THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2017-0449

APPEAL OF NEW HAMPSHIRE DIVISION OF STATE POLICE

BRIEF FOR THE DIVISION OF STATE POLICE

RULE 10 APPEAL
FROM THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD

STATE OF NEW HAMPSHIRE
N.H. DIVISION OF STATE POLICE

GORDON J. MACDONALD
ATTORNEY GENERAL

Karen A. Schlitzer (Bar 15169)
Senior Assistant Attorney General
New Hampshire Department of Justice
33 Capitol Street
Concord, New Hampshire 03301-6397
(603) 271-3675

January 19, 2018

(15 minutes)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

QUESTION PRESENTED

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 the 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.

STATEMENT OF THE FACTS AND CASE

This is an appeal of a Personnel Appeals Board ("board") decision. Classified State employees are entitled to appeal disciplinary action against them to the board. This appeal pertains to State Trooper First Class David Appleby who was dismissed from the Division of State Police for violating personnel rules and Professional Standards of Conduct by endangering the life, health or safety of another, obstructing an internal investigation, and falsifying records. App. 9-10.[1]

Appleby's Prior Issues

In 2011, Appleby was issued a memo of counsel (which does not constitute discipline) for violating the extra-duty detail policy. App. 18 ¶ 38. He violated the Professional Standards of Conduct, Chapter 22-E, section 1.2(9) which states that, "Division members shall not schedule more than 16 hours on any day off or Annual Leave within any 'rolling' 24 hour period. Once a total of sixteen (16) hours have been scheduled there must be eight (8) consecutive hours off-duty." Id. A lieutenant met with Appleby to counsel him so he would have a better understanding of the policy. Id. The lieutenant believed Appleby understood and accepted the counsel. Id.

In late 2012, Appleby received a letter of warning for eight violations, including Obedience to Orders, Division Reports, Performance Expectations, and Extra-Duty Details. App. 18 ¶ 39. The least severe form of discipline (letter of warning) was based on Appleby's "commitment to the Division, personnel record, [his] honesty and [his] remorse." App. 19 ¶ 40. The letter of warning expressly advised Appleby that his conduct was "unacceptable and will not be tolerated in the future." Id. The Colonel believed that Appleby made mistakes due to working too much, including the extra-duty details. App. 18 ¶ 39. Appleby was suspended from

[1] "App." refers to the Appendix at the end of this brief.

the privilege of working extra-duty details. App. 4. He was removed from the Field Training Officer program and the peer-to-peer counseling program. App. 19 ¶ 41; App. 4. Appleby withdrew from his responsibilities as an Intoxilyzer Instructor, Troop Armorer, and Preliminary Breath Test Instructor. App. 19 ¶ 42. Appleby admitted that it was made clear to him that his primary function was his patrol functions. Id.

In 2013, Appleby's request to be reinstated to the Field Training Officer program was denied, as was his request to remove the extra-duty detail restriction of 20 hours per week. App. 19 ¶¶ 42, 43. Months later, in August 2013, his extra-duty detail restriction was lessened to allow him 25 hours per week. App. 20 ¶ 44.

In 2014, Appleby resumed his status as a Field Training Officer, and the restriction on extra-duty detail hours was removed. App. 20 ¶ 45. Beginning January 27, 2014, Appleby worked his regular duty schedule, served on the SWAT Team, acted as a Field Training Officer, and was a peer-to-peer counselor. App. 20 ¶ 46. The board found that between January 8 and December 22, 2014, in addition to Appleby's regular schedule "and his important and demanding assignments," he worked 765 hours of extra-duty details, which averaged 14.7 hours of extra-duty detail each week, excluding annual and sick time. Id.

Incident that Led to Appleby's Dismissal

On May 12, 2015, Appleby worked an extra-duty detail for Jewell Transport. App. 10 ¶ 6. He was to escort the hauling of a steel girder that was more than 86 feet long; including the length of the truck, the overall length was 110 feet. App. 11 ¶ 6. This load was scheduled to travel from Claremont, New Hampshire to the Massachusetts border in Plaistow. App. 10-11 ¶ 6. Jewell Transport was granted a permit by the New Hampshire Department of Transportation to haul a load in excess of legal limits on the condition that it had at least one State Police escort.

App. 23. The purpose of the escort is to control the movement of the oversized load, control surrounding traffic, and to protect the public sharing the same roadways. App. 29. The latter part of the scheduled travel route was Route 101 and Route 125, with the escort ending at the Massachusetts border. App. 12 ¶ 12.

Due to mechanical problems of the truck that arose that morning, the trip was delayed two hours, so it left at 8:30 a.m. instead of 6:30 a.m. App. 11 ¶¶ 7, 11. Appleby was nervous about the delay because of his impending (regular duty) work schedule. App. 11 ¶ 8. Appleby worked in Troop F, which is comprised of Coos and Grafton counties. App. 10 ¶ 3. He had agreed to modify his schedule in order to participate in a Phase II Oral Board for a probationary employee at 1300 hours at Troop F headquarters (in Twin Mountain). App. 13 ¶ 17; App. 23. Accordingly, he was required to be in Troop F territory by 1100 hours. App. 23.

Appleby abandoned the detail before it was complete. App. 16 ¶ 30. He did not disclose this to anyone at the time. App. 7-30. That violation was only exposed after a captain's review of extra-duty detail records. App. 12 ¶ 15. A captain oversees the Detail Desk to ensure the extra-duty detail policy is not violated. Id. Appleby's detail voucher indicated an end time of 1030 for the extra-duty detail and 1100 hours as the start time of his next regular duty shift in Troop F. Id. The captain did not believe that Appleby could drive from Plaistow to Troop F (Grafton County) in 30 minutes. Id. In fact, EZ Pass records established that Appleby drove (north) through the Hooksett tolls at 1100 hours, which is south of Troop F. App. 23.

During the Division's investigation into this matter, Appleby made statements that were inconsistent with each other, and which also conflicted with the escort records. App. 7. By way of brief example, Appleby said he arrived in Plaistow in his first interview. Id. In the follow up interview, however, he said that he was "heading to Plaistow" after taking exit 7 off Route 101.

App. 9. Ultimately, Appleby said that he thought Plaistow was where Epping actually is. Id. The Division concluded that Appleby was untruthful and that he obstructed the investigation. Id.

Appleby's Dismissal

Appleby was dismissed for having abandoned the extra-duty detail and his conduct during the investigation. Id. An employee may be dismissed for violating "a posted or published agency policy" if it warns that violating it may result in dismissal. N.H. Admin. Rules, Per 1002.08(b)(7). Appleby was dismissed for violating a number of Professional Standards of Conduct and personnel rules. In particular, he was dismissed on August 5, 2015 for:

1. Endangering the life, health or safety of another employee or individual served by the agency. Per 1002.08(b)(9).

2. Obstructing an internal investigation. Per 1002.08(b)(10).

3. Falsification of any agency records received, maintained or utilized by the agency. Per 1002.08(b)(12).

4. Violating Professional Standards of Conduct, Chapter 1 Rules and Regulations, Section 1.4.0 Obligations, Subsection 1.4.2 Patrol Availability: "No Division Member shall absent themselves from duty [or] patrol assignment...without permission of their Commanding Officer."

5. Violating Professional Standards of Conduct, Chapter 1 Rules and Regulations, Section 1.4.0 Obligations, Subsection 1.4.8 Integrity, in relevant part:
"No Division Member shall, under any circumstances, make any false official statement or intentional misrepresentation of facts."

6. Violating Professional Standards of Conduct, Chapter 22-E Extra Duty Details, Section 22-E.1.2(A) Procedures, Subsection (11):
"Employees shall not be permitted to travel to or from an Extra Duty Detail on scheduled duty time."

7. Violating Professional Standards of Conduct, Chapter 22-E Extra Duty Details, Section 22-E.1.2(A) Procedures, Subsection (17):
"When working an Extra Duty Detail, employees shall notify the dispatch center of the troop where the detail is being performed of the following: (a) time of arrival and departure from the detail location, (b) exact location, (c) the nature of the detail and (d) the name of the contractor (if applicable) for

which the detail is being performed."

App. 10-11. He appealed the dismissal to the board. App. 7.

The Board Hearing & Order

A year later, in August 2016, the board held a three day hearing. App. 7. Although there was much confusion surrounding the process, it appears that the board intended to bifurcate the hearing, first, to determine whether the appeal should be granted (i.e., the three day hearing), and, second, to determine what the modified discipline should be. App. 30, 62-63.

After the three day hearing, the board issued a decision on January 11, 2017, finding that Appleby had committed four different violations when he prematurely abandoned the escort on May 12, 2015. App. 23-24, 29. First, Appleby traveled from an extra-duty detail while on regular duty time. App. 23. Therefore, the board found that he violated subsection 11 of the extra-duty detail policy, a Professional Standard of Conduct, stating that, "Employees shall not be permitted to travel to or from an Extra Duty Detail on scheduled duty time." Id. Second, Appleby was unavailable for duty because he was traveling back from the extra-duty detail. App. 24. As such, he violated Professional Standard of Conduct, Chapter 1 Section 1.4.0 Subsection 1.4.2 (Patrol Availability) which states that, "No Division Member shall absent themselves from duty...[or] patrol assignment...without permission of their Commanding Officer." Id. Third, the board found that, in light of Appleby's admission of it, he violated subsection 17 of the Extra Duty Detail Policy which states:

> When working an Extra Duty Detail, employees shall notify the dispatch center of the troop where the detail is being performed of the following: (a) Time of arrival and departure from the detail location, (b) Exact location of the detail, (c) The nature of the detail and (d) the name of the contractor (if applicable) for which the detail is being performed.

App. 23. Appleby committed this violation, in part, by virtue of failing to change channels when

going from one troop to another during the escort. App. 14 ¶ 21. Appleby explained at the hearing that the peer-to-peer phone calls had distracted him on the way to the detail destination, and he had been distracted on the way to Troop F, because he was nervous about being late for the Oral Board. App. 23. He acknowledged that he should have interrupted his phone calls to communicate with dispatch. Id. Notwithstanding that distraction and nervousness, during the escort, Appleby texted the Detail Desk asking for a detail for one of his days off. App. 12 ¶ 13. Finally, Appleby admitted that he did not complete the escort. App. 29. The board found that Appleby's "actions could have endangered the life, health or safety of the Jewell Transport employees as well as the general public." Id.

Despite agreeing with the Division that Appleby had committed these violations, the board nevertheless voted to "GRANT the appeal and found that the decision to dismiss the Appellant was unjust in light of the facts in evidence." App. 30 (emphasis in original). The board ordered the Division "to remove letters from the Appellant's file referring to the intent to dismiss and the notice of dismissal." Id. The board indicated it would hold a separate hearing at the request of the parties so the parties could "argue damages." Id. The Division did not know what that meant since the order did not reinstate Appleby to his position. App. 31 ¶ 3, 43 ¶ 12.

The Division filed a Motion for Rehearing/Reconsideration. App. 31-47. Relevant to this appeal, the Division pointed out that the board did not reinstate Appleby and, as the sole remedy, directed the Division to remove letters from Appleby's file referring to the intent to dismiss and the notice of dismissal. App. 31¶ 3; App. 46 ¶ 17. The Division explained that bifurcating the hearing on back pay would only be relevant if Appleby were reinstated. App. 43 ¶¶ 11-12. Given that the board did not reinstate Appleby, the board had no authority to award loss of pay, so a damages hearing was unnecessary and outside the board's jurisdiction. App. 43

¶ 12. As relief, the motion sought a rehearing, or for the termination letter to be upheld. App. 46 ¶¶ A-C.

Appleby objected. App. 48-59. He acknowledged that the January order did not reinstate Appleby, but claimed that damages and liability were to be bifurcated, and "Reinstatement is part of the damages." App. 56 ¶ 21. Appleby further argued that "the [board] has rescinded the termination of this matter and found it unjust in light of the evidence. As such, a damage hearing should proceed. ... [R]einstatement materially follows as damages would not be provided if reinstatement was [sic] not considered." Id. He appeared to be arguing that whatever the discipline was, it would be decided at the damages hearing. App. 56-57 ¶¶ 21-23. Appleby further argued that the board "may modify this discipline to a suspension without pay...or written warning" which would be handled at the damages hearing. App. 56-57 ¶ 23.

On March 8, 2017, the board issued an order finding that the arguments in the Division's motion were the same as raised previously in the hearing, that no evidence or argument showed that the board's decision was unlawful or unreasonable, or that the appeal should be reheard. App. 61. The board further stated that it had agreed, at the parties' request before the hearing, to bifurcate the hearing if Appleby prevailed "so that each party could argue damages/sanctions." Id. The introduction of "sanctions" with regard to a "damages" hearing was additionally confusing to the Division, which interpreted the board's January order as not having reinstated Appleby to his position. App. 68 ¶ 8. The order indicated that a "damages" hearing would be scheduled, but in the meantime, the parties should work together "to resolve these issues" without the board. App. 61. The board held a prehearing conference on April 19, 2017, at which it remained clear that the parties held different interpretations of the board's January order. App. 62-63. Subsequently, the board issued an order on May 8, 2017, explaining that:

> 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 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.

App. 63. The board considered restricting how many extra-duty details Appleby could do, but decided that decision should be made by the appointing authority. App. 64.

The Division moved for rehearing/reconsideration of the Board's May 8, 2017 Clarifying Order, arguing that the board had not reinstated Appleby in its first two orders (App. 66 ¶ 3; 68 ¶ 7) and that the sole remedy ordered was for the Division to remove the letters referring to the intent to dismiss and the notice of dismissal from Appleby's file (App. 66 ¶ 3). The Division further argued that the May 8 clarifying order did not explain how the board concluded that a 60 work day suspension was appropriate in place of a termination. App. 73-74 ¶¶ 17-18. The Division argued that the parties agreed in their pleadings that the January order did not reinstate Appleby, that the board did not clarify its interpretation in the March order, so the substance of the January order remained unchanged, which was that Appleby was not reinstated, but the board would be holding a damages hearing. App. 68 ¶ 7.

Appleby filed an objection. App. 76-82. The Board denied the Division's Motion for Rehearing/Reconsideration of the Board's May 8, 2017 Clarifying Order. App. 85-77. This appeal followed.

STANDARD OF REVIEW

This Court will overturn a personnel appeals board decision if there is an error of law, or "by a clear preponderance of the evidence" the order is "unjust or unreasonable." RSA 541:13; Appeal of Boulay, 142 N.H. 626, 627-28 (1998). This Court does not review the order to "determine whether [it] would have found differently than did the board, or to reweigh the evidence, but rather to determine whether the findings are supported by competent evidence in the record." Appeal of Lalime, 141 N.H. 534, 539 (1996); Appeal of Armaganian, 147 N.H. 158, 167-68 (2001). The board's factual findings are "deemed prima facie lawful and reasonable[,]" but "its interpretations of statutes and administrative rules...are reviewed de novo." Appeal of Alexander, 163 N.H. 397, 401 (2012).

SUMMARY OF ARGUMENT

The board's order should be set aside because its reinstatement of Appleby was unjust and unreasonable. The board found that Appleby's conduct violated the personnel rule which allows for termination for endangering the life, health or safety of another person served by the agency. And, the board found that Appleby committed three violations of the Professional Standards of Conduct. Inexplicably, however, the board chose to forego disciplining Appleby for two of those violations, despite the fact that they were violations of the extra-duty detail policy, a policy for which he had been disciplined for violating previously.

While RSA 21-I:58 allows the board to reinstate an employee or modify an appointing authority's order, this statute does not grant unlimited authority to the board. To the contrary, the board may not simply substitute its own judgment carte blanche over the appointing authority's. In deciding whether the disciplinary action was unjust in light of the facts in evidence, the board must consider any factors that the appointing authority considered. This is clear from reading the administrative rules together with RSA 21-I:58, I. In particular, the personnel rules expressly allow the appointing authority to consider a host of factors in deciding what discipline to issue. To find that the board need not consider the factors that the appointing authority did would render the personnel rules meaningless by virtue of an appeal.

The Division considered important factors in deciding to dismiss Appleby, but the board ignored them. The board overlooked that the wrongdoing at issue debases the State Police's core functions. A law enforcement officer's duty is to protect the public. Appleby shirked that obligation. His bad judgment reflected poorly on the Division and the entire law enforcement profession. As such, it was unjust and unreasonable for the board to overturn the termination.

ARGUMENT

I. Where the Board Expressly Found that Appleby Committed a Terminable Offense, it was Unreasonable and Unjust for the Board to Overturn the Termination.

The order should be reversed because the board's reinstatement of Appleby was unjust and unreasonable. In its January decision, the board found that Appleby committed three violations of the Professional Standards of Conduct, two of which constituted violations of the extra-duty detail policy—a policy he had previously been disciplined for violating. App. 23, 4. Of even greater concern was the fact that Appleby abandoned his escort of the oversized Jewell Transport truck well before it reached the Massachusetts border. App. 29. The board specifically found that Appleby's "actions could have endangered the life, health or safety of the Jewell Transport employees as well as the general public." Id. Such conduct is cause for termination under the personnel rules.

In particular, New Hampshire Administrative Rules, Per 1002.08 (Dismissal) allows an appointing authority to dismiss employees, without prior warning, for offenses such as, but not necessarily limited, to those enumerated in the rule. N.H. Admin. Rules, Per 1002.08(b). One such offense is "[e]ndangering the life, health or safety of another employee or individual served by the agency[.]" N.H. Admin. Rules, Per 1002.08(b)(9). The board expressly found that Appleby committed such an offense by prematurely abandoning the escort. App. 22, 29.

A. The board's authority to modify discipline imposed by the appointing authority is not boundless.

A permanent employee affected by the "application of the personnel rules," subject to irrelevant exceptions, may appeal the action to the board. RSA 21-I:58, I; RSA 21-I:46, I. The board will determine if:

(1) The disciplinary action was unlawful;
(2) The appointing authority violated the rules of the division of personnel by

imposing the disciplinary action under appeal;
(3) The disciplinary action was unwarranted by the alleged conduct or failure to meet the work standard in light of the facts in evidence; or
(4) The disciplinary action was unjust in light of the facts in evidence.

N.H. Admin. Rules, Per-A 207.12(b) (emphasis added). The first two rules above require the board to determine if there was a violation of law. If there is a violation, then "the employee shall be reinstated to the employee's former position or a position of like seniority, status, and pay." RSA 21-I:58, I (including a finding that action was taken for a discriminatory reason, such as on the basis of age, sex, or race). The board did not find that the disciplinary action was unlawful, App. 7-30, 62-64, so the first two rules are not invoked here.

