, NH 03301

For Department of
Safety, Division of
State Police: Marta Modigliani, Esquire
Department of Safety
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Concord, NH 03305

Chairperson: Charla Stevens

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1 talking about the different routes that go by, there
2 are some roads that run parallel to 101, correct?

3 A. Correct.

4 Q. And you can get off at different exits and
5 actually one parallel and end up in the same spot,
6 correct?

7 A. Correct.

8 Q. Okay. And you have no idea sitting here
9 today how Mr. Appleby got to the actual incident, the
10 officer involved shooting?

11 A. I, I don't know.

12 Q. You had mentioned you were on a Swat Team
13 with David. Other than that, you mentioned one
14 incident. How many other incidents have you gone on
15 125 with the SWAT Team?

16 A. On 125 not many but we've had others that
17 have been, you know --

18 Q. You go around to different places?

19 A. -- in -- yes, we go over all the State.

20 Q. Okay. And working with Dave on the, with the
21 SWAT Team, you'd agree with me, wouldn't you, that
22 Dave was a go to guy on the SWAT Team?

23 A. I'd -- he protected me, he protected me and

1 my life, yes.

2 Q. Do you need a minute?

3 A. No, I'm good, thanks. I depended on him a
4 lot.

5 Q. Okay. And he's somebody that you could
6 depend on?

7 A. Yes.

8 Q. And you do, too, today?

9 A. If there's an incident I'd want him there.

10 Q. You spoke so, you spoke with me with David --

11 MS. MODIGLIANI: Can we take a five-minute
12 recess?

13 MR. KRUPSKI: Sure. I have no problem with
14 that.

15 CHAIRPERSON STEVENS: Yeah, sure.

16 (Recess.)

17 UNIDENTIFIED MALE SPEAKER: Back on the
18 record.

19 BY MR. KRUPSKI:

20 Q. Lieutenant, I believe during your direct
21 examination you had referenced a meeting in which in
22 the latter part of July but before the attempt to
23 terminate was issued which has been marked as State

STATE OF NEW HAMPSHIRE
PERSONNEL APPEALS BOARD

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IN RE:

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Docket No. 2016-T-002

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APPEAL OF DAVID APPLEBY

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EXCERPT OF HEARING
TESTIMONY OF COLONEL ROBERT QUINN - 8/9/16

For Mr. Appleby: John Krupski, Esquire
Milner & Krupski, PLLC
109 North State Street, Suite 9
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For Department of
Safety, Division of
State Police: Marta Modigliani, Esquire
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1 Q. And I'm sorry --

2 A. Can I, can I --

3 Q. Yes.

4 A. -- add onto that answer?

5 Q. Of course.

6 A. When I say probably because if he had told,
7 if he had told Staff Sergeant Terhune that, that I
8 took this escort, he had every right to take the
9 escort and again I, I believe he, he wanted to get
10 back in because he wanted to participate in that
11 Phase 2 Board because it -- he was engaged, he's
12 interested. He's, he's -- he wants to do it for the
13 right reasons. But if he had told Staff Sergeant
14 Terhune, listen, I took this escort. The truck was
15 late and what, what happened was this. I, I didn't
16 sign over and I only went to, I only went to Exit 7,
17 I didn't finish it. And I went back, and I went back
18 because I was so nervous that I just wanted to be
19 here. This was more important than that. Getting
20 here was more important than driving that 14 miles
21 down 125. Do I, could we have gotten through that?
22 I, I think so, I think we could have. I mean, I
23 can't -- it's very hard to say but we would have been

1 dealing with an integrity issue, we'd have been
2 dealing with again another performance issue. But
3 that's, that's what I think.

4 Q. And the falsification of agency records,
5 Colonel?

6 A. The, the detail voucher says, you know,
7 Claremont to Plaistow. You know, and the other thing
8 is this. But we have an obligation to these
9 companies. I mean, they're paying -- they paid for
10 Claremont to Plaistow. They're permitted. They're
11 required. So I mean, you know, we -- we've got an
12 obligation to them. We've got to finish these jobs.

13 Q. And what about the time record? Would David
14 Appleby have been entitled to payment at 11 o'clock
15 on Lawson?

16 A. No, no, because he was -- you've got to be,
17 he -- let me explain this. David could have, could
18 have left his house. He could have gone to
19 Claremont. He could have made that escort and he
20 could have driven back and as soon as he hit Ashland,
21 go 10-1 and as the Staff Sergeant said --

22 Q. Stop, what's 10-1?

23 A. 10-1 means unable for duty.

1 A. It was, yeah.

2 Q. And this was a 16-year Trooper. Was this an
3 easy decision for you, Colonel?

4 A. No. No, this isn't easy. And, and --

5 Q. Well, why?

6 A. Well, I'll tell you why, because, because
7 he's -- he's given a lot. I mean he's served and
8 he's served well. His whole, his whole life he's
9 done it and I know the reputation he has. I mean,
10 it's -- you know, he's got a good reputation. He's
11 a, he's a good worker, he's a high performer. I
12 would say he's an over-achiever. You know, he likes
13 to -- he's, and I tried -- I tried to protect him
14 from, from this in 2012. I was looking out in his
15 best interest. I, I know that. I know that. And do
16 you know what it does to the Division to, to lose
17 somebody of his, you know, his special units? His
18 contributions to peer-to-peer. There's nothing, you
19 know, words can't express, you know, what -- what he
20 and many others have done and you know, for me. You
21 know, it's hard. But at the end of the day, these
22 decisions are not easy. They're not taken lightly.
23 But I have to look at the overall Division. I have

1 for, I think you said seven or eight violations of
2 the detail policy? I think your direct testimony was
3 it was seven or eight violations?