The last two rules above require a determination as to whether the disciplinary action was unwarranted or unjust. See N.H. Admin. Rules, Per-A 207.12(b)(3) and (4). Here, the board found that "the decision to dismiss" Appleby "was unjust in light of the facts in evidence." App. 30. By statute, "[i]n 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." RSA 21-I:58, I. This statute, however, does not allow the board to simply substitute its own judgment for that of the appointing authority, particularly when the appointing authority has properly followed the personnel rules, and the board found that the employee committed a terminable offense.

B. In deciding whether discipline is unjust in light of the facts in evidence, the board must consider the prior disciplinary history and any other factors that the appointing authority considered, as envisioned by the personnel rules.

While the board is authorized to modify an order of the appointing authority, or make an order "as it may deem just[,]" RSA 21-I:58, I, the board does not have carte blanche. Rather, the board must consider the factors sanctioned by the personnel rules, and in light of those, determine whether the discipline imposed by the appointing authority is unjust. The board may

not substitute its judgment in place of the appointing authority's merely at the board's preference. This is clear from reading the statutory and regulatory schemes together.

This Court is the final arbiter of the interpretation of a statute. Holt v. Keer, 167 N.H. 232, 239 (2015). Under the rules of statutory construction, statutes are interpreted according to the plain meaning of their words and in accordance with the overall intent of their statutory scheme. Id. Moreover, statutes are interpreted in a manner so as to avoid an unjust or absurd result. Id. Additionally, statutes will not be interpreted in a manner that renders them meaningless. Appeal of Barry, 142 N.H. 284, 287 (1997). The same rules of statutory construction are used when interpreting administrative rules. Vector Mktg. Corp. v. N.H. Dep't of Revenue Admin., 156 N.H. 781, 783 (2008).

To start, the disciplinary process begins when the appointing authority takes action against the employee. N.H. Admin. Rules, Part Per 1002. In so doing, the appointing authority must comply with the personnel rules. Id. The purpose of the personnel rules is to "implement RSA 21-I:42-58 and to establish a statewide system of personnel administration based on ... sound management techniques, ... in such a manner as to ensure ... a state system of personnel administration based on ... accepted methods for the ... discipline of classified state employees ... ." N.H. Admin. Rules, Per 101.01(a).

Turning to the personnel rules, Administrative Rule Per 1002.08 (Dismissal) allows an appointing authority to dismiss employees without prior warning for "[e]ndangering the life, health or safety of another employee or individual served by the agency[.]" N.H. Admin. Rules, Per 1002.08(b)(9). In determining the appropriate discipline, an appointing authority may consider factors including, but not limited to, "[t]he nature and severity of the conduct or offense in relation to the employee's position classification, responsibilities, and accountabilities, and the

functions of the agency[.]" N.H. Admin. Rules, Per 1002.03(b). The Division gave due consideration to this latter rule, but the board did not.

As for the nature and the severity of the conduct or offense, abandoning the kind of escort that Appleby did is a terminable offense because, as the board found, it "could have endangered the life, health or safety of the Jewell Transport employees as well as the general public." App. 63. The board overlooked the critical functions of the Division of State Police, the employing agency, especially as those functions relate to Appleby's wrongdoing. The police are "trusted with one of the most basic and necessary functions of civilized society, securing and preserving public safety." Everitt v. GE, 156 N.H. 202, 217 (2007). Appleby allowed a load that exceeded legal limits and was allowed to be hauled only with a State Police escort, to continue with no police presence. App. 29; App. 3. It is undeniable that "a police officer must be above suspicion of violation of the laws he is sworn to enforce[.]" Appeal of Waterman, 154 N.H. 437, 440 (2006) (citation omitted). The Division of State Police is the premier law enforcement agency in the State. As such, its members serve as an example of its high standards, and they are therefore, expected to meet them. Appleby's conduct belied "the most basic and necessary" standard of preserving public safety. His "poor decision making not only compromised public safety" but he "also placed the Division at a tremendous risk of civil liability if an accident had occurred with the oversized vehicle." App. 3. It is axiomatic that the police should symbolize safety and protection.

Moreover, Appleby's conduct echoes his judgment. The Division found that Appleby exercised "very poor judgment" by abandoning the escort and allowing it to travel on the public roads without the police. App. 3. It cannot be overstated that the State Police, like any law enforcement agency, must demonstrate good judgment. As widely recognized by courts, the

police are called upon to respond and render aid in a variety of situations, and they must use their discretion to do their job. A police officer "must maintain the public trust." Appeal of Waterman, 154 N.H. at 440. Appleby's conduct during the incident reflected negatively upon his character, "the law enforcement profession, and the Division of State Police." App. 4. It is critical to have public trust, or there are grave consequences for the Division, the public, and law enforcement in general. Appleby's poor judgment and disregard for safety denigrate what are core values of law enforcement, and especially the Division of State Police.

If a catastrophic incident had occurred as a result of Appleby abandoning the detail, there would be no question that his dismissal should be upheld. It would be unreasonable to require a catastrophic event to occur in order for discipline to be upheld when it pertains to a State police officer creating a hazard to public safety. Neither the Division, nor the public, should have to assume such a risk.

In the circumstances of this case, the board's substituted discipline is unreasonable and unjust because the board failed to distinguish the repetitive nature of Appleby's violations of the extra-duty detail policy. In that vein, the board found that Appleby committed two violations of the extra-duty detail policy in the current incident, but inexplicably gave no discipline whatsoever for them. Compare App. at 23 (finding violations) with App. 63 (imposing no discipline for those violations). The personnel rules permit the appointing authority to consider "[t]he employee's past record of performance and discipline, including whether or not the employee has been disciplined in the past for the same or a similar offense." N.H. Admin. Rules, Per 1002.03(c). The Division gave due consideration to this latter rule, but the board did not. The board's failure to do so, in the circumstances of this case, result in an unjust and unreasonable decision by the board.

The Division considered Appleby's 16 years with the Division, as well as the fact that this was not the first time he faced discipline for similar infractions. App at 4. Appleby's prior history with respect to the extra-duty detail policy is an aggravating factor. He violated the extra duty detail policy before albeit not the same subsections. See supra at 2. In 2012, he was issued a letter of warning for eight violations, including extra-duty details. App. 18 ¶ 39. One of the reasons the least severe form of discipline was chosen then, was because of Appleby's personnel record. App. 19 ¶ 40. The letter of warning nevertheless advised him that his conduct was "unacceptable and will not be tolerated in the future." Id. Appleby was reminded that if he failed to change his behavior, he "would be subject to additional disciplinary action, up to and including dismissal. It is apparent that you did not take your former warning seriously[.]" App. 4. The record shows that he, indeed, did not take his former warning seriously.

To the contrary, in 2015, Appleby violated the extra-duty detail policy, again. This, despite the prior engagement by the appointing authority to help Appleby achieve success after his last infraction. See supra at 2-3 (detailing responsibilities removed from Appleby and gradual return of some). The board found it noteworthy that in 2014, he worked 765 hours of extra duty details, which averaged 14.7 hours of extra-duty detail each week, excluding annual and sick time. App. 20 ¶ 46. The board's decision to overturn the termination under those circumstances is unreasonable and unjust. Its findings about the high number of extra duty detail hours reflect an officer whose focus is on trying to maximize the number of detail hours, rather than on the core functions of his job. Not only did he fail to correct his conduct and learn from the prior discipline, but his error in 2015 had the exacerbating components of danger to the public and exposing the Division to potential civil liability. App. at 3.

After discipline is issued, an aggrieved permanent employee may appeal the discipline to

the board. RSA 21-I:58, I; RSA 21-I:46, I. As noted, the 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." RSA 21-I:58, I. As shown above, however, the factors that an appointing authority has considered must also be considered by the board when deciding whether to reinstate an employee or modify the appointing authority's order. Indeed, the appointing authority must explain the basis for its discipline at the time of issuing it. See, e.g., N.H. Admin. Rules, Per. 1002.04(c)(1); id. 1002.08(d) (requiring appointing authority to offer to meet with the employee to discuss the evidence it believes supports its decision to dismiss).

If the board were not required to consider the reason for the appointing authority's decision, then the personnel rules would be rendered meaningless by virtue of an appeal to the board. Statutes and rules will not be interpreted in a manner that renders them meaningless. Appeal of Barry, 142 N.H. at 287; Vector Mktg., 156 N.H. at 783.

Additionally, if the board were not required to consider the reason for the appointing authority's decision, then the appeal process would lead to an unjust and absurd result. Statutes and rules will not be interpreted in a manner that leads to an unjust or absurd result. Holt v. Keer, 167 N.H. at 239; Vector Mktg., 156 N.H. at 783. The process would result in a scheme that would eviscerate the discretion and authority of the appointing authority granted by the rules. See N.H. Admin. Rules, Part Per 1002.

If the board could overturn an appointing authority's decision simply because the board had a difference of opinion, then the State's disciplinary system would be based on the whimsy of the board, not on compliance with the standards set forth in the personnel rules. Statutes and rules are interpreted in accordance with the intent of their overall scheme. Holt v. Keer, 167 N.H. at 239 (relating to statutes); Vector Mktg., 156 N.H. at 783 (relating to administrative

rules). The rules serve to establish a system based on "sound management techniques" to ensure "a state system of personnel administration based on ... accepted methods for the ... discipline" of classified employees. N.H. Admin. Rules, Per 101.01. The factors considered by the appointing authority are one component of the "management techniques" of an appointing authority in issuing discipline. Failing to consider such factors on appeal would result in a system that is arbitrary and capricious. The process would provide no guidance or predictability for discipline for either the employer or the employee.

In the instant case, the board failed to consider the appointing authority's reasoning pursuant to the personnel rules, and instead substituted its own judgment without explaining why the Division's dismissal decision was unjust. Consequently, the board's decision to reinstate Appleby should be set aside.

CONCLUSION

The Division requests that this honorable Court set aside the board's order because it is unjust and unreasonable.

ORAL ARGUMENT

The Division requests 15 minutes of argument to be presented by Senior Assistant Attorney General Karen Schlitzer.

Respectfully submitted,

STATE OF NEW HAMPSHIRE
N.H. DIVISION OF STATE POLICE

By its attorneys,

GORDON J. MACDONALD
ATTORNEY GENERAL

January 19, 2018

Karen A. Schlitzer (Bar 15169)
Senior Assistant Attorney General
New Hampshire Department of Justice
33 Capitol Street
Concord, New Hampshire 03301-6397
(603) 271-3675

Certification

I hereby certify that two copies of the foregoing were sent this date via U.S. mail, postage prepaid, to:

John S. Krupski, Esquire
Milner & Krupski, PLLC
109 North Street, Suite 9
Concord, NH 03301

January 19, 2018

Karen A. Schlitzer

1923785

APPENDIX

TABLE OF CONTENTS

STATE EXHIBIT 5

State of New Hampshire

Inter-Department Communication

DATE August 5, 2015

FROM Colonel Robert L. Quinn AT (OFFICE) Division of State Police

SUBJECT Disciplinary Action: Dismissal from State Service

TO TFC. David Appleby

Per 1002.08(b) the Administrative Rules of the Division of Personnel, an appointing authority may dismiss an employee without prior warning for offenses such as, but not necessarily limited to, the following: Per 1002.08(b)(7) for "violation of a posted or published agency policy or procedure, the text of which warns that violation of same may result in dismissal", in this case Professional Standards of Conduct; Chapter 1 Rules and Regulations; Section 1.4.0 Obligations, Sub-section 1.4.8 Integrity which states in part, "No Division Member shall, under any circumstances, make any false official statement or intentional misrepresentation of facts." Professional Standards of Conduct; Section 1.4.0 Obligations, Sub-section 1.4.1 Patrol Availability which states "No Division Member shall absent themselves from duty, patrol assignment, or leave the state on police business without permission of their commanding Officer"; Chapter 22-E Extra Duty Details; Section 22-E.1.2(A) Procedures, Sub-section (11) which states, "Employees shall not be permitted to travel to or from an Extra Duty Detail on scheduled duty time." And Professional Standards of Conduct; Chapter 22-E Extra Duty Details; Section 22-E.1.2(A) Procedures, Sub-section (17) which states, "When working an Extra Duty Detail, employees shall notify the dispatch center of the troop where the detail is being performed of the following: (a) time of arrival and departure from the detail location, (b) exact location, (c) the nature of the detail and (d) the name of the contractor (if applicable) for which the detail is being performed."; 1002.08(b)(9) "Endangering the life, health or safety of another employee or individual served by the agency"; Per 1002.08(b)(10) "Obstructing an internal investigation"; and, Per 1002.08(b)(12) "Falsification of any agency records received, maintained or utilized by the agency".

The relevant facts are as follows:

On May 12, 2015 you worked an extra duty escort for Jewell Transport. The escort traveled from Claremont to Plaistow through multiple Troop areas. Records indicate that you failed to sign 10-1 with your escort in addition to not signing over to the different Troop areas in which you traveled through. Records also indicate that you began your duty shift at 1100 hours, however you signed on with Troop F from headquarters at 1130 hours giving the appearance that you traveled back from your escort while on duty.

On June 9, 2015 you were interviewed by Ssgt. Terhune. During the course of the interview you informed Ssgt. Terhune that the escort was approximately 2 ½ hours delayed from its originally scheduled departure time of 0630 from Claremont. From this time it should have been noted and questioned how an escort leaving Claremont at approximately 0900 hours could arrive at its destination in Plaistow at 1030 as suggested on your detail voucher.

During the interview, you were questioned about your lack of radio transmissions which is a violation of the Detail Policy. You attributed it to a peer to peer call that you were on and that it lasted from "Lebanon until just before arriving in Plaistow."

Ssgt. Terhune concluded in his investigation that you were clearly in violation of the detail policy in that you failed to notify dispatch of where the escort was being performed, your time of arrival and departure from the detail, the nature of the detail, and that you failed repeatedly to utilize the radio as you changed frequencies from Troop to Troop.

Ssgt. Terhune further suggested in his conclusion that your duty schedule on May 12, 2015 was "flexible" in order to accommodate a Probationary Trooper Phase II oral board to be conducted at Troop F at 1300. He and Lt. Landry were not concerned with the hours you chose to work on May 12, 2015 or that you be in Troop F at the start of your duty shift, rather only that you be at Troop F at 1300.

As a result of your failure to document your times and locations and the obvious discrepancies with times that you did notate, EZ Pass records were obtained and it was determined that on May 12, 2015 you passed through the Hooksett Toll southbound at 1011 hours and returned through the Hooksett Toll northbound at 1100 hours.

On June 19, 2015 at 1445 hours, Capt. Gary Wood spoke with the operator of the vehicle that you escorted on May 12, 2015. Adam Jewell of Jewell Transport informed Capt. Wood that you told him that you had obligations in Twin Mountain and you were nervous about the escort running late. The piston on the trailer broke in the yard and the escort did not get started until 0800-0830. Without any warning that you were abandoning the escort, you turned around at exit 7. Jewell stated that he turned right at the bottom of the ramp and that you turned left. Jewell recalled saying to himself, "I guess he's done for the day".

On June 22, 2015 at approximately 1105 Capt. Gary Wood and Lt. Gilbert, conducted a follow up interview with you. The interview was conducted at headquarters in the operations conference room. The interview was audio recorded in its entirety and you were advised of your Garrity Rights. You were further afforded the opportunity to seek union representation, to which you declined.

You were asked to detail the route of travel of the escort with times, to the best of your ability. You explained that the escort was running approximately 2 hours late. The route of travel was route 12a to Interstate 89, Interstate 89 south to Interstate 93, Interstate 93 south to Route 101 east. You stated the escort then turned right at exit 7 "to Plaistow." Capt. Wood asked you "Is that where you went?" You responded "Well that's where it went". "I stopped traffic, made a right turn heading to Plaistow." "They're picked up by Mass I assume." "I stayed behind the escort and shortly thereafter they waved me off. "They waved me off a couple minutes south on route 125." 'I turned around the first opportunity I had after they waved me off. "I thought as soon as I turned right on 125, I was in Plaistow."

You acknowledged that you were well aware the escort was supposed to go to the Massachusetts state line. Throughout your interview with Lt. Gilbert, you maintained that you traveled "two to three miles" down 125 into Plaistow. You insisted that your belief was that the Massachusetts border was close. You also indicated that when you turned right onto Rte. 125, you thought that was Plaistow when in fact you were in Epping, approximately half hour from Plaistow. You attempted to attribute your misrepresentations to your unfamiliarity with the area. However, you further acknowledged you had conducted this exact escort in the past and that you had conducted over 100 escorts. The Division's records reveal that you have conducted this exact escort three times in the six months prior to this incident.

You were given numerous opportunities to clarify where you discontinued the escort. You maintained over and over again that you traveled 2-3 miles south on route 125 from route 101 until you were "waved off."

You were confronted with EZ Pass records and informed that Capt. Wood had spoken with the driver of the escort vehicle. Capt. Wood explained that the truck driver had a clear recollection that at the end of the exit 7 ramp he turned right and you turned left without any warning and abandoned the escort.

Upon being confronted with evidence indicating you turned around at exit 7 and didn't travel any distance on Route 125, you slowly began to alter your statement by saying that 2-3 miles was "an over exaggeration." While still not explaining where you turned around, Lt. Gilbert explained to you that the evidence indicates you abandoned the escort at the bottom of the Exit 7 off ramp and then proceeded to head west on Route 101 and that you never traveled south on Route 125. You eventually conceded that you did in fact turn around at Route 101 and 125. In doing so, you abandoned a permittee who was granted a DoT permit to move a load in excess of legal limits over the roads of New Hampshire on the condition that it had one state police escort. State Police escorts are required to control the movement of oversized vehicles and to safeguard the safety of the motoring public sharing the road with the oversized vehicle. You exhibited very poor judgment in abandoning the escort and allowing it to travel over New Hampshire roads without police presence. Your poor decision making not only compromised public safety and violated standards of performance and conduct of your job as a New Hampshire State Police Trooper, but you also placed the Division at a tremendous risk of civil liability if an accident had occurred with the oversized vehicle.

Your poor judgment did not end there. You recorded on your detail voucher that the detail ended at 10:30 (presumably, in Plaistow). However, the EZ Pass records indicate that you went southbound at the Hooksett tolls at 10:11. The distance from the Hooksett tolls to exit 7 off Rte. 101 is approximately 27 miles. By your Detail Voucher, you place yourself in Plaistow at 10:30, which means you would have been traveling southbound with the escort at a rate of speed in excess of 85 mph. The evidence points to the fact that you did not travel to Plaistow, you turned around at exit 7 more likely at around 10:40 a.m. and headed back north towards Troop F. The EZ pass records indicate you traveled through the Hooksett tolls northbound at 11:00 a.m. which means you were traveling at an excessive speed to make it through the toll 20 minutes after turning around in Epping. You also recorded on your time card and Detail Voucher that you were "on duty" at 11:00 a.m. However, at 11:00 a.m. you were still traveling from the detail and you were miles from your patrol in Troop F. You are well aware that the Division does not pay employees to travel to and from details. By knowingly recording your start time as 11:00 a.m. on May 12, you willfully falsified your time card in order to cover up the fact that you were still traveling from the detail and you were not available for duty, in violation of policy. Knowing that your supervisors had already provided you with flexibility with regards to your duty times for that day, compounded by the fact that you were aware they were only concerned that you arrive at Troop F for 1:00 p.m., I am unable to reconcile your poor judgment in the face of the circumstances you were dealing with.

I am equally troubled by your inability to be forthcoming and candid throughout this internal investigation, causing me to have serious concerns about the truthfulness of the statements you made in connection with this event.

Per 1002.08(d) requires the appointing authority to document in writing the nature and extent of the offense, offer to meet with the employee, and offer the employee an opportunity to refute the evidence. A meeting was scheduled on August 5, 2015 at 9:00 a.m. in my office where the findings and recommendations of internal investigation PSU-15-042 were to be presented. Through your New Hampshire Troopers' Association Representative, Sergeant Marc Beaudoin, you refused to attend this meeting. Pursuant to Per 1002.08(d)(2)a. and b., an employee's failure to respond, or refusal to meet with

the appointing authority shall not bar the appointing authority from dismissing an employee pursuant to Per 1002.

As a result, I have carefully considered all the evidence before me, including the fact that you have been with the Division sixteen years. I have also considered the fact that this is not the first time you have been disciplined for similar infractions. On October 1, 2012 you were disciplined for violating the following:

Professional Standards of Conduct, Chapter 1 Rules and Regulations, Section 1.3.0 Obedience
Sub-section 1.3.3 Obedience to Orders
Section 1.4.0 Obligations, Sub-section 1.4.13 Division Reports
Section 1.5.0 Performance Expectations
Chapter 220E Extra Duty Details

As you may recall, at that time I chose to administer the least severe form of discipline based upon mitigating circumstances including your perceived remorse, your commitment to correct the deficiencies, and your personnel record at that time. You were provided a corrective action plan that required you to properly familiarize yourself with all the pertinent provisions of the Professional Standards of Conduct manual. You were also ordered to make submissions of your time card on a daily basis in order to insure that your reporting was accurate. You were removed from the extra duty detail availability list and your privilege to work these details was suspended. You were also removed from the FTO Program and Peer to Peer Program. Additionally, you were placed on notice that your related conduct was unacceptable and would not be tolerated in the future. You were reminded should you fail to take corrective action immediately and modify your conduct accordingly, you would be subject to additional disciplinary action, up to and including dismissal. It is apparent that you did not take your former warning seriously and also, I am disappointed by your refusal to accept responsibility for your conduct during this investigation.

Your actions constituted willful violations of Division policies and personnel rules. It is also clear to me that you were not truthful during this internal administrative investigation and your integrity has been compromised. As a law enforcement officer, your accountabilities include prosecuting cases and serving as witness in court or administrative proceedings. Your lack of honesty at the outset of this investigation was not only obstructive, but also placed your veracity into question and would affect your credibility as a witness in any future court or administrative proceeding. The most important trait a State Trooper must have is his or her credibility and integrity. Your lack of honesty violates the Code of Ethics and Vision Statement of the New Hampshire State Police and would necessitate disclosure under *State v. Laurie* and RSA 105:13-b, which could detrimentally affect your ability to prosecute criminal cases.

After careful consideration of all the relevant facts, I have concluded there are sufficient grounds to sustain the disciplinary charges set forth below. Your personal conduct during the incident on May 12, 2015, your misrepresentations, including your falsification of Division records and lack of truthfulness during the subsequent internal investigation, reflects negatively upon your character, the law enforcement profession, and the Division of State Police.

I conclude that your actions violated the following rules and policies:

Administrative Rules of the Division of Personnel, Per 1002.08 Dismissal:

Per 1002.08(b): An appointing authority may dismiss an employee without prior warning for offenses such, but not limited to, the following: 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.

Per 1002.08(b)(9) "Endangering the life, health or safety of another employee or individual served by the agency"

Per 1002.08(b)(10) "Obstructing an internal investigation"; and

Per 1002.08(b)(12) "Falsification of any agency records received, maintained or utilized by the agency".

Professional Standards of Conduct, Chapter 1 Rules and Regulations:

Section 1.4.0 Obligations, Sub-section 1.4.2 Patrol Availability: No Division Member shall absent themselves from duty, patrol assignment, or leave the state on police business without permission of their Commanding Officer.

Section 1.4.0 Obligations, Sub-section 1.4.8 Integrity: No Division Member shall, under any circumstances, make any false official statement or intentional misrepresentation of facts. Any Division Member who becomes aware that another Division Member has made a false statement or intentional misrepresentation of facts shall, without delay, inform his or her Commanding Officer. Any Division Member, who becomes aware that any person has provided false information to a superior, shall inform the superior as soon as possible.

Professional Standards of Conduct, Chapter 22-E Extra Duty Details:

Section 22-E.1.2(A) Procedures, Sub-section (11): Employees shall not be permitted to travel to or from an Extra Duty Detail on scheduled duty time.

Section 22-E.1.2(A) Procedures, Sub-section (17): When working an Extra Duty Detail, employees shall notify the dispatch center of the troop where the detail is being performed of the following: (a) time of arrival and departure from the detail location, (b) exact location, (c) the nature of the detail and (d) the name of the contractor (if applicable) for which the detail is being performed.

Based upon the foregoing, you are hereby DISMISSED FROM STATE SERVICE EFFECTIVE IMMEDIATELY.

In accordance with Per 1002.08 (e)(2), you may appeal this dismissal to the Personnel Appeals Board within fifteen calendar days of the date of this letter if you can allege facts sufficient on their face to support an allegation that your dismissal was arbitrary, illegal, capricious, or made in bad faith. To be considered, your appeal must be made in writing and must be received by the Appeals Board at 25 Capitol Street, Concord, New Hampshire, 03301, within fifteen calendar days of the date of this letter. Copies of the Board's procedural rules are available on-line at http://www.gencourt.state.nh.us/rules/per-a.html, or in hard copy through the Division of Personnel.

Please sign and date this letter in the space indicated below. As noted below, copies of this letter will be placed on file here in the agency and in your personnel file at the Division of Personnel. Pursuant to Per

State of New Hampshire

Inter-Department Communication

1002.08 (f) of the Rules of the Division of Personnel, "An appeal filed under the provisions of RSA 21-I:58 shall not stay the dismissal decision".

Respectfully,

Colonel Robert L. Quinn
Director of State Police

Approved by:

John J. Barthelmes
Commissioner of Safety

Acknowledgement of receipt:

My signature below does not indicate either my agreement or my disagreement with the contents of this letter. My signature simply confirms that I have received this letter on the date indicated.

David Appleby

08 | 05 | 2015
Date

cc: Department of Personnel
Department of Safety H/R File
Division of State Police Personnel File
PSU-15-042

State of New Hampshire

PERSONNEL APPEALS BOARD
25 Capitol Street
Concord, New Hampshire 03301
Telephone (603) 271-3261

Appeal of David Appleby

Docket #2016-T-002

New Hampshire Department of Safety

Division of State Police

January 11, 2017

The New Hampshire Personnel Appeals Board met in public session on Monday, August 8, 2016, Tuesday, August 9, 2016 and Wednesday, August 10, 2016 under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, to hear the appeal of David Appleby, the Appellant. The following commissioners sat for this hearing: Chair Charla Stevens, Esq., Vice Chair Norman Patenaude, Esq., Commissioner Christopher Nicolopolous, Esq., and Commissioner David Goldstein. Mr. Appleby, who was represented at the hearing by John S. Krupski, Esq., appealed his termination as a State Police Trooper First Class at the New Hampshire Department of Safety, Division of State Police. Marta Modigliani Esq., appeared on behalf of the Department of Safety, Division of State Police.

The record of the hearing in this matter consists of pleadings filed by the parties prior to the date of the hearing, notices and orders issued by the Board, the audio recording of the hearing on the merits of the appeal, documents admitted into evidence and post hearing briefs.

THE FOLLOWING PERSONS GAVE SWORN TESTIMONY[1]:

Adam Jewel
Staff Sergeant Robert Terhune
Lieutenant Todd Landry

[1]The witnesses were sequestered.

Captain Paul Hardcastle

Lieutenant Michael Commerford

Captain Gary Wood (Ret.)

Lieutenant Scott Gilbert

Colonel Robert Quinn

David Appleby, Appellant

ISSUES OF LAW:

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)

Per 1002.08(b)(9) (Endangering the life, health or safety of another employee or individual served by the agency)

Per 1002.08(b)(10) (Obstructing an internal investigation)

Per 1002.08 (b)(12) (Falsification of any agency records received, maintained or utilized by the agency)

PSC Chapter 1 Section 1.4.0: (Obligations)

Subsection 1.4.2 (Patrol Availability)

Subsection 1.4.8 (Integrity)

Chapter 22-E Extra Duty Details

Section 22-E 1.2(A), Procedures, Sub-section 11 (Employee shall not be permitted to travel to or from an Extra Duty Detail on Scheduled duty time)

Section 22-E 1.2(A), Procedures, Sub-section 17 (When working an Extra Duty Detail employees shall notify the dispatch center of the troop where the detail is being performed of the following: (a) time of arrival and departure from the detail location, (b) exact location, (c) the nature of the detail and (d) the name of the contractor (if applicable) for which the detail is being performed)

BACKGROUND

The Appellant was hired by the Department of Safety, Division of State Police as a probationary Trooper in June 1999. After serving one year as a probationary trooper he was promoted to State Trooper I. After ten years of service, he was promoted to Trooper First Class, which was his rank and position at the time of his dismissal.

On May 12, 2015, the Appellant worked an extra-duty detail wherein he was scheduled to escort an oversized load from Claremont to the Massachusetts' border in Plaistow. The Appellant was a Field Training Officer and was required to participate in a Phase II Oral Board for a probationary trooper at 1300 hours that same day. The detail was scheduled to begin at 0630 hours and end at 1030 hours. The escort, however, began two (2) hours late and did not leave for Plaistow until 0830 hours.

Captain Gary Wood reviewed the Appellant's detail voucher, his timecard and the Computer Aided Dispatch (hereinafter the CAD) and Captain Wood did not believe that the Appellant could have travelled from Plaistow to Troop F in thirty (30) minutes and, as a result, may have traveled from a detail on regular duty time. It also appeared that the Appellant did not maintain appropriate contact with dispatch during the escort. This prompted an investigation into whether the Appellant violated the Extra-Duty Detail Policy. Staff Sergeant Terhune (hereinafter SSG Terhune) from Troop F interviewed the Appellant and SSG Terhune's report was reviewed by Captain Wood.

SSG Terhune's report led Captain Wood to question whether the Appellant actually completed the escort. As a result, Captain Wood and Lieutenant Scott Gilbert interviewed the Appellant and concluded that the Appellant violated Extra-Duty Detail policies, was untruthful during the investigation and interviews, that the Appellant obstructed the internal investigation, that the Appellant falsified agency records, was unavailable for patrol, and that the Appellant endangered the lives of others by abandoning the escort. Due to these findings, the Appellant was dismissed from the Department of Safety, Division of State Police.

After carefully considering the parties' testimony, evidence and arguments, the Board made the following findings of fact and rulings of law:

FINDINGS OF FACT

1. The Appellant was hired by the Department of Safety, Division of State Police as a probationary Trooper in June 1999. After serving one year in this capacity he was promoted to State Trooper I. After ten years of service, he was promoted to Trooper First Class, which was his rank and position at the time of his dismissal. (Testimony of Appellant)

2. In addition to his regular duties as a Trooper at the time of his dismissal, the Appellant was a member of the Special Weapons and Tactical Unit (hereinafter SWAT), SWAT Sniper Team Leader, Peer-to-Peer Counselor, Field Training Officer (hereinafter FTO) and Troop Armorer. (Testimony of Appellant)

3. During the Appellant's tenure as a Trooper he worked out of Troop F, which is the northernmost Troop in the state. Troop F consists of Coos County and Grafton County. Troop A is in the southeastern part of the State and borders Massachusetts. Troop F also has the largest Troop area in the State, the towns in Troop F are much larger than those in Troop A, and Troop F area is approximately double the size of the area covered by Troop A. (Appellant's Exhibit #5 and Testimony of Colonel Quinn)

4. During the Appellant's career as a Trooper, he received numerous Letters of Appreciation and Official Commendations for his outstanding service. (Appellant's Exhibit #4)

5. The Appellant 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 has been described as a "go to guy" and that his fellow troopers would trust him with their life. (Testimony of SSG Terhune, Lieutenant Commerford, and Colonel Quinn)

6. On May 12, 2015, the Appellant worked an extra-duty detail for Jewell Transport Inc. The extra-duty detail was an escort that was scheduled to travel from Claremont to the

Massachusetts' border in Plaistow. The load that was to be escorted was a steel girder that measured eighty six (86) feet eleven (11) inches in length, with an overall length of one-hundred and ten (110) feet, including the length of the truck. (Testimony of Adam Jewell and State Exhibit #31 BS 141)

7. The extra-duty detail was scheduled to begin at 0630 hours. The Appellant arrived in Claremont and learned that there were mechanical problems with the truck that was scheduled to haul the steel girder to Plaistow. (Testimony of Appellant and Mr. Jewell)

8. The Appellant was initially told that the mechanical problems would be resolved in thirty (30) minutes. After thirty minutes expired, the Appellant was told several times that it would not be much longer before the truck was repaired. The Appellant became increasingly nervous at the amount of time it was taking to repair the truck as he had to be back at Troop F at 1300 hours to participate in a Phase II Oral Board for a Probationary Trooper. (State's Exhibit #32 BS 146 and Testimony of Appellant)

9. The Appellant learned that the part needed to repair the truck was being sent from Vermont. After learning this, the Appellant telephoned Troop F at 6:25 am and then again at 6:35am in order to seek guidance from a supervisor, considering he was due back at Troop F headquarters at 1300 hours. The Appellant was told that a supervisor was not available. (Testimony of Appellant and Appellant's Exhibit #1)

10. The Appellant contacted the detail desk at 7:58am and 8:10am in an attempt to get rid of the detail. The Extra-Duty Detail Policy, however, states that it is the employee's responsibility to find coverage if it is needed within twenty-four (24) hours of the detail. (Testimony of Appellant, Appellant's Exhibit #1 and Chapter 22-E.1.2 [5.a])

11. As a result of the mechanical problems, the escort did not leave Claremont until approximately 0830 hours. (Testimony of Appellant)

12. The Appellant was scheduled to escort the load from Claremont to the Massachusetts's state line in Plaistow via Route 12A, Route 89, Route 93, Route 101 and Route 125. (State's Exhibit #31 BS 141)

13. During the escort, the Appellant was on the phone in his capacity as a Peer-to-Peer Counselor. From 9:42am to 10:42am the Appellant was on the phone for fifty-nine (59) minutes. Also during the escort, the Appellant sent a text to the Detail Desk and asked to be assigned a detail on one of his days off. (Testimony of Appellant and Appellant's Exhibit #1)

14. The Appellant was on a peer-to-peer telephone call when he got to exit 7 on 101 East but was nearly finished with the call. The Appellant drove to the bottom of the ramp and stopped traffic to allow the steel girder to be maneuvered around the corner. (Testimony of Appellant)

15. Captain Wood oversaw the Detail Desk to ensure that there were no violations of the Extra-Duty Detail Policy. In reviewing detail vouchers, Captain Wood noticed that the Appellant's detail voucher indicated that his start time was 0630 hours and end time was 1030 hours and the detail was an escort from Claremont to Plaistow. Captain Wood also noticed that the Appellant recorded 1100 hours as the start time of his next regular duty shift in Troop F. This concerned Captain Wood as he resides in Rockingham County and did not believe that the Appellant could leave Plaistow and make it back to Troop F in thirty (30) minutes. As a result, Captain Wood reviewed the CAD to determine if the Appellant made a mistake when recording times on the extra-duty detail voucher. Captain Wood determined that the Appellant's arrival time at Troop F Headquarters was 1254 hours. Captain Wood also noticed that the Appellant had not changed his radio frequency from Headquarters to when the Appellant signed back on in Troop F, nearly four hours later. (State's Exhibit #37 BS 164, State's Exhibit #27 BS 121, and Testimony of Captain Wood)

16. On June 1, 2015 Captain Wood sent an e-mail, with the Appellant's detail voucher for May 12, 2015 attached, to Lieutenant Todd Landry and asked him to meet with the Appellant and learn, amongst other things, why the Appellant signed on for duty at 1100 hours when he was

scheduled to begin his shift at 1600 hours and if this change had been approved, who had authorized the change and why. Lieutenant Landry was also directed to ask the Appellant why he did not sign onto Troop C and Troop A for the detail and why he never advised dispatch of his start and end time of the escort and how he could have traveled from Plaistow to Troop F in thirty (30) minutes. In addition, the Appellant never advised dispatch that he was traveling through different troop areas. (State's Exhibit #41 BS 171 and Testimony of Captain Wood)

17. Lieutenant Landry met with the Appellant the very same day for an informal interview. The Lieutenant did not ask the Appellant if he completed the extra-duty detail. Lieutenant Landry e-mailed Captain Wood the answers to his questions. Lieutenant Landry advised Captain Wood that the Appellant was scheduled to begin work at 1600 hours but the Appellant agreed to change his schedule for that day so that he could participate in a Phase II Oral Board for a probationary employee at 1300 hours at Troop F headquarters. Lieutenant Landry also reported that the Appellant could not recall if he signed over to each Troop area. On June 5, 2015 Colonel Quinn ordered that a formal internal investigation of this matter be conducted. (State's Exhibit #41 BS 169, 170 and Testimony of Appellant)

18. On June 9, 2015 the Appellant was notified by Lieutenant Scott Gilbert that the Professional Standards Unit was in receipt of a complaint filed by Captain Wood concerning the extra-duty detail on May 12, 2015. It was alleged that the Appellant may have violated Chapter 22-E Extra Duty Details Section 22-E. 1.2(A)(11) (traveling to or from an extra-duty detail on regular duty time) and Section 22-E.1.2 (A) (17) (failure to communicate required information with the dispatch center of the troop where the detail is being performed). SSG Terhune from Troop F was assigned to initiate an internal administrative investigation. (State's Exhibit #42 BS 172)