4 A. Correct.

5 Q. Okay.

6 A. I think it's --

7 Q. Separate incidents, right?

8 A. Yeah, incidents, right.

9 Q. Yeah. And thereafter you also -- he had
10 voluntarily requested to be removed from the FTO and
11 the peer-to-peer but that was going to happen anyway.
12 But at some point in time he rehabilitated himself
13 and he got back all of the privileges of being the
14 FTO, being a peer-to-peer and having full access to
15 extra duty detail, correct?

16 A. He did.

17 Q. And you would agree with me, sir, wouldn't
18 you, and looking at it in fairness, discipline can
19 serve many functions? It can be punitive, it can
20 also be commendations and it can also be for
21 modifying behavior and having an individual modify
22 their behavior to accepted norms, correct?

23 A. Yes.

1 A. The second paragraph? Furthermore, and --

2 Q. No, just to yourself, sorry. You don't have
3 to read it out loud.

4 A. Oh, okay. Yeah.

5 Q. So if I might, sir, would that -- it seems
6 that the letter seems to represent that Dave's
7 telling you of primary importance he understands is
8 his patrol duties and his duties as a Trooper above
9 all the other ancillary things?

10 A. Correct.

11 Q. And the ancillary things being, if I might,
12 not ancillary but, you know, not --

13 A. Extra.

14 Q. Extra such as FTO, peer-to-peer, details,
15 etc., SWAT?

16 A. And, and --

17 Q. And SWAT.

18 A. Yeah, and if I can, those are -- those are
19 very, very laborious extra duties. There's a lot
20 there.

21 Q. I sense, sir. Now, one of the things that
22 you said, and sir, I paraphrase, I don't have every
23 transcript but it seemed to me that you had said,

1 look, the real big issue here is the integrity issue.
2 The other things we could probably move beyond but
3 it's the integrity issue that is really weighing on
4 you when you made your decision. Would that be
5 accurate?

6 A. Well, and the -- and the fact that the 2012,
7 but if you asked me what is the most serious issue
8 here is the integrity.

9 Q. Okay. And one of the things I thought you
10 said in your direct examination was look, this was
11 kind of a -- should have been a simple issue. He
12 should have said when I got to -- I got off of Exit
13 7, the detail, I left. And, and that was the end of
14 it and that probably would have solved or made a lot
15 of this unnecessary, correct?

16 A. Well, if that had been done we would have
17 been looking at performance.

18 Q. Okay. Sir, I'd like you to turn to tab 19.
19 And on tab 19, I'm going to go off the little pages
20 where it says page, page 9 of 43 or page -- okay,
21 because I don't have the Bates stamp but it's
22 paginated. This is 43 pages of a -- the June 22nd
23 interview, so and if you note, and I'd like you to go

1 Q. -- approved the issuance of that letter?

2 A. Correct.

3 Q. That was based on your opinion --

4 A. Correct.

5 Q. -- and the investigation that was done?

6 A. Yes, sir.

7 Q. Okay. Sir, you would -- you would also
8 agree that in your experience with the -- as a
9 Trooper going through the ranks and Troopers have
10 left escorts before, correct?

11 A. I, I don't -- I don't have any, any first-
12 hand knowledge. I heard that testimony so I'm going
13 to speak to that. It would depend why you left the
14 escort, what were the causes but I don't have any as
15 I sit here know that there's widespread people just
16 leaving an escort.

17 Q. Sure.

18 A. And, and if they did and there wasn't some
19 exigency or a competing arms, then they'd be subject
20 to, you know, a potential internal review.

21 Q. Okay.

22 A. You just don't leave. Could it have
23 happened? It may have happened but I'm -- I don't

1 also asking for a five-minute break.

2 CHAIRPERSON STEVENS: Sure.

3 MS. MODIGLIANI: Thanks.

4 UNIDENTIFIED MALE SPEAKER: We'll go off the
5 record.

6 (Off the record.)

7 CHAIRPERSON STEVENS: Redirect?

8 UNIDENTIFIED MALE SPEAKER: Back on the
9 record.

10 REDIRECT EXAMINATION

11 BY MS. MODIGLIANI:

12 Q. Colonel, you were pointed to the Appellant's
13 State Exhibit 4 which were the commendations letters?

14 A. Yes.

15 Q. As Colonel, have you seen these come in on
16 employees?

17 A. Yes.

18 Q. And do they come in often?

19 A. They do and we have a -- we have a lot of
20 great employees so I see a lot of them.

21 Q. Is this unusual for any other 16-year
22 Trooper?

23 A. I would, I would say that Trooper Appleby

1 was, I'd say he -- he got above average ones because
2 of all his extra duties, so yeah. I mean, I've got,
3 I've got Troopers that might get none, you know. No,
4 this is, it's quite impressive.

5 Q. Okay. And with regard to the Laurie
6 designation that Attorney Krupski had spoken to you
7 about, you had testified that there was, or he had
8 asked you about an opportunity to review that. What
9 is the pre-disciplinary meeting purpose for?

10 A. Well, the pre-disciplinary meeting would be
11 for me to present the facts and allow the, the
12 Trooper to offer their own evidence, contest it, just
13 to have a conversation and maybe, you know, speak up
14 and speak up for themselves if they chose.

15 Q. And if they were able to for example refute
16 the evidence that is the basis for the Laurie
17 designation, what would happen?

18 A. Well, the outcome might change. It's, it's
19 hard to say but that's the opportunity to do it. In
20 other words, you've got it wrong. That isn't true or
21 this isn't true.

22 Q. And he didn't show up?

23 A. He did not.