19. SSG Terhune interviewed the Appellant on June 9, 2015. The Appellant chose not to have representation during this interview. Prior to conducting the formal interview, the Appellant was provided with the Garrity Warning which requires the interviewee to answer the questions narrowly, directly and truthfully. Specifically, the Garrity Warning addressed the

alleged violation of Chapter 22-E.1.2 (A)(11) and Chapter 22-E.1.2 (A)(17). (State's Exhibit #30 BS 140, State's Exhibit #35 BS 158-159, Testimony of SSG Terhune)

20. The documents reviewed for this investigation were the "Paid Detail Voucher" for Jewell Transport Inc. on May 12, 2015 and the CAD Report for the Appellant on May 12, 2015 between the hours of 0509 hours and 1933 hours. (State's Exhibit # 35 BS 159)

21. SSG Terhune found that the Appellant changed from the Troop F frequency to Headquarters frequency at 0619. The next time the Appellant changed frequencies was when he signed on at Troop F at 1130 hours. The Appellant reported that while he was in Lebanon he received a peer-to-peer call and he was dealing with peer-to-peer calls until just before arriving in Plaistow. The Appellant reported that he was focused on the calls and that was the reason why he did not appropriately communicate with dispatch. The Appellant stated that this was not an excuse but an explanation and he realized that he should have interrupted the phone calls and made the radio changes to the dispatch center. The Appellant asserted that he did not radio the dispatch center on the way back from the detail as he was distracted by the thought of being late for the Phase II Oral Board. The Appellant did not offer this as an excuse but rather an explanation and acknowledged that he should have been more focused and fulfilled the requirements for communicating with the dispatch center. SSG Terhune concluded that "[i]t was determined that TFC Appleby was clearly in violation of the policy by not changing channels when going from one Troop to another during his escort detail." (State's Exhibit #35 BS 159, 160, 162 State's Exhibit #27 BS 121, Testimony of SSG Terhune and Testimony of Appellant)

22. SSG Terhune also interviewed the Appellant regarding the allegation that he traveled back from his extra-duty detail during his regular duty time. The records indicate that the Appellant began his duty shift at 1100 hours. The Appellant, however, did not sign on with Troop F Headquarters until 1130 hours, giving the appearance that he did travel on duty time. The Appellant was one of the Probationary Trooper's FTO's and was required to attend the Phase II Oral Board. The Appellant already had the extra-duty detail scheduled when he was informed of the oral board and was asked to accommodate. SSG Terhune wrote in his Report that "The hours of 1100 were based on an approximation time that TFC Appleby

thought he could be back in the Troop by, but something had to be put into the schedule on the server." SSG Terhune concluded, "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 with Troop F but rather he make it to Troop F in time for the Phase II Board at 1300." The issue of the Appellant traveling on duty time was of little concern at the time. (State's Exhibit #35 BS 159, 161 and Testimony of SSG Terhune)

23. SSG Terhune recalled that the Appellant answered his questions narrowly, directly and truthfully during this investigation. SSG did not ask the Appellant if he completed the extra-duty detail. (Testimony of SSG Terhune)

24. On June 11, 2015 Lieutenant Landry sent an Inter-Department Communication to Colonel Quinn and copied Captain Wood and Lieutenant Gilbert to inform them that he reviewed the facts of the case and agreed with SSG Terhune's findings that the Appellant's errors were based on mitigating circumstances and stated that no further action was necessary. (State's Exhibit #34 BS 156, 157)

25. Captain Wood received the report from SSG Terhune and learned, for the first time, that the escort had been delayed approximately two (2) hours. After learning of the delay, Captain Wood did not believe that it was possible to drive from Claremont to the Massachusetts' border in Plaistow in two (2) hours. As a result, SSG Terhune's Report did not resolve Captain Wood's concerns surrounding the escort. Captain Wood also disagreed with SSG's Terhune's findings and Lieutenant Landry's concurrence. Captain Wood understood the Appellant was given flexibility with his schedule to accommodate the Oral Board but he disagreed that the flexibility allowed the Appellant to travel on duty time. (Testimony of Captain Wood)

26. Captain Wood contacted Major David Parenteau and told him that the time frame the Appellant gave for the extra duty detail was not feasible. Captain Wood informed Major Parenteau that he had gathered additional information, including the E-Z Pass information from the transponder on the police cruiser. The E-Z pass records indicated that the Appellant drove south through the Hooksett tolls at 1011 hours and then drove north through the

Hooksett tolls at 1100 hours. Captain Wood is very familiar with the southeastern area of the state as he regularly drove from his home in the area of Route 125 to Concord for work. He determined that it was implausible that the Appellant could have traveled from the Hooksett tolls to the Massachusetts' border in Plaistow and returned to the Hooksett tolls in forty-nine (49) minutes. (State's Exhibit #32 BS 145 and Testimony of Captain Wood)

27. As a result of Captain Wood's questions and concerns, it was determined that Lieutenant Gilbert and Captain Wood would interview the Appellant. The tape-recorded interview occurred on June 22, 2015. The Appellant chose to participate in the interview without representation. The Appellant was read the Garrity Warning and initialed and signed where appropriate. The Garrity Warning stated that the inquiry pertained to "Events surrounding an Extra Duty Detail on May 12, 2015." (State's Exhibit #36 and Testimony of Captain Wood)

28. In the beginning of the interview, Lieutenant Gilbert instructed the Appellant to describe, from the best of his memory, the details of the escort. Lieutenant Gilbert also instructed the Appellant... "if you don't know, you know, if you don't know, it's my best estimate is this, or my best recollection is this." (State's exhibit #19 BS 47)

29. Throughout the hour long interview, the Appellant maintained that he thought the overpass off exit 7 on Route 101 divided Epping and Plaistow. In other words, the Appellant thought that if he turned left at the bottom of the ramp he would be in Epping and if he turned right he would be in Plaistow. (State's Exhibit #19 BS 53, 55, 56, 57, 58, 62, 67, 76, 87, 88 and Testimony of Appellant)

30. The Appellant, throughout the interview, admitted that he did not complete the detail by traveling to the Massachusetts' border in Plaistow. He believed he left the detail in Plaistow and believed that the state border was not far. Lieutenant Gilbert asked the Appellant if he could do the escort all over again would he do things differently and the Appellant replied in the affirmative. (State's Exhibit 19 BS 62, 64, 73, 75, 76, 82, 83, 85 and Testimony of Appellant)

31. During the interview, minutes and miles were used interchangeably when the Appellant was questioned as to where he turned around on Route 125 to travel back up north. In addition,

the Appellant maintained that he could not recall where he turned around and headed back to Troop F. When presented with information from Captain Wood and Lieutenant Gilbert that he turned around at the bottom of the off ramp at Exit 7, the Appellant did not dispute this and said it was possible. The Appellant did not try and hide the fact that he left the detail before completion. (State's Exhibit #19 BS 55, 56,58; 70, 72, 65, 66, 69, 74, 78, 83,84, 87 and Testimony of Appellant)

32. On June 23, 2015 Lieutenant Gilbert issued a Report to Colonel Quinn and copied Major Parenteau regarding the events surrounding the extra-duty detail on May 12, 2015 and subsequent investigations. Lieutenant Gilbert sustained the allegation that the Appellant traveled from a detail on regular duty time, he sustained that the Appellant did not maintain appropriate communications with dispatch, and he sustained that the Appellant made a false official statement or intentional misrepresentation when he said he was on a peer-to-peer call during the escort until just prior to arriving in Plaistow and when he repeatedly asserted he drove two (2) to three (3) miles south on Route 125 until he was waved off. (State's Exhibit #33 BS 153-155)

33. After the June 22, 2015 interview, the Appellant's status with the State Police changed. The Appellant was informed that he would no longer be on patrol and that he needed to report to Troop F Headquarters every day. In addition, he was relieved of his ancillary duties. (Testimony of Appellant)

34. On August 4, 2015 the Appellant was presented with the Pre-disciplinary Meeting-Intent to Dismiss letter. In the letter, the Appellant was informed that a meeting was scheduled for the following day, August 5, 2015, at which the Appellant could discuss and refute evidence supporting the state's decision to dismiss him. (State's Exhibit #4 BS 13-14)

35. The Appellant chose not to attend the August 5, 2015 Pre-disciplinary Meeting. Therefore, he was instead presented with a Disciplinary Action: Dismissal from State Service Letter dated August 5, 2015. (State's Exhibit #5 BS 15-20)

36. On August 5, 2015 Colonel Quinn advised the Appellant that he would be sending out disclosures about him under *State v. Laurie* and NH RSA 105:13-b. The Colonel did send out notices to the appropriate people/agencies stating that the Appellant engaged in conduct that may be subject to disclosure under *State v. Laurie* and NH RSA 105:13-b. (State's Exhibit #6 BS 21-24)

Relevant Background History:

37. SSG Terhune was not aware of the Appellant having major disciplinary issues prior to his dismissal but did recall, after his memory was refreshed, that an extra-duty detail violation by the Appellant had been investigated in 2009. SSG Terhune had been the investigator. He acknowledged that he had written the report and that it was his signature on the report, but he did not recall the details of the violation. (Testimony of SSG Terhune)

38. Lieutenant Landry issued the Appellant a "Memo of Counsel" on September 28, 2011, which is not discipline, regarding the violation of the extra-duty detail policy. The Appellant violated Chapter 22-E 1.2 (9) which states, in relevant part, "Division members shall not schedule more than 16 (16) hours on any day off or Annual Leave within any "rolling" 24 hour period. Once a total of sixteen (16) hours have been scheduled there must be 8 (sic) eight (8) consecutive hours off-duty". Lieutenant Landry had a meeting with the Appellant and counseled him so that the Appellant would have a clearer understanding of this particular policy. Lieutenant Landry believed that the Appellant understood the issue and he accepted the counsel. (State's Exhibit #48 and Testimony of Lieutenant Landry)

39. On October 1, 2012 Colonel Quinn issued a Letter of Warning to the Appellant. There were eight (8) separate violations listed, which included Obedience to Orders, Division Reports, Performance Expectations and Extra-Duty Details. Lieutenant Landry investigated the matter at the Troop level. The Letter of Warning did not contain the issue of integrity; however, integrity was considered by the Colonel during the investigation. Captain Hardcastle interviewed the Appellant and submitted a report to the Colonel. The Colonel could not say, after review of Captain Hardcastle's report, that the Appellant purposely recorded incorrect times worked because not all of the inconsistencies benefitted the

Appellant. 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. The Colonel believed that the Appellant simply made mistakes because he had been working so much, including extra-duty details. (State's Exhibit #17 BS 36-38, Testimony of Lieutenant Landry and Testimony of Colonel Quinn)

40. The Colonel wrote in the Letter of Warning, "I have chosen to administer the least severe form of discipline based on your commitment to the Division, personnel record, your honesty and your remorse". The Colonel went on to write, "Therefore, you are hereby issued a WRITTEN WARNING and placed on notice that your conduct cited above is unacceptable and will not be tolerated in the future". The Colonel also told the Appellant that he (the Appellant) had to make sure he did not go down the same path again. (State's Exhibit #17 BS 36-38 and Testimony of Colonel Quinn)

41. Being aware of the impending discipline, the Appellant voluntarily withdrew from the FTO program and the Peer-to-Peer Counseling program. (State's Exhibit # #11 BS 30 and #13 BS 32)

42. The Appellant issued a correspondence to Colonel Quinn on January 1, 2013 requesting that he withdraw from his responsibility as an Intoxilyzer Instructor, Troop Armorer and Preliminary Breath Test Instructor. In the same correspondence, the Appellant asked to be re-instated as a Peer-to-Peer Counselor, and a FTO and he also requested that his extra-duty detail restriction of twenty (20) hours per week be lifted. The Appellant acknowledged that it had been made clear to him that as a road Trooper his primary function was his patrol functions. (State's Exhibit #7 BS 25-26)

43. On March 29, 2013 Major Russell Conte issued a response to the Appellant's January 1, 2013 correspondence informing him that he would be reinstated to the Division's PEER counseling but not to the FTO program and his extra-duty detail restriction remained in effect. Major Conte included in his letter that he spoke with the Appellant's Troop Commander and Field Captain who assured him that the Appellant was in compliance with the conditions of his corrective action plan. In addition, Major Conte wrote that the

Appellant had shown a marked improvement in the deficiencies outlined in the Letter of Warning. (State's Exhibit #9 BS 28)

44. On August 20, 2013, Captain Wood issued a correspondence to the Appellant, responding to a correspondence from Lieutenant Landry requesting that the Appellant be reinstated in the FTO program and that the restrictions on the number of hours the Appellant could work on extra-duty details be changed. Lieutenant Landry recommended that the Appellant's extra-duty detail restriction be modified from twenty (20) hours to twenty-five (25) hours per week. Captain Wood granted the request for the increase in extra-duty detail hours but denied reinstatement to the FTO program. (State's Exhibit #15 BS 34)

45. On January 27, 2014, Major Conte notified the Appellant that he could resume his status as an FTO and he would also be unrestricted in the number of extra-duty detail hours he worked. (State's Exhibit #16 BS 35)

46. Beginning January 27, 2014 the Appellant was working his regular duty schedule, was on the SWAT Team, was an FTO and was a Peer-to-Peer Counselor. Between January 8, 2014 and December 22, 2014, in addition to his regular schedule and his important and demanding assignments, the Appellant worked one-hundred and twenty-six (126) extra-duty details, which totaled seven-hundred and sixty-five (765) hours of extra-duty details. This equals an average of 14.7 hours of extra-duty detail hours every week, excluding annual and sick time. The Appellant worked an average of two (2) to three (3) extra-duty details a week in 2014 and worked a similar amount of extra-duty details in 2015. SSG Terhune acknowledged that the Appellant worked "quite a few" extra-duty details. (State's Exhibit #15 BS 34 #16 BS #29 BS 131-139 Testimony of SSG Terhune and Testimony of the Appellant)

47. At the time of the Appellant's dismissal he was working patrol, was a member of the SWAT team, he was the SWAT Sniper Team Leader, a Peer-to-Peer Counselor, an FTO and the Troop Armorer in addition to working extra-duty detail hours comparable to the amount he had worked in 2014. (Testimony of Appellant)

48. The Appellant traveled to Brentwood, approximately three (3) miles south on Route 125 off exit 7 in Epping, on May 14, 2014 as a member of the SWAT team in response to an officer involved shooting. (Testimony of Lieutenant Commerford and Testimony of Appellant)

49. The Appellant attended trainings at the Sig Sauer facility via Route 101 East via Exit 8 in Epping. (Testimony of Appellant)

50. The Appellant escorted Jewell Transport Inc. three (3) times in approximately six (6) months prior to the detail that gave rise to this appeal. The Appellant would not have remembered working these escorts had he not been reminded during the discovery process of this appeal. During the previous escorts the Appellant could not recall if he travelled in a convoy for all three details but believed it was likely since the other troopers working the same detail had the same start time on their extra-duty detail vouchers. He definitely recalled that at least one (1) escort was in a convoy as he remembered he and others had to pull off the road due to inclement weather. Whenever in a convoy escort to the southern part of the State, the Appellant stayed towards the rear and followed the others because he was not as familiar with the area as other troopers. (State's Exhibit #21 BS 93-102, # 22 BS 104 and State's Exhibit #25, BS 112-119 and Testimony of Appellant)

51. The Appellant worked approximately fifty (50) extra duty details since the last time he escorted a vehicle for Jewell Transportation Inc. on December 8, 2014 and the escort that occurred on May 12, 2015. (Testimony of Appellant)

52. The Appellant worked approximately fifteen (15) extra-duty details between the Jewell Escort on May 12, 2015 and the interview with Captain Wood and Lieutenant Gilbert on June 22, 2015. (Testimony of Appellant)

RULINGS OF LAW:

A. 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, in this case PSC Chapter 1 Rules

and Regulations; Section 1.13.0 Discipline, which states "Any Division member found to have violated any provision of these Rules and Regulations may be subject to disciplinary action, up to and including dismissal from the Division of State Police."

B. Per 1002.08(b)(9) (Endangering the life, health or safety of another employee or individual served by the agency)

C. Per 1002.08(b)(10) (Obstructing an internal investigation)

D. Per 1002.08 (b)(12) (Falsification of any agency records received, maintained or utilized by the agency)

E. PSC Chapter 1 Section 1.4.0: (Obligations)
Subsection 1.4.2 (Patrol Availability) No Division Member shall absent themselves from duty, patrol assignment, or leave the state on police business without permission of their Commanding Officer.

F. Subsection 1.4.8 (Integrity) No Division member shall, under any circumstances, make any false official statement or intentional misrepresentation of facts. Any Division member who becomes aware that another Division Member has made a false statement or intentional misrepresentation of facts shall, without delay, inform his or her Commanding Officer. Any Division Member who becomes aware that any person has provided false information to a superior, shall inform the superior as soon as possible.
Chapter 22-E Extra Duty Details:
Section 22-E 1.2(A), Procedures, Sub-section 11: Employee shall not be permitted to travel to or from an Extra Duty Detail on scheduled duty time.
Section 22-E 1.2(A), Procedures, Sub-section 17: When working an Extra Duty Detail, employees shall notify the dispatch center of the troop where the detail is being performed of the following: (a) time of arrival and departure from the detail location, (b) exact location, (c) the nature of the detail and (d) the name of the contractor (if applicable) for which the detail is being performed.

G. According to Per-A 207.12 (b) of the Board's rules, "In disciplinary appeals, including termination, disciplinary demotion, suspension without pay, withholding of annual increment or issuance of a written warning, the board shall determine if the appellant proves by a preponderance of the evidence that : (1) The disciplinary action was unlawful; (2) The appointing authority violated the rules of the division of personnel by imposing the

disciplinary action under appeal; (3) the disciplinary action was unwarranted by the alleged conduct or failure to meet the work standard in light of the facts in evidence; or (4) the disciplinary action was unjust in light of the facts in evidence."

DISCUSSION and ORDER:

The Board will first address the allegation that the Appellant violated Chapter 22-E 1.2 (A) Sub-section 11 of the Extra Duty Detail Policy. Sub-section (11) of the policy states, "Employees shall not be permitted to travel to or from an Extra Duty Detail on scheduled duty time." The Appellant agreed to modify his schedule on May 12, 2015 so he could participate in a Phase II Oral Board for a probationary trooper in Troop F. The Appellant recorded that his duty time began at 1100 hours but the E-Z pass records obtained by Captain Wood reflect that the Appellant was passing through the Hooksett tolls at this time, which is south of Troop F. Although this was not of major concern to the Appellant's superiors, the Appellant was still traveling from an extra-duty detail while on duty time. As such, the Board finds that the Appellant violated this sub-section of the extra-duty detail policy.

The Board next addresses Sub-section (17) of the Extra Duty Detail Policy which states, "When working an Extra Duty Detail, employees shall notify the dispatch center of the troop where the detail is being performed of the following: (a) Time of arrival and departure from the detail location, (b) Exact location of the detail, (c) The nature of the detail and (d) the name of the contractor (if applicable) for which the detail is being performed." The Appellant acknowledged that he did not comply with this provision of the Extra Duty Detail Policy. The Appellant told SSG Terhune that he was distracted by peer-to-peer phone calls on the way to the detail destination and was distracted on the way back to Troop F as he was nervous about being late for the Phase II Oral Board. The Appellant took responsibility for violating this sub-section and offered no excuses but only an explanation. The Appellant acknowledged that he should have interrupted his peer-to-peer phone call to make the appropriate communications with dispatch. As a result of the Appellant's acknowledgement of this violation and the evidence presented, the Board finds that the Appellant violated this sub-section of the extra-duty detail policy.

The Board next addresses the allegation that the Appellant violated PSC Chapter 1 Section 1.4.0 Sub-section 1.4.2 (Patrol Availability). Pursuant to Section 1.4.0, "No Division Member shall absent themselves from duty, patrol assignment, or leave the state on police business without permission of their Commanding Officer." The Appellant recorded that he was on duty at 1100 hours on May 12, 2015. Captain Wood, however, discovered that the Appellant was travelling through the Hooksett tolls at 1100 hours, which is south of Troop F. As such, the Appellant was not available for duty as he was traveling back from an extra-duty detail. As a result, the Board finds that the Appellant was not available for patrol and violated Sub-Section 1.4.2.

The Board next addresses the issue of integrity as outlined in Subsection 1.4.8 of the Professional Standards of Conduct. Under this Sub-section, "No Division member shall, under any circumstances, make any false official statement or intentional misrepresentation of facts. Any Division member who becomes aware that another Division Member has made a false statement or intentional misrepresentation of facts shall, without delay, inform his or her Commanding Officer. Any Division Member who becomes aware that any person has provided false information to a superior, shall inform the superior as soon as possible." The State has alleged that the Appellant made a clear misrepresentation of the facts when he told SSG Terhune that he was involved with a peer-to-peer phone call just prior to arriving in Plaistow. This particular issue is whether the Appellant believed he was in Plaistow when he exited Route 101 East via Exit 7. The Board took the following into consideration in deciding on this issue:

> The Appellant lives in Thornton and has worked out of Troop F the northernmost Troop in the State. In contrast, Troop A is in the southeastern part of New Hampshire and borders Massachusetts. In addition, the towns are much bigger in Troop F as compared to those in Troop A.
>
> Upon arriving in Claremont on May 12, 2015 to conduct the transport, the Appellant was told that there were mechanical issues which would delay their start time. At first, the Appellant was told that the delay would be brief but eventually learned that the part needed to repair the issue was being delivered from Vermont. The Appellant became

increasingly nervous that the delay would cause him to be late or miss the Phase II Oral Board. The delay caused the Appellant to telephone Troop F so that he could get direction from a supervisor, however, a supervisor was not available. The Appellant also tried to get rid of the detail by telephoning the detail desk but rule 1.2 5.a of the Extra Duty Detail Policy prohibits a trooper from doing this within twenty-four (24) hours of the detail.

In addition to being nervous about running two (2) hours behind schedule, the Appellant was on the phone, using a hands-free device, handling a peer issue in his capacity as a Peer-to-Peer Counselor. The Board understands this position to be one of great importance as a Peer-to-Peer Counselor deals with a wide variety of issues that the Appellant's colleagues may be dealing with. The Board believes this distracted the Appellant and contributed to him believing that he was in Plaistow when he exited Exit 7 on Route 101 East.

From January 8, 2014 through December 22, 2014 the Appellant worked one-hundred and twenty six (126) extra-duty details for a total of seven-hundred and sixty five (765) hours. This averages out to be between two (2) to three (3) extra-duty details every week. The Appellant worked a similar amount of extra-duty details in 2015. In addition to extra-duty details, the Appellant was working on the SWAT team, he was the SWAT Sniper Team Leader, he was working as a Peer-to-Peer Counselor, an FTO, and he worked as the Troop Armorer along with his primary duty of road patrol.

Although the Appellant travelled the same route three (3) times within six (6) months of May 12, 2015, the Appellant believes he traveled behind other troopers who were more familiar with the southeastern part of the State. The Appellant did recall, specifically, that he and other troopers had to pull over during an escort to Plaistow due to inclement weather. The Board finds the Appellant's testimony credible as State's Exhibits #21, #22 and #25 demonstrate that there were multiple troopers involved in the same escort with similar start and end times. The Board finds that it is more likely than not that the

troopers traveled together during these three escorts. Furthermore, the Appellant conducted approximately fifty (50) details between December 8, 2014 and May 12, 2015. In determining whether the Appellant violated the integrity policy when he told SSG Terhune that he was on the phone until he reached Plaistow, the Board takes into consideration the Appellant's lack of familiarity with the area and the difference in the size of the towns in each troop. The Appellant works in the northernmost troop in the State and also resides in Thornton. In addition, the Board considers the Appellant's state of mind during the escort. The Appellant immediately became nervous when he was told that the escort was going to be delayed. The Appellant became increasingly nervous as time went by and the escort had not left Claremont. He was eventually told that the part needed for the repair was being delivered from Vermont. The Appellant became so nervous that he tried to contact a supervisor for guidance without success. As a result, the Appellant tried to get rid of the detail. The Appellant was not allowed to do this as the extra-duty detail rules do not permit it. Once the escort got under way, the Appellant was dealing with peer-to-peer issue that distracted him to the point he admittedly violated a section of the extra-duty detail policy.

The Board also considered the Appellant's argument that he believed, on May 12, 2015, that he had to be back at Troop F at 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.

The Board also takes into account the inordinate number of details the Appellant was allowed to work in the same year and the preceding year. The Appellant worked one-hundred and twenty-six (126) extra duty details in 2014 and a similar amount in 2015. This averages out to be two (2) to three (3) details a week, not including annual and sick

time that the Appellant may have used during the year. Due to the number of extra-duty details performed in 2014 and 2015, the level of nervousness the Appellant was experiencing due to the delay of the start time of the escort, the peer-to-peer issues the Appellant was dealing with while escorting the truck, his concern about being late for the Phase II Oral Board, and the Appellant's unfamiliarity with the area, the Board finds that it is reasonable to believe that the Appellant believed that he was in Plaistow when he exited Route 101 via Exit 7. As a result, the Board finds that the Appellant did not make any false official statement or intentional misrepresentation when he stated he was on the telephone until just before reaching Plaistow.

The Board next addresses whether the Appellant made a false official statement or intentional misrepresentation during the interview with Captain Wood and Lieutenant Gilbert. At the beginning of the interview, Lieutenant Gilbert told the Appellant to describe, from the best of his memory, the details of the escort and also instructed him to use his best recollection to answer questions about the detail. The Appellant was adamant that he was waved off but was unsure of where this occurred.

The Appellant was using his memory and best recollection when he stated that he believed he travelled south on Route 125. The Appellant also stated that he could have turned around at the bottom of the ramp. He did not write down these details and was relying on his memory and best recollection. He did make it clear that he did not complete the escort. That is, he did not escort the oversized load to the Massachusetts' border where Massachusetts' State Troopers would have been waiting to take over the transport. The Appellant did not try to hide the fact that he did not complete the detail. The Board fails to see the relevance or significance of whether the Appellant travelled southbound and, if so, how far or for how long. The fact remains that the Appellant, throughout the interview, acknowledged that he did not complete the detail. The fact that he could not remember specific details about the escort is inconsequential. It should be noted that the Appellant worked fifteen (15) extra-duty details between May 12, 2015 and June 22, 2015. The Board believes the Appellant was trying to remember the details to the best of his recollection. Moreover, the Board considered the Appellant's state of mind during the end of

this escort and believes that it was a contributing factor in his failure to recollect exactly where he turned around after exiting Route 101. As a result, the Board finds that the Appellant did not make any false official statement or intentional misrepresentation when he was interviewed by Lieutenant Gilbert and Captain Wood.

The Board next addresses whether the Appellant obstructed the internal investigation. The Appellant was first interviewed by Lieutenant Landry. This was an informal interview and he did not ask the Appellant if he completed the extra-duty detail. Lieutenant Landry e-mailed Captain Wood the answers to his questions. Lieutenant Landry advised Captain Wood that the Appellant was scheduled to begin work at 1600 hours but the Appellant agreed to change his schedule for that day so that he could participate in a Phase II Oral Board for a probationary employee at 1300 hours at Troop F headquarters. Lieutenant Landry also reported that the Appellant could not recall if he signed over to each Troop area. On June 5, 2015 Colonel Quinn ordered that a formal internal investigation be conducted.

After the Appellant was interviewed by Lieutenant Landry, he was then interviewed by SSG Terhune. It was alleged that the Appellant may have violated Chapter 22-E Extra Duty Details Section 22-E. 1.2(A)(11) (traveling to or from an extra-duty detail on regular duty time) and Section 22-E.1.2 (A) (17) (failure to communicate required information with the dispatch center of the troop where the detail is being performed). Prior to conducting the formal interview, the Appellant was provided with the Garrity Warning which requires the interviewee to answer the questions narrowly, directly and truthfully. Specifically, the Garrity Warning addressed the alleged violation of Chapter 22-E.1.2 (A)(11) and Chapter 22-E.1.2 (A)(17). SSG did not ask if the Appellant completed the escort. SSG Terhune recalled that the Appellant answered his questions narrowly, directly and truthfully during this investigation.

The Appellant was then interviewed by Captain Wood and Lieutenant Gilbert. Lieutenant Gilbert told the Appellant to, essentially, do the best he could in remembering the details of the escort. In fact, Lieutenant Gilbert instructed the Appellant that if he did not have specific recall, that he should use his best estimate. During this interview, the Appellant was asked if he left the detail before completion and he answered in the affirmative. The Appellant never made any

assertion that he completed the escort. The Appellant stated that he left the detail in Plaistow before reaching the Massachusetts' border. The Appellant, throughout the hour long interview, stated that he thought the overpass off exit 7 on Route 101 divided Epping and Plaistow and that the Massachusetts' border was close. In making its decision, the Board took into account that the Appellant was allowed to work fifteen (15) extra-duty details between May 12, 2015 and June 22, 2015, which may have clouded the Appellant's memory. The Board does not believe that the Appellant obstructed the internal investigation and also believes that the Appellant answered the questions he was asked to the best of his recollection.

The Board next addresses whether the Appellant's actions endangered the life, health or safety of another employee or individual served by the agency. The Appellant accepted the extra-duty detail to escort the steel girder, that measured 110 feet (including the length of the truck hauling it) from Claremont to the Massachusetts' border in Plaistow. Although the Appellant believed he was in Plaistow, he admittedly did not complete the escort to the Massachusetts' border. Jewell Transport Inc.was granted a Department of Transportation permit to move a load in excess of legal limits provided that it had at least one State Police escort. The purpose of the escort is to control the movement of the oversized load, control surrounding traffic and to protect the public sharing the same roadways. As a result, the Board finds that the Appellant's actions could have endangered the life, health or safety of the Jewell Transport employees as well as the general public.

The Board next addresses whether the Appellant falsified any agency records received, maintained or utilized by the agency. The E-Z pass records indicated that the Appellant drove south through the Hooksett tolls at 1011 hours and the State asserts that the Appellant could not have driven from the Hooksett tolls to Exit 7 on Route 101 East in 19 minutes. The State argued that the Appellant most likely turned around at Exit 7 at 10:40am. In addition, the State asserts that the Appellant falsified his timecard. The Appellant recorded on his timecard that he was on duty at 1100 hours even though he did not inform dispatch he was in Troop F until 1130 hours. It was discovered, however, that the Appellant was traveling through the Hooksett tolls at 1100 hours, which is south of Troop F. The Board does not believe that the Appellant intentionally

recorded incorrect times on his duty voucher or his timecard. The Board considered the level of stress and anxiety the Appellant was under as he feared he would either be late or miss the Phase II Oral Board that he was required to attend and made a mistake. The Board also believes that the Appellant did not recall exactly what time the detail ended when he turned around and headed north.

Having carefully considered the evidence and arguments 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. The Department of Safety, Division of State Police is directed to remove letters from the Appellant's file referring to the intent to dismiss and the notice of dismissal. At the request of the parties on August 8, 2016, the Board shall hold a separate hearing so that the parties have the opportunity to argue damages.

The Findings of Fact and Rulings of Law that are consistent with this ruling are GRANTED and those that are inconsistent are DENIED.

THE PERSONNEL APPEALS BOARD

for Charla Stevens

Chair, Charla Stevens, Esq.

Vice Chair, Norman Patenaude, Esq.

Commissioner Christopher Nicolopoulos, Esq.

Commissioner David Goldstein

cc: Sara Willingham, Director of Personnel, 28 School Street, Concord, NH 03301
John S. Krupski, Esq., Milner & Krupski, PLLC, 1 Pillsbury Street, Suite 204, Concord, NH 03301
Marta Modigliani, Esq., Department of Safety, Office of the Commissioner, 33 Hazen Drive, Concord, NH 03305

STATE OF NEW HAMPSHIRE
PERSONNEL APPEALS BOARD

Docket Number 2016-T-002

David Appleby
Appellant

Appeal of Dismissal

v.

Division of State Police
New Hampshire Department of Safety
Appellee

MOTION FOR REHEARING/RECONSIDERATION

NOW COMES the Division of State Police, New Hampshire Department of Safety, through its attorney, Marta A. Modigliani, Esq., and respectfully submits this Motion For Rehearing/Reconsideration. In support thereof, the Appellee states as follows:

1. This Honorable Board met in public session on August 8, 9, and 10, 2016 to hear the appeal of the Appellant's termination from the Division of State Police, effective August 5, 2015.

2. Closing Briefs were submitted by both parties on or about September 16, 2016.

3. On or about January 11, 2016, this Honorable Board issued its decision granting the Appellant's appeal and "found that the decision to dismiss the Appellant was unjust in light of the facts in evidence". Decision at page 24.

3. Though the Board did not reinstate the Appellant, the Board did not modify or change the appointing authority's discipline. Instead, as the sole remedy, the Board directed the Appellee to remove letters from the Appellant's file referring to the intent to dismiss and the notice of dismissal. Id. This order is arbitrary, unjust and unreasonable because it fails to take into consideration, or inaccurately states, key evidence.

4. The Board correctly found that the Appellant in this case did not complete the escort of a 110 foot steel girder from Claremont to the Massachusetts border in Plaistow. Decision at page 23. As a result the Board found that the "Appellant's actions could have endangered the life, health or safety of the Jewell Transport employees as well as the general public." Id. The Personnel Rules state that "an appointing authority may dismiss an employee without prior warning for offenses such as, but not limited to....[e]ndangering the life, health, or safety of another employee or individual served by the agency." See Per 1002.08(b)(9). In short, this simple finding was sufficient to sustain the termination under the Personnel rules. However, the Board failed to explain how the sustained finding of a violation of Per 1002.08(b)(9) must result in **no discipline**, and for that reason, the Board's decision appears arbitrary and unsupported by the evidence.

5. The Board failed to make a finding of fact with regard to the excessive speed the Appellant traveled once he abandoned the escort in Epping. The evidence before the Board was that the Appellant was traveling in excess of 80 mph and sometimes, in excess of 90 mph, on his return trip to Troop F for the sole purpose of saving time. Cross Examination of the Appellant and the Automatic Vehicle Locator ("AVL"). On cross-examination the Appellant admitted to traveling excessive speeds. After reviewing the AVL, the Appellant also acknowledged, contrary to prior testimony, that he arrived at Troop F at 12:16, and not 12:54 as the CAD stated (State Exhibit). The CAD, as the Appellant admitted, is based on the information provided by the Trooper to communications dispatch. If excessive speed by a sworn law enforcement officer is of no consequence to the Board, than it is unreasonable for the Board to fail to address the fact that the Appellant had sufficient time to finish the escort but chose to sit at Troop F for 45 minutes

instead of completing the requisite escort, at the peril of the motoring public and Jewell Transport employees.

6. The Board also sustained the appointing authority's determination that the Appellant had violated Chapter 22-E 1.2 (A) subsection 11 and subsection 17; and Chapter 1, Section 1.42. The Board also acknowledged that the Appellant had previously received memos of counsel concerning violation of the extra-duty policy. The Board correctly found that the Appellant was issued a Letter of Warning in 2012 concerning the inaccurate paperwork and timecards surrounding his extra duty details. The Board expressly noted that the memos of counsel were not "discipline". It is perplexing that the Board should take special notice of that fact because the Board did not address or explain how it *did* consider the Appellant's prior record of discipline for the same or similar offense when it determined that the termination should be vacated. See Per 1002.03(c). The record is devoid of any such explanation rendering the Board's decision as arbitrary and unreasonable. If the Board is to supplant the appointing authority's role and determine the "appropriate discipline" in light of the facts in evidence, it must follow the same Personnel Rules that the appointing authority must follow. Per 1002.03 states:

> "In determining the appropriate form of discipline under Per 1002.04 through 1002.08, an appointing authority may consider factors including, but not limited to:
> (a) The impact that the conduct or offense has on the operations or functions of the agency;
> (b) The nature and severity of the conduct or offense in relation to the employee's position classification, responsibilities, and accountabilities, and the functions of the agency; and
> (c) The employee's past record of performance and discipline, including whether or not the employee has been disciplined in the past for the same or a similar offense."

The Board's Decision does not reflect that it gave any deference to the appointing authority who did consider the above factors. The Board failed to explain if and how it

considered the impact and conduct of the Appellant on the day in question, in relation to the operations and functions of the premier law enforcement agency in the State; the Board failed to explain if and how it considered the nature and severity of the Appellant's conduct and offense in relation to his job as a law enforcement officer and State Trooper; and, the Board failed to explain how it considered the Appellant's past record of performance and discipline, including whether or not he had been disciplined in the past for the same or similar offense when it determined vacating the termination is the appropriate discipline in this case.

The treatment of state employees must be fair. Employees must know what the work expectations are, and what the consequences are for failing to meet those expectations. The Personnel rules set forth the offenses that warrant progressive discipline. Some of those offenses are serious enough that would warrant termination without any prior warning. Without justification for the Board's decision to deviate from the Personnel Rules, this Decision informs state troopers that they may abandon escorts, inaccurately report time cards, absent themselves from their patrol areas, double dip in their reporting of their time; and travel at excessive speed without ***any*** consequence.

7. This Honorable Board's Order also rests on a clearly unreasonable interpretation of the facts. The Board's following findings of fact is inaccurate and not supported by the evidence:

a. The Board found that from 9:42 a.m. to 10:42 a.m. the Appellant was on the phone for 59 minutes. Finding of Fact #13, Decision at page 6. In actuality, Appellant's Exhibit 1 indicates that the Appellant was on the phone at 9:42 for one minute; 9:43 for one minute; 9:47 for 10 minutes; 9:56 for 22 minutes;

10:18 for 3 minutes; and then at 10:22 for 10 minutes for a grand total of 46 minutes. Where the duration of time overlapped with the next itemized call would presumably indicate that the Appellant received a call while on another call (for example: at 9:47, the record indicates the Appellant was on a call for 10 minutes which would naturally mean that the call lasted until 9:57; however at 9:56, a new call came in that lasted 22 minutes, thus there is one minute overlap between these two calls). The fact is that at 10:32, the Appellant had terminated his telephone call and did not receive another one until 10:42. At 10:32, according to the AVL, the Appellant was nowhere near "Plaistow"; he was still travelling on 101 East in Raymond and not at the bottom of the ramp as the Board's Finding of Fact #14 states (Decision at page 6). During this 10 minute gap, the Appellant admitted on cross-examination he was not likely on the telephone; that is because at 10:38 the AVL indicates that the Appellant was on Calef Highway (Route 125). At 10:42 when the Appellant next received a telephone call (Appellant Exhibit 1), the AVL indicates he was traveling westbound on 101 in Raymond. Therefore, it is unreasonable for the Board to conclude that the Appellant was distracted by the telephone call which "contributed to him believing he was in Plaistow when he exited Exit 7." Decision at 19.

b. The Board found that the Appellant was "required to attend the Phase II Oral Board." Finding of Fact 22, Decision at page 8. The evidence before the Board through testimony of SSgt. Terhune, Lt. Landry, and the Appellant, is that the Appellant was asked to attend the Phase II Oral Board. Evidence

before the Board was that the Appellant had all the flexibility in the world. The Appellant admitted on cross that his presence was not vital. In its Decision, the Board placed an unjust and unreasonable emphasis on the self-imposed pressure that the Appellant was experiencing over the possibility that he might be late for a meeting to evaluate a probationary trooper. Such was what the Board relied on to excuse the Appellant's belief that he was in Plaistow when he exited Exit 7 onto Route 125. There was no evidence before the Board that the Division's actions or comments contributed in any way, shape or form to the Appellant's self-imposed nervousness surrounding the fact that he might be late. The Board did not receive or hear any evidence that would indicate that it was reasonable for the Appellant to believe that the Division would place more importance on his attendance at a Phase II Oral Board than the Appellant's completion of a legally required escort of a 110 foot steel girth on Route 125. Likewise, the Board did not receive or hear any evidence from either Party that would indicate that the Division would penalize the Appellant for being late to a Phase II Oral Board. On the contrary, the Board received testimony and evidence that the Appellant had all the flexibility in the world because he was accommodating Troop F. See State Exhibit 19, BS 61.

c. The Board, in its Decision, placed a great deal of emphasis on the finding that the Appellant "tried to contact a supervisor for guidance without success." Decision at Page 20. The basis for that statement is that Appellant's Exhibit 1 is redacted to indicate that the Appellant telephoned Troop F at 6:25 a.m. and

then again at 6:35 a.m., and the Appellant testified that he was told there was no supervisor available. Fact Finding 9, Decision at Page 5. However, that same Exhibit 1 evidences that the Appellant had a direct dial to Sgt. Wade. See calls at 11:34 and 12:09. The Board ruled unreasonably that it believed that the Appellant was stressed and anxious about being late to the Phase II Oral Board. It would be reasonable to assume that an individual who was that stressed and anxious, would make greater efforts to contact a supervisor than simply calling the Troop F dispatcher at 6:25 and 6:35. It is evident that the Appellant had direct contact information to Sgt. Wade, however, the evidence points to the fact that the Appellant never reached out to him to obtain guidance. See Appellant Exhibit 1. The only time he called Sgt. Wade was when he was en route back to Troop F and that was to give him an update on his status. The Appellant could have called Headquarters for a supervisor; he could have waited until 8:00 a.m. when the Command Staff was reporting to work at Headquarters; the Appellant could have asked the detail desk for assistance instead of trying to secure his next detail at 9:32 a.m. on the date in question; or, the Appellant could have called Troop A in Epping for assistance.

d. The Board made a finding of fact that the Appellant worked three escorts for Jewell Transport six months prior to the detail giving rise to the Appeal. Finding of Fact 50, Decision at page 15. Further, the Appellant asserted that "he would not have remembered working these escorts had he not been reminded during the discovery process of this appeal." Id . However, the

termination letter issued to the Appellant on August 5, 2015 states specifically that "the Division's records reveal that you have conducted this exact escort three times in the six months prior to this incident." See State Exhibit 5, BS 16. The Appellant in his interview with Lt. Gilbert and Captain Wood acknowledged that he had conducted the same escort in the last year. State Exhibit 19, BS 62. Nonetheless, even without the distraction of a Peer to Peer call, or self-imposed anxiety from the potential of being late for a meeting, during the interview with Lt. Gilbert and Captain Wood the Appellant maintained that he believed that Epping was on one side of Exit 7, and Plaistow on the other. Unreasonably so, the Board fails to appreciate the incredulous nature of that statement given a 16 year trooper whose activity and career with the Division of State Police was anything but confined to Troop F. As the Board recognized, the Appellant was on the SWAT team which required him to travel throughout all corners of the State on a moment's notice. The Board heard testimony that the Appellant travels to Sig Sauer in Epping on a regular basis for SWAT training. The Board acknowledges that the Appellant has a history of taking on many extra duty details. Those details are not confined to the northern part of the State but rather ***throughout*** the State. The Appellant on cross-examination acknowledged he uses a GPS, but could not specifically recall if he may have used it that day. The Appellant acknowledged traveling down 101 to Exit 7 onto Rte. 125 south for the Brentwood officer involved shooting on May 12, 2014. See also Finding of Fact #48, Decision at page 15. Lt. Commerford testified that the Appellant

had arrived in his own cruiser. Although the Board indicated that they were all familiar with the 125 beltway, the Board also saw the video that demonstrates that traveling 3 minutes or 3 miles south on 125 ends up in Brentwood, with no indication from road signs or markers that one is in Plaistow, or near the Massachusetts border.

e. The Board indicates in its decision that it "fails to see the relevance or significance of whether the Appellant travelled southbound and, if so, how far or for how long." Decision at page 21. What the Board fails to recognize is that throughout the formal interview with Captain Wood and Lt. Gilbert, the Appellant maintained that he traveled south on Route 125 before returning to Troop F. Those statements are simply not true and contradictory to the testimony of Adam Jewell, the AVL, the testimony of Captain Wood and Lt. Gilbert. The facts are that the Appellant got to the bottom of the ramp, stopped traffic and jumped back on 101 to head to Troop F without ever traveling south on Route 125. It strains credibility to believe that the Appellant (a 16 year State Trooper), who the Board believed his state of mind was focused on not being late to a meeting, would not remember where and when he made the decision to abandon an escort so that he could make his Phase II Oral Board meeting. Any statements made by the Appellant that he actually traveled south on Route 125 are simply misrepresentations that warrant a sustained finding of a violation of PSC 1.4.8.

f. The Board gave undue deference to the Appellant's inability to recall when the detail ended and where he turned around. The Board acknowledged that

the Appellant had conducted many, many details. It is more reasonable to believe that given the amount of experience the Appellant had with doing details and having been disciplined prior for his lack of attention to record-keeping, that the Appellant would know exactly when and where he turned around. When he reached the bottom of the ramp of Exit 7 onto Route 125 and decided to abandon the escort, the Appellant had formed a belief that he had inadequate time to finish the escort to the Plaistow/Massachusetts line and make it back to Troop F by 1300. To make that decision, the Appellant knew exactly where he was, and exactly when the detail ended for him.

The Board's deference to the Appellant's inability to recall these critical pieces of information does not reconcile with the Board's reliance on the Appellant's sharp recollection of one of the three exact same details that he had done for Jewell Transport six months prior to the detail subject to the Appeal. The Board noted that the "Appellant did recall, specifically, that he and other troopers had to pull over during an escort to Plaistow due to inclement weather." This was new evidence that the Appellant never provided to the appointing authority at the pre-termination meeting required pursuant to Per 1002.08(d). This prejudiced the State in that ***had*** it received the information during the pre-disciplinary meeting, the State could have (and would have) reviewed the weather history for those three days in question. For argumentative purposes only, a review of the weather history today through www.wunderground.com/history for the airports along that route (West, Lebanon, NH; Concord, NH; and North Andover, MA) reveals that there was

no weather event such as fog, rain or snow on November 13, 2014; December 3, 2014; or December 8, 2014 during the hours that the Appellant recorded on his Detail Voucher as the duration of the detail. This information would have been beneficial to the State to refute the Appellant's recollection.

g. In the face of contradictory evidence in the form of testimony of Adam Jewell and Captain Wood (who also spoke to the other employees of Jewell Transport), the Board indicates in its Decision that the "Appellant was adamant that he was waved off but was unsure of where this occurred." Even if he was waved off, which the evidence indicates he was not, this does not authorize the Appellant to terminate the legally required escort, jeopardizing the public and employees of Jewell Transport, and exposing the Division to unnecessary civil liability.

h. The Board unreasonably assumed that the Appellant's Peer to Peer call was with a peer issue. Peer to Peer counselors provide support not only to colleagues, but also to family members. Not all contacts are direct calls to the affected employee as the Peer to Peer members also assist members in obtaining counseling and support services. See Appellant Exhibit 2. The State attempted through the informal and formal exchange of information, to obtain information about the Peer-to-Peer call and the Board only ordered the Appellant to provide a redacted telephone log. The Board was provided an unredacted telephone log and the State is without any information as to whether or not the calls were designated in any way. To the extent that the Board attributes any calls to a specific member of the Division is unduly

prejudicial to the State given the fact that it was not allowed to explore the nature of the calls on the telephone log because it was provided a log that was redacted and labeled by the Appellant's counsel.

8. It was unlawful and unreasonable for the Board to rely on evidence that was not presented to the Colonel in a pre-disciplinary meeting. This Board acknowledges that the Appellant chose to forego the pre-disciplinary meeting with the Colonel that is required pursuant to the Personnel Rules. Specifically, Per 1002.08(d)(2).

9. In its Response to the Appeal, the Appellee argued that having foregone that opportunity, the Appellant should not be allowed to argue or rely on any rebuttal evidence, or mitigating circumstances that was never presented to the Colonel pursuant to Per 1002.08(d). However, the Honorable Board in explaining its rulings relied on evidence such as Appellant's testimony, that was never presented to the Colonel as part of the internal investigation or as part of the requisite pre-termination hearing. This Board in a prior decision has affirmatively stated and recognized that "[t]he obligations created by Per 1002.08(d) ...apply to both the agency and the employee. The agency is obliged to produce the evidence supporting termination from employment in order to allow the employee an opportunity to refute that evidence. If the employee knows that the evidence is insufficient or the reason for dismissal is flawed, the employee has an obligation to inform the employer so that errors in the decision-making process can be corrected before the termination occurs." *Appeal of Tracie Bettez,* Docket No. 2007-T-0019 (2009) at page 12. The Board went on to say that "[t]he fact that Ms. Bettez failed to do so should not now obligate the employer to reverse its decision and compensate her for lost wages." Id.

10. The Board's Decision in this case, whether intended or not, encourages employees to absent themselves from the pre-disciplinary meeting with the appointing authority that is required by the Personnel rules, and present their evidence directly to this Board in the hopes that discipline is overturned and "damages" are awarded, regardless as to whether or not an appointing authority had the opportunity to weigh the rebuttal evidence first. This Board should not encourage state employees to shirk their obligation under the Personnel rules and assert evidence for the first time during an adjudicative hearing. This would create an unduly and unnecessarily burdensome case load for the Board and places the Board in the position of being a super human resource manager for the State.

11. Finally, the Board indicates in its Decision that "[a]t the request of the parties on August 8, 2016, the Board shall hold a separate hearing so that the parties have the opportunity to argue damages." Id.

12. The Parties agreed to bifurcate a hearing related to back pay, ***only*** if such a hearing would be necessary based on the outcome of the Board's decision. The Appellee submits that based on the Board's Decision, the Board lacks authority to award the Appellee any loss of pay and therefore, any hearing related to "damages" is unnecessary and outside the Board's jurisdiction.

13. RSA 21-I:58, I states:

> "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."

14. The plain reading of the RSA 21-I:58, I mandates that an employee ***shall*** be reinstated to his or her former position of like seniority, status, and pay, and without loss of pay only when the Board has determined that the "action complained about by the employee 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.***" RSA 21-I:58, I. If the Board determines that an appointing authority took an employment action against a permanent employee 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 of personnel, then and only then, shall the affected employee be reinstated **and** entitled to loss of pay. In order to recover 'loss of pay' under these circumstances, the employee must first be reinstated.

15. RSA 21-I:58, I goes on to state that "[i]n 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 added. The NH Supreme Court has stated that "[t]he remedial authority of a quasi-judicial administrative body is expressly limited

by statute." Appeal of Campaign for Ratepayers' Rights et al., 162 NH 245, 255 (2011) *citing Appeal of Land Acquisition, 145 N.H. 492, at 498 (2000).* The plain reading of the last sentence in RSA 21-I:58, I does not expressly provide the Board with authority to award loss of pay in all cases. On the contrary, RSA 21-I:58, I, provides for award of back pay only when the Board determines that the appointing authority took an adverse employment action because of discriminatory reasons, or in violation of a statute or rules adopted by the director of Personnel *and* the employee is reinstated. See also Appeal of Boulay, 142 NH 626 (1998) where the Board reinstated the Appellant without back pay, the Court ruled that because the appointing authority violated the Personnel rules, RSA 21-I:58 mandated that the Appellant be reinstated and awarded loss of pay. Id. at 628.

16. It is well established law that the Court will "interpret legislative intent from the statute as written and will not consider what the legislature might have said or add words that the legislature did not include." Id. *citing Appeal of Town of Bethlehem, 154 N.H.314, 319 (2006).* The legislature knew how to delegate to the Board authority to award loss of pay in all cases, however, it chose to leave that remedy exclusively for when an employee is reinstated ***after*** the Board determined that an appointing authority took an adverse employment action against a permanent employee for discriminatory reasons, or violated statute or rules adopted by the Director of Personnel.

17. The Board's Decision to grant the Appellant's appeal is based solely on the decision that the termination of the Appellant was "unjust in light of the facts in evidence." Decision at p. 24. The Board did not overturn the termination because it found the Appellee had discriminated against the Appellant. Nor did the Board overturn the termination because it found the Appellee had violated any statute or rule adopted by the Director of Personnel. Furthermore,

the Board's remedy does not include the Appellant's reinstatement. Rather, the remedy fashioned by the Board is to remove the "letter from the Appellant's file referring to the intent to dismiss and the notice of dismissal".

18. To the extent that the Appellant may argue he is entitled to reinstatement, the Appellee submits that because the Board did not find that the appointing authority's disciplinary dismissal was made for discriminatory reasons, or, that the Appellee did not violate any statutes or rules of the Division of Personnel, the Appellant is not entitled to reinstatement or any loss of pay. Furthermore, it should be noted that in the Appellant's Appeal and later filings with this Board, the Appellant never requested reinstatement as relief. The first time the Appellant requested "reinstatement" is in his Closing Brief. Having not requested relief in the form of reinstatement in his Appeal, the Appellee submits that he has waived reinstatement as a relief, and thus any loss of pay.

WHEREFORE, it is respectfully requested that this Honorable Board:

A. Grant this Motion for Reconsideration/Rehearing; and

B. Rehear this matter; or

C. Uphold the Appellee's termination letter;

D. Grant such other relief as is just and proper.

Respectfully submitted,

Marta A. Modigliani, Esq.
Department of Safety
Office of the Commissioner
33 Hazen Drive
Concord, New Hampshire 03305
(603) 271-2791

February 10, 2017

I do hereby certify that a copy of the foregoing has been delivered to John S. Krupski, Esq. via email jake@molanmilner.com and First-Class mail.

Marta A. Modigliani, Esq.

STATE OF NEW HAMPSHIRE
PUBLIC APPEALS BOARD

APPEAL OF DAVID APPLEBY

Docket No. 2016-T-002

OBJECTION TO MOTION FOR REHEARING/RECONSIDERATION

NOW COMES the Appellant, David Appleby, by and through counsel, Milner & Krupski, PLLC, and submits this Objection to Motion for Rehearing/Reconsideration and in support thereof, the Appellant states as follows:

1. On or about February 10, 2017, the State of New Hampshire Department of Safety, Division of State Police (hereinafter "State") filed a Motion for Rehearing/Reconsideration (17 pages) of the lawful and reasonable Order of this Honorable Board on January 11, 2017, which provided that the Board had voted unanimously to grant the appeal in the above captioned matter and found that the decision to dismiss the appellant was unjust in light of the facts in evidence. See, Decision, p. 24. The Board further held that, "at the request of the parties on August 8, 2016, the Board shall hold a separate hearing so that the parties have the opportunity to argue damages." (emphasis supplied) Id.

2. Throughout this appeal process, which commenced with a filing of a Notice of Appeal on August 19, 2015, and the conduct of discovery, prehearing conferences, and ultimately a three (3) day hearing on its merits, the gravamen of the State's allegations against the appellant, David Appleby (hereinafter "David") was that David was untruthful. The State alleges that David made a false official statement or intentional misrepresentation of facts when he said he was on phone calls just prior to arriving in Plaistow and his alleged repeated statements said he traveled two or three miles south on route 125 (see, State Ex. 33 at BS155; see State Ex. 32 at BS149; and see State Ex. 5 at BS15-16). The second part of the allegation was that David did not drive all the

way to Plaistow, but he consistently maintained that he believed he was in Plaistow when he got off Exit 7 of Route 101 onto Route 125. See, State Ex. 19 at BS53, 55, 56, 57, 62, 67, 76 and 87. Also, David did not intentionally falsify any documents. In essence, the Board heard the testimony of David in regards to this matter, assessed the creditability, viewed his nonverbal action and, taken in conjunction with the circumstances and evidence in this matter, determined that he was not untruthful in contravention of the allegations of the State.

3. The Board correctly assessed the testimony, presentation and circumstances of the situation and determined that David was not untruthful and the circumstances and allegation could be explained and David did not violate the integrity prohibitions of the Professional Standards of Conduct 1.4.8 (Decision, p. 21), did not violate the prohibition of a false statement or intentional misrepresentation during his interview with Captain Wood and Gilbert (Decision, p. 22); did not obstruct a formal investigation (Decision, p. 23); and did not falsify any agency documents (Decision, p. 23-24).

4. The State argues that the Decision reached by this Honorable Board should be reconsidered based upon the State simply disagreeing with the factual conclusions reached by the Board, based solely on opinion; reliance on irrelevant and immaterial factual minutia; legally and internally inconsistent arguments; and an attempt to argue that the parties' stipulation to bifurcate the issues of liability and damages should be disregarded by this Honorable Board.

5. The Board should determine that the arguments in the Motion for Rehearing/Reconsideration were essentially the same raised by the State in its pleadings and testimony before the Board during the hearing on the merits of the appeal. The State provided neither evidence nor argument that would support the conclusion that the Board's decision was

unlawful and unreasonable and therefore the matter should not be reheard. Accordingly, the State's Motion for Rehearing/Reconsideration should be denied.

6. In its motion, the State, without support and based solely upon opinion, disagrees with the well supported factual findings of the Board and relies upon irrelevant and immaterial factual minutia to disagree with the Board's conclusions and rulings. The State erroneously asserts that the Board failed to make a finding in regards to the AVL or automatic vehicle locator and failed to consider the past history of David.

7. The State also asserts, that the Board's interpretation of seven factual circumstances were unreasonable. These include, that David was distracted by a peer to peer phone call (Motion at 7a); that the Appellant was required to attend the Phase II Oral Board (Motion at 7b); that David tried to contact a supervisor without success (Motion at 7c); that he was unfamiliar with the southern most area of the State (Motion at 7d); insignificance of the alleged southbound travel (Motion at 7e); the insignificance of the weather during three days of travel (Motion at 7f); insignificance of a waive off (Motion 7g) and the fact that David was on a peer to peer call (Motion at 7h). However, the findings of the Board are amply and credibly supported by the record.

8. As to the automatic vehicle locator ("AVL"), the PAB is well within their discretion to exclude the irrelevant and immaterial evidence. See, Per-A 203.04and Per-A 207.04(c). See, In Re Alexander, 163 N.H. 397 (2012). The State itself provides the following statement, "It is unlawful and unreasonable for the Board to rely on evidence that was not presented to the Colonel in a pre disciplinary meeting." See, Motion at 8. However, in a self-serving nature, the State argues that the AVL should have been considered by the PAB. Counsel for the State admitted that the appointing authority, the Colonel, had not seen the AVL or even reviewed the

AVL prior to making the determination to terminate David. It is clear that the AVL and its alleged findings were not contained in the Intent to Dismiss nor the Notice of Dismissal Letters. See, State Ex. 4 and 5. Further, this information was not produced in discovery and was presented for the first time at the third day of the three day hearing. The PAB correctly disregarded or provided little weight to this supposed evidence.

9. The PAB also lawful and reasonable considered the past history of David in making their determination. It just so happens that the evidence demonstrated that David was a well respected trooper. The PAB found that, "A memo of counsel, was issued on September 28, 2011, which was not discipline nor to be used in the progressive discipline nature. See, Per 1002.01 and Appeal of Patrick Curran, Docket #2015-D-006, March 12, 2015. The Board also found that on October 1, 2012, almost five years ago, Colonel Quinn issued a letter of warning to the Appellant. See, Findings of Fact #39. The Colonel wrote in his letter of warning, I have chosen to administer the least severe form of discipline based on your commitment to the division, personnel record, **your honesty**, and your remorse." (emphasis supplied) (Findings of Fact #40). By January 27, 2004, the Appellant was working his regular duty schedule, was on the SWAT team, was an FTO and was a peer to peer counselor. (Findings of Fact #46). In addition, at the time of his dismissal, David was also working on the patrol, was a member of the SWAT team, was a SWAT sniper team leader, was a peer to peer counselor, and FTO and the troop armorer in addition to working extra duty detail hours comparable to the amount he worked in 2014 (Findings of Fact #47).

10. During his career as a trooper, he received numerous letters of appreciation and official commendations for his outstanding services (Findings of Fact #4).

11. David was described as by his peers and commanding officers as being an excellent trooper, possessing a strong work ethic, and highly motivated and dedicated. He has been described as the "go to guy" and that his fellow troopers would trust him with their life (Findings of Fact #5).

12. The simple fact is that David's history is exemplary prior to his dismissal, except for one minor written warning that was received in October 2012.

13. The determination of the PAB that David believed his was required to attend the Phase II Oral Board is amply supported by the record. In fact, the documents provided by the State reinforce this statement. During his interview, Staff Sergeant Terhune concluded, "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 with Troop F, but rather, he make it to Troop F in time for Phase II Board at 1300." The issue of the Appellant traveling on time was of little concern at this time. State Ex. 35 at BS159, 161 and Testimony Terhune. Further, it was made clear that the Appellant was made aware that his primary duty was to act as a trooper. See, Findings of Fact #40, #42. The Board acknowledged this in their Decision (p. 20).

14. Further, the Board provided ample evidence that David attempted to contact a supervisor without success. David attempted to contact Troop F at 6:25 a.m. and again at 6:35 a.m. in order to seek guidance from a supervisor. He was told a supervisor was not available. Testimony Appellant; Appellant Ex. 1; Findings of Fact #9. In addition, Appellant tried to contact the detail desk two time in an attempt to get rid of the detail. However, the extra duty detail policy provides that it is the employee's responsibility to find coverage if it is needed within twenty-four hours of the detail. Testimony Appellant; Appellant Ex. 1; Chapter 22-E 1.2 [5.8]. This decision was well supported by the record.

15. The findings of the PAB that David was unfamiliarly with this area of the State was well supported in the record. The Board took several matters into consideration, in which they found David credible when he said that he believed he was in Plaistow when he exited Route 101 via Exit 7. (1) David's residence in Thornton and that he had spent almost sixteen years at Troop F, the northern most troop in the State; (2) that the delay, outside of David's control, was enough to make him nervous; (3) that in addition to being nervous about running two hours behind, he was also hamstrung with handling peer to peer calls as a counselor; and (4) that he had worked 126 details from January 8, 2014 through December 22, 2014. He was also a SWAT Team leader, a member of the SWAT Team, peer to peer counselor, FTO and a troop armorer. See, Decision, p. 19-21. The Board concludes that, "Due to the number of extra duty details performed in 2014 and 2015, the level of nervousness the Appellant was experiencing due to the delay of the start time of the escort, the peer to peer issues the Appellant was dealing with while escorting the truck, his concerns about being late for Phase II Oral Board and the Appellant's unfamiliarity with the area, the Board finds with reasonable belief that the Appellant believed he was in Plaistow when he exited Route 101 Exit 7." Decision, p. 21.

16. The State also attempts to make much ado over irrelevant and immaterial facts that David believed he was waved off. David testified that he did not find this as an excuse and took responsibility for leaving the escort. He was only relaying the facts that he was asked about during the interview. The State ignores the fact that "....he advised me that the truck drivers would clear the troopers and said that they may give a thumbs up to the troopers, but that would be it." In addition, Chip Powers stated that he kind of told the troopers to do what they needed to do in order to make the meeting up north." State Ex. 32 at BS144. As the Board found that David was simply relaying the facts as he remembered them, and not making excuses. Further, in the

Dismissal Letter, David was not charged with being untruthful about the waive by the driver. State Ex. 5.

17. The Board appropriately found that there is no relevance or significance to whether the Appellant traveled southbound and if so how far. Decision, p. 21. It is up to the Board to determine relevance in this matter. The fact is that the Board found that David used the best of his memory and recollection when he said he believed he traveled south on Route 125. He admitted he could have turned around at the bottom of the ramp and was relying solely on his memory. He was clear that he did not complete the escort. The fact remains is that the Appellant, throughout the interview, acknowledged that he did not complete the detail. See, Decision, p. 21. The State fails to see the forest for the trees. The discrepancy in human memory is not in all cases an intentional misrepresentation. People simply make mistakes when they remember significant but not insignificant facts concerning a particular situation. The Board recognized this human failing. Throughout his testimony, David provided that he did not remember where he turned around. The record indicated that he may have turned around at the bottom of the ramp and that he was not trying to deceive anyone. The transcript reflects that David told investigators that he did not know where he turned around and provided that it may have been two or three miles or two or three minutes at the behest of the investigators. See, State Ex. 19 at BS65. He was told to give his best memory and would not be held to the minute. State Ex. 19 at BS47-48. Thus, the conclusion where David turned around, as opposed to the fact that he did turn around, was of little relevance to the finding of a violation. As fact finder, the PAB is given great discretion and its findings are deemed to have great weight. Desmarias v. State Personnel Commission, 117 N.H. 582, 586 (1977).

18. Further, the State misinterprets the findings of the Board in regards to the mitigating factor that David traveled behind other troopers who are more familiar with the southern part of the State in his previous trips to Plaistow. The State focuses on inclement weather, but this is insignificant to the analysis. Rather the Board relied upon, not the inclement weather, but rather the State Ex. 21, 22 and 25, that there were multiple troopers involved in the same escorts with similar start and end times. See, Decision, p. 19. The Board appropriately found that the Appellant conducted approximately fifty details between December 8, 2014 and May 12, 2015. The detail to Plaistow was of no moment until the investigation began months later.

19. The Board's determination that David was on a peer to peer call is uncontested by the evidence. The State merely speculates as to David not being on a peer to peer call. The record is replete that David was on a peer to peer call. See, Appleby Ex. 1. It is somewhat disheartening that the State provides that the Division would scrupulously honor the confidentiality requirements of the peer to peer provisions or questioning a peer to peer counselor when he asserts the confidentiality. See, RSA 153-A:17-a and Professional Standards of Conduct, Chapter 22AB, Section 3.2; Appleby Ex. 2 and 3. Again, the State fails to see the forest for the trees in that David was not untruthful during the interview or in his testimony before this Honorable Board. He provided his testimony truthfully and answered the questions narrowly and directly as required by the *Garrity* rights provisions provided by the State. It is concerning that the State did not give the benefit of the doubt to a highly decorated, dedicated and hard working trooper. It appears the State reached a conclusion and would be undeterred by the facts and circumstances to alleviate that allegation.

20. Thereafter, the State attempts to argue, through many aspects of its Motion, that David is not entitled to reinstatement. However, the State's Motion for Reconsideration is

premature as the parties had agreed to bifurcate liability and damages. See, Decision, p. 24. In addition, the State relies upon three basis for stating that any reinstatement would be unlawful and unreasonable. The State relies upon the language of RSA 21-I:58 to provide that unless the individual is terminated for a specific class specification, that individual is not entitled to reinstatement. Second, the State argues that because David did not attend the so-called "Loudermill meeting" he waved his right to reinstatement and finally, the State relies upon the case of Appeal of Tracy Bettez, Docket No. 2007-T-0019 (2009). However, the State is incorrect.

21. The parties agreed on the first day of hearing, as is recognized by the Board, that they would bifurcate damages and liability. Reinstatement is part of the damages. Further, the PAB has rescinded the termination of this matter and found it unjust in light of the evidence. As such, a damage hearing should proceed. As a practical matter, reinstatement materially follows as damages would not be provided if reinstatement was not considered. The Board would have said reinstatement was not awarded as they did in Appeal of Conrad, Docket #2008-T-008.

22. The plain, clear and unambiguous language of RSA 21-I:58 provides that, "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 Board clearly found that the dismissal of David was unjust in light of the facts and evidence in violation of Per-A 207.12(b)(4). The State attempts to contort the meaning and plain language of the statute to fit its own needs.

23. The finding that David could have endangered the life, health or safety of the Jewell Transportation employees as well as the general public (Decision, p. 23) does not require that this matter be reversed. First, the language of the regulation is written in current tense. It requires

a finding that David did, not "could have endangered....". Even assuming that the PAB found a violation of Per 1002.08(b)(9) they may modify this discipline to a suspension without pay (see, Per 1002.06(a)(3)(h)) or written warning (see, Per 1002.04(b)). This will be handled at the damages hearing agreed to by the parties.

24. An individual is not required to attend a prehearing conference. Said conference is discretionary by the plain meaning of the regulation. The relevant regulation does not require that David attend a prehearing session. See, Per 1002.08(d). Rather, the regulation presupposes that an individual may not attend the pre termination meeting. Per 1002.08. this provides in relevant part,

> (d) No appointing authority shall dismiss a classified employee under this section until the appointing authority:.
>
> (1) **Offers** to meet with the employee to discuss whatever evidence which the appointing authority believes supports the decision to dismiss the employee;
>
> (2) **Offers** to provide the employee with an opportunity to refute the evidence presented by the appointing authority provided. however:
>
> a. An employee's failure to respond to a request for a meeting with the appointing authority shall not bar the appointing authority from dismissing an employee pursuant to this part; and
>
> b. An employee's refusal to meet with the appointing authority shall not bar the appointing authority from dismissing an employee pursuant to this part; and
>
> (3) Documents in writing the nature and extent of the offense.
>
> (emphasis provided)

If the State believed they had a right to the hearing, the State could have ordered David to attend. The State did not require attendance.

25. Reliance upon the case of Tracey Bettez is misplaced and actually supports the position of David. In fact, Tracy Bettez was reinstated despite the fact that she did not attend the pre termination meeting. The remedy was that Ms. Bettez was not provided with any backpay. However, this case is factually distinct as the Board found that David fully cooperated with the investigation. In the case of Bettez, she refused to provide her side of the story on two separate occasions (Bettez at12). The Board also described her as being "curt, uncooperative and disrespectful" (Bettez at 13). On the other hand, this Board found that Sergeant Terhune recalled that the Appellant answered his questions narrowly, directly and truthfully during the investigation. See, Decision, p. 22. The Board also holds that the "Board does not believe that the Appellant obstructed the internal investigation and also believes that the Appellant answered the questions he was asked of to the best of his recollection." Decision, p. 23. Thus, the Appeal of Bettez provides the State with no safe harbor.

26. Finally, the allegation that David somehow waived his right to seek reinstatement is disingenuous. David, at no time, waived a right to seek reinstatement. Rather, through several prehearings and during the testimony, it was clear that David was seeking reinstatement to his former position. He would not have asked to bifurcate the damage aspect of this case had he not been seeking reinstatement. Throughout the discovery process, the State requested information, particularly Workers' Compensation information and information concerning his current employment in order to obtain information concerning a mitigation of damages. Clearly, the State knew that David was seeking reinstatement. The State agreed to bifurcate damages.

27. The State asserts that David waived his right as it was not contained in his initial appeal. His initial appeal is governed by the the rules of the Personal Appeals Board. These rules do not require a statement as to requested remedy or damages. Please see Per-A 206.01.

28. The State is simply attempting act with impunity and disregard to the fact they had illegally and unlawfully terminated David as found by this Board.

WHEREFORE, the Appellant respectfully requests this Honorable Board grant the following relief:

A. Deny the Motion for Rehearing/Reconsideration;

B. Schedule a hearing on damages as soon as the calendar allows; and

C. Grant such other and further relief as is just and equitable.

Respectfully Submitted,
David Appleby
By and Through Counsel,

MILNER & KRUPSKI, PLLC

February 15, 2017

By: _____
John S. Krupski, Esquire
NH Bar #11309
1 Pillsbury Street, Ste. 204
Concord, NH 03301
(603) 410-6011
jake@milnerkrupski.com

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was this date mailed to Marta Modigliani, Esquire.

_____
John S. Krupski, Esquire

State of New Hampshire

PERSONNEL APPEALS BOARD
25 Capitol Street
Concord, New Hampshire 03301
Telephone (603) 271-3261

Appeal of David Appleby

Docket #2016-T-002

Department of Safety

Division of State Police

New Hampshire Personnel Appeals Board's Decision on Appellee's Motion for Rehearing/Reconsideration

March 8, 2017

The New Hampshire Personnel Appeals Board met in public session on August 8, 2016, August 9, 2016 and August 10, 2016 to hear the appeal of David Appleby. The Board issued its decision on January 11, 2017. The Appellee filed a Motion for Rehearing/Reconsideration on February 10, 2017 and the Appellant filed his Objection to the Appellee's Motion for Rehearing/Reconsideration on February 15, 2017. Per-A 208.03 (c) (Rehearing), states "such motion for rehearing shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable."

The Board conducted a three (3) day hearing in which it heard from multiple witnesses for the Appellee and received numerous exhibits as well. The Board participated in thorough and thoughtful deliberations and considered parties' pleadings, arguments, evidence and closing

briefs prior to reaching its decision. The Appellee fails to set forth any ground that would show that the decision is unlawful or unreasonable Per 208.03 (f).

After reviewing the Appellee's Motion for Rehearing/Reconsideration, the Board finds that the arguments in said Motion are essentially the same arguments raised by the Appellee in its pleadings and witness testimony before the Board during the hearing on the merits of the appeal. The Appellee offered neither evidence nor argument that would support the conclusion that the Board's decision was unlawful or unreasonable, and that the appeal should be reheard. Accordingly, the Board voted unanimously to DENY the Appellee's Motion for Rehearing/Reconsideration.

The Board agreed, at the request of the parties prior to the beginning of the hearing on August 8, 2016, to bifurcate the hearing in the event the Appellant prevailed so that each party could argue damages/sanctions. The Board shall schedule a hearing as the docket permits. In the meantime, the Board encourages the parties to work together to resolve these issues without the need for intervention by the Board.

THE PERSONNEL APPEALS BOARD

Chair, Charla Stevens, Esq.

cc: Sara Willingham, Director of Personnel, 25 Capital Street, Concord, NH 03301
Marta Modigliani, Esq., Department of Safety, Office of the Commissioner, 33 Hazen Drive, Concord, NH 03305
John S. Krupski, Esq., Milner & Krupski, PLLC, 1 Pillsbury Street, Suite 204, Concord, NH 03301

State of New Hampshire

PERSONNEL APPEALS BOARD
25 Capitol Street
Concord, New Hampshire 03301
Telephone (603) 271-3261

Appeal of David Appleby

Docket #2016-T-002

Department of Safety

Division of State Police

New Hampshire Personnel Appeals Board's Clarifying Order

May 8, 2017

The New Hampshire Personnel Appeals Board met in public session on August 8, 2016, August 9, 2016 and August 10, 2016 to hear the appeal of David Appleby. The Board issued its final decision on January 11, 2017, granting the appeal. The Appellee filed a Motion for Rehearing/Reconsideration on February 10, 2017 and the Appellant filed his Objection on February 15, 2017. The Board issued its decision on March 8, 2017, denying the Appellee's Motion for Rehearing/Reconsideration.

The Board held a Prehearing Conference with the parties on April 19, 2017 to schedule a hearing so that the parties could present arguments regarding damages/sanctions. During the Prehearing Conference, the Appellee asserted that it did not interpret the Board's final order to mean that the Appellant was reinstated as the order directed the Appellee to remove letters from the Appellant's file referring to the intent to dismiss and the notice of

dismissal. Conversely, the Appellant argued that the final order did, in fact, reinstate the Appellant as it granted his appeal. At the conclusion of the Prehearing Conference, the Board informed the parties that it would issue a clarifying order to supplement the final 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 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.

The Appellant shall be reinstated without loss of pay or benefits, with the exception of the aforementioned sixty (60) days, provided that the sum shall be equal to the amount of the Appellant's base pay lost 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 the event the parties are unable to reach an agreement on damages, a hearing shall be scheduled at the request of either party.

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.

THE PERSONNEL APPEALS BOARD

Christopher Nicolopolous, Esq.

cc: Sara Willingham, Director of Personnel, 25 Capital Street, Concord, NH 03301
Marta Modigliani, Esq., Department of Safety, Office of the Commissioner, 33 Hazen Drive, Concord, NH 03305
John S. Krupski, Esq., Milner & Krupski, PLLC, 1 Pillsbury Street, Suite 204, Concord, NH 03301

STATE OF NEW HAMPSHIRE
PERSONNEL APPEALS BOARD

Docket Number 2016-T-002

David Appleby
Appellant

Appeal of Dismissal

v.

Division of State Police
New Hampshire Department of Safety
Appellee

MOTION FOR REHEARING/RECONSIDERATION OF THE BOARD'S MAY 8, 2017 CLARIFYING ORDER

NOW COMES the Division of State Police, New Hampshire Department of Safety, through its attorneys, Marta A. Modigliani, Esq. and Karen A. Schlitzer, Esq., and respectfully submits this Motion For Rehearing/Reconsideration of the Board's Order dated May 8, 2017. In support thereof, the Appellee states as follows:

A. Procedural Background

1. This Honorable Board met in public session on August 8, 9, and 10, 2016 to hear the appeal of the Appellant's termination from the Division of State Police, effective August 5, 2015.

2. Closing Briefs were submitted by both parties on or about September 16, 2016.

3. On or about January 11, 2016, this Honorable Board issued its decision granting the Appellant's appeal on the sole basis that "the decision to dismiss the Appellant was unjust in light of the facts in evidence." Decision at 24. The Board did not find that the termination was based on discrimination, nor did the Board find that Appellee had violated any statute or rule adopted by the Director of Personnel. *Id.*; *see also* RSA 21-I:58, I (authorizing an award of back

pay only when an employee is reinstated based on a finding of discrimination or violation of law).

3. The Board's Order did not reinstate the Appellant, nor did it modify the appointing authority's discipline. Instead, as the sole remedy, the Board directed the Appellee to remove letters that referred to the intent to dismiss and the notice of dismissal from the Appellant's file. *Id.* Despite the fact that Appellant had not been reinstated, the Board also stated in its Order that "[a]t the request of the parties on August 8, 2016, the Board shall hold a separate hearing so that the parties have the opportunity to argue damages." *Id.* Because the Board had neither reinstated the Appellee nor made a finding of discrimination or violation of law, the purpose of holding a "damages" hearing was unclear.

4. The Appellee filed a timely Motion for Rehearing/Reconsideration dated February 10, 2017, which is incorporated by reference as if fully set forth herein, articulating its reasons and arguments that the Board's decision was unlawful or unreasonable. In addition, the Appellee pointed out that a hearing relating to "damages" was unnecessary and outside the Board's jurisdiction because the Board's January 11, 2017 Order did ***not*** reinstate the Appellant. *See* Motion for Rehearing/Reconsideration at ¶¶ 11-18 (citing RSA 21-I:58, I).

5. The Appellant filed his Objection to the motion for rehearing on or about February 15, 2017. In his Objection, the Appellant agreed that the Board's January 11, 2017 Order did ***not*** reinstate the Appellant to his position. *See* Objection at ¶¶ 20-23 (arguing that the Appellee's motion for rehearing was premature because "reinstatement is part of the damages" phase of the litigation, and that the issue of reinstatement would "be handled at the damages hearing agreed to by the parties"). The Appellant took the position, for the first time, that "the parties had agreed to bifurcate ***liability and damages,"*** and argued that the Board could therefore

consider reinstatement at the upcoming damages hearing. *Id.* That is mischaracterization of the agreement made by the parties on August 8, 2016. As indicated in its Motion for Rehearing/Reconsideration, the Appellee agreed to bifurcate a hearing ***related to back pay***, only if such a hearing would be necessary based on the outcome of the Board's decision. Such an agreement was consistent with past practice of the Board, where the issue of back pay would be addressed at a subsequent hearing if, and only if, the Board ordered reinstatement in its final order. Here, the Board did not order reinstatement in its final order; therefore, a hearing on the issue of back pay was not necessary.

6. By Order dated March 8, 2017, the Board summarily denied the Appellee's Motion for Rehearing/Reconsideration, stating that the "Appellee fail[ed] to set forth any ground that would show that the decision is unlawful or unreasonable Per 208.03(f).....and that the [Appellee's] arguments in [its Motion for Rehearing/Reconsideration] are essentially the same arguments raised by the Appellee in its pleadings and witness testimony before the Board during the hearing on the merits of the appeal." Decision on Appellee's Mot. for Rehearing/Reconsideration at 2. The Order did not address the Appellee's argument that a hearing on "damages" was unnecessary and outside the Board's jurisdiction given that the January 11, 2017 Order did not reinstate the Appellant. *See id.* Instead, the Order simply concluded that the Board had "agreed, at the request of the parties prior to the beginning of the hearing on August 8, 2016, to bifurcate the hearing in the event the Appellant prevailed so that each party could argue damages/sanctions.[1] The Board shall schedule a hearing as the docket permits." *Id.*

[1] The Board's Decision on Appellee's Motion for Rehearing/Reconsideration is the first time the Board references "sanctions."

7. Given that both the Appellee and the Appellant had agreed in their pleadings that the January 11, 2017 Order as *not* reinstating the Appellant, and the Board did not clarify that interpretation in its March 8, 2017 Order, the substance of the January 11, 2017 Order remained unchanged, i.e. the Appellant was not reinstated, but the Board would be scheduling a hearing to address "damages/sanction."

8. Prior to scheduling the damages hearing, the Board issued a Notice of Scheduling Prehearing Conference in this matter for April 19, 2017. At the Prehearing Conference the Appellee reasserted its position that the Board's Decision did not reinstate the Appellant, and therefore a hearing on back pay was unnecessary. The Appellee further argued that the Board could not at this late date amend its final order to reinstate the Appellee, and that even if it could, the Board lacked statutory authority to order back pay because the Board's Order did not find that the Appellee violated any laws or rules that would authorize, in accordance with RSA 21-I:58, I, the award of back pay to the Appellant. Finally, the Appellee again vehemently denied agreeing to a bifurcated hearing for the purposes of determining "sanctions," however that term was meant by the Board. In response, the Appellant argued for the first time, and contrary to the arguments raised in his Objection, that the January 11, 2017 Order ***did***, in fact, reinstate him.

9. On May 8, 2017, the Board issued a Clarifying Order "to supplement the final order." In its Clarifying Order the Board stated that "[a]lthough the Board did not use the word 'reinstatement' explicitly in its final order, the Board's intent was to reinstate the Appellant." Clarifying Order at 2. The Board then reinstated the Appellant subject to a sixty (60)[2] day suspension as a result of violating PSC Chapter 1 Section 1.4.0 and 1.4.2 and that the Appellant's

[2] Although the Board's Order references both a suspension of "60-day" and "60 calendar days", the Appellee assumes the Board intended a 60 work day suspension, as a suspension on a scheduled day off would not constitute a "suspension without pay." Furthermore, Per 1002.06 of the Personnel Rules, references disciplinary suspension in terms of "work days" and not calendar days.

action could have endangered the life, health or safety of the Jewell Transport employees as well as the general public." *See* Per 1002.08(b)(9). Importantly, the Clarifying Order did not include any finding that the Appellant's termination had been based on discrimination, nor did the Board find that Appellee had violated any statute or rule adopted by the Director of Personnel in terminating the Appellant. Nevertheless, contrary to RSA 21-I:58, I, the Board ordered the Appellant "reinstated without loss of pay or benefits, with the exception of the aforementioned sixty (60) days . . . ." Clarifying Order at 2.

10. The Board's final order, as clarified by the May 8, 2017 Order, is unlawful and unreasonable for the reasons set forth below.

B. **The Board's Clarifying Order unreasonably and unlawfully modified the Board's final order.**

11. The January 11, 2017 Decision was required to be the final decision; and the issuance of the Clarifying Order was unlawful. The Board is required to follow its own rules. See Appeal of Town of Bethlehem, 154 NH 314, 327 (2006). Pursuant to Per-A 208.02 ("Decisions"), the Board is required to issue "final decisions on all appeals" within 45 days of the close of evidence, unless notice is given to the parties regarding the delay which was done here. Per-A 208.02 (a) and (b). Final decisions must be in writing. Per-A 208.02(c). The Board's final decision was in writing, dated January 11, 2017. Within 30 days, a party may request a rehearing regarding any matter "covered or included in the order." Per-A 208.03(a). The Appellee did this. *See* Appellee's Motion for Rehearing/Reconsideration dated Feb. 10, 2017.

12. In its motion, the Appellee specifically pointed out that the Appellant had not been reinstated by the January 11, 2017 Order, and the Appellee agreed with that interpretation.[3] *See* Appellant's Objection to Motion for Rehearing/Reconsideration at pp. 8-10, ¶¶ 20-23. In ruling on the motion, the Board did not disavow the parties interpretation or in any way clarify the January 11, 2017 Order. Therefore, the board's "final decision" in this matter is the January 11, 2017 decision. Because Per-A 208.02(a) and (b) require the Board to issue its final decision within 45 days of the close of evidence, unless notice is given to the parties regarding the delay, it was unlawful and unreasonable for the Board to substantively modify its January 11, 2017 final order almost four months later. Accordingly, the issuance of the Clarifying Order was unlawful and it is of no legal effect.

C. Contrary to the plain language of RSA 21-I:58, I, the Board's Clarifying Order unlawfully awards back pay in the absence of a finding of either discrimination or a violation of a statute or rule.

12. For the reasons stated above, the final order does not reinstate the Appellant to his position; therefore, he is not entitled to back pay, making a damages hearing unnecessary. But in any event, even if the Board determines that it lawfully and reasonably clarified its final decision by issuing the May 8, 2017 Clarifying Order, the Board still lacks authority to award the Appellant back pay and/or benefits.

13. RSA 21-I:58, I states:

> 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

[3] The parties' disagreement about the January 11, 2017 Order related not to whether the Appellant had been reinstated in the order, but rather whether the Board had the authority to address that issue at the upcoming "damages hearing." The Appellee argued that the Board had already considered the issue of modification of discipline and had declined to do so in its January 11, 2017 Order; in contrast, the Appellant argued that the Board had not yet considered the issue of modification of discipline and could address that issue at the "damages hearing."

> 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.*** (Emphasis added).

The NH Supreme Court has stated that "[t]he remedial authority of a quasi-judicial administrative body is expressly limited by statute." *Appeal of Campaign for Ratepayers' Rights et al.*, 162 NH 245, 255 (2011) (citing *Appeal of Land Acquisition*, 145 N.H. 492, at 498 (2000)). The plain reading of the RSA 21-I:58, I mandates that an employee ***shall*** be reinstated to his or her former position of like seniority, status, and pay, and without loss of pay only when the Board has determined that the "action complained about by the employee 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.***" RSA 21-I:58, I (emphasis added). Here, there was no such finding. Therefore, back pay or benefits cannot be awarded. RSA 21-I:58, I.

14. In contrast, the plain reading of the last sentence in RSA 21-I:58, I, does not provide the Board with authority to award loss of pay, let alone benefits, in other types of cases. In cases other than those involving discrimination or violation of statute or rule, the statute provides that the Board "may reinstate" or otherwise change or modify the discipline. RSA 21-I:58, I. Had the legislature intended to grant Board the authority to order back pay in such cases, it would have expressly stated that in the statute. *See Appeal of Boulay*, 142 N.H. 626, 628 (1998) (citing *Appeal of Town of Bethlehem*, 154 N.H.314, 319 (2006) (The court will "interpret legislative intent from the statute as written and will not consider what the legislature might have said or add words that the legislature did not include."). The language of the statute demonstrates that the legislature knew how to delegate to the Board authority to award loss of pay, and it expressly chose to leave that remedy exclusively for when an employee is reinstated after the Board determined that an appointing authority took an adverse employment action against a permanent employee for discriminatory reasons, or violated statute or rules adopted by the Director of Personnel. *See Appeal of Boulay*, 142 N.H. 626 (holding that because the appointing authority violated the Personnel rules, RSA 21-I:58 mandated that the Appellant be reinstated and awarded loss of pay).

15. In the matter at hand, the Board's decision to grant the Appellant's appeal is based solely on the decision that the termination of the Appellant was "unjust in light of the facts in evidence." January 11, 2017 Decision at 24. The Board did not overturn the termination because it found the Appellee had discriminated against the Appellant. Nor did the Board overturn the termination because it found the Appellee had violated any statute or rule adopted by the Director of Personnel. Therefore, based on a plain reading of RSA 21-I:58, I, the Board lacks authority to award the Appellant any loss of pay or benefits. The Board's Clarifying Order

reinstating the Appellant without loss of pay or benefits is therefore unlawful, unreasonable, and exceeds the authority granted to the Board in RSA 21-I:58, I.

16. Finally, in the event the Board denies the Appellee's request to vacate the May 8, 2017 Clarifying Order, it is unjust and unfair to calculate back pay beyond the Board's final order dated January 11, 2017. As the Board stated in its Clarifying Order, "[although] the Board did not use the word 'reinstatement' explicitly, the Board's intent was to reinstate the Appellant." Clarifying Order at 2. It is unfair and unreasonable for the Board to hold the Appellee liable for back pay beyond January 11, 2017 because the Board did not expressly state its intent to reinstate the Appellant in its original final order.

D. <u>The Board's decision to overturn the Appellant's termination and modify the discipline to a 60 day suspension is unlawful, unreasonable, and not supported by the evidence.</u>

17. The Board's Clarifying Order does not explain how it concluded that a 60 work day suspension is an appropriate discipline, especially in light of its original January 11, 2017 and March 8, 2017 Decisions, which referenced neither a reinstatement nor any other discipline for that matter. The Personnel Rules state that "an appointing authority may dismiss an employee without prior warning for offenses such as, but not limited to....[e]ndangering the life, health, or safety of another employee or individual served by the agency." *See* Per 1002.08(b)(9). In short, this simple finding is sufficient to sustain the Appellee's termination under the Personnel rules. The Board fails to explain how a violation of Per 1002.08(b)(9) warrants a 60 work day suspension, and for that reason, the Board's decision is arbitrary and unsupported by the evidence.

18. Further, the Board's ordering of a 60 work day suspension is unreasonable because, in reality, it is equivalent to a discharge. A 60 work day suspension is roughly

equivalent to three months without pay. Under the Personnel rules, an appointing authority "may suspend an employee for more than 20 work days when the employee's job function in relation to the offense warrants a suspension of more than 20 work days." Per 1002.06(c). The Board's Order is unlawful and unreasonable because it fails to articulate why the Appellant's sustained wrong doing cannot support a termination in spite of Per 1002.08(b)(9), but can support a 60 work day suspension.

19. Finally, the Board's Decision to overturn the Appellant's termination and award him loss of pay and benefits is unlawful and unreasonable for all of the reasons set forth in Appellee's Motion for Rehearing/Reconsideration dated February 10, 2017, which is incorporated by reference as if fully set forth herein.

WHEREFORE, it is respectfully requested that this Honorable Board:

A. Grant this Motion for Reconsideration/Rehearing; and

B. Uphold the Appellee's termination letter; or, in the alternative,

C. Vacate the Board's May 8, 2017 Clarifying Order;

D. Find that the Appellant is not reinstated and not entitled to an award of back pay or benefits; and

E. Grant such other relief as is just and proper.

Respectfully submitted,

Karen Schlafer for

Marta A. Modigliani, Esq.
Department of Safety
Office of the Commissioner
33 Hazen Drive
Concord, New Hampshire 03305
(603) 271-2791

Karen A. Schlitzer, Esq
Senior Assistant Attorney General
Transportation & Construction Bureau
Department of Justice
33 Capitol Street
Concord, NH 03301

June 2, 2017

I do hereby certify that a copy of the foregoing has been delivered to John S. Krupski, Esq. via email jake@molanmilner.com and First-Class mail.

Karen Schlitzer for
Marta A. Modigliani, Esq.

STATE OF NEW HAMPSHIRE
PUBLIC APPEALS BOARD

APPEAL OF DAVID APPLEBY

Docket No. 2016-T-002

OBJECTION TO STATE'S MOTION FOR REHEARING/RECONSIDERATION OF THE BOARD'S MAY 8, 2017 CLARIFYING ORDER

NOW COMES the Appellant, David Appleby, by and through counsel, Milner & Krupski, PLLC, pursuant to Per-A 208.03 (d) and submits this Objection to State's Motion for Rehearing/Reconsideration of the Board's May 8, 2017 Clarifying Order and in support thereof, the Appellant states as follows:

1. On or about June 2, 2017, the State of New Hampshire Department of Safety, Division of State Police (hereinafter "State") filed a Motion for Rehearing/Reconsideration of the lawful and reasonable Clarifying Order of this Honorable Board issued on May 8, 2017. The order provided in relevant part,

> 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 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.

2. The State's Motion is the third attempt by the State to this Honorable Board to argue that the Appellant was not reinstated by the Board's January 11, 2017. The first attempt was in the State's original Motion for Reconsideration/Rehearing filed on February 10, 2017. (See, Original Motion pages 13-16). This argument was rejected by the Board on March 8, 2017, in the order denying the State's Motion for Reconsideration. The second attempt by the

State to argue that the Appellant was not entitled to reinstatement was during a prehearing concerning damages on April 19, 2017, in which the State made essentially the same arguments presented in writing in the present Motion. These arguments were rejected by the Board in it's Clarifying Order dated May 8, 2017. In the present Motion, the State repeats the arguments previously made to this Honorable Board.

3. The Board should determine that the arguments in the present Motion for Rehearing/Reconsideration were essentially the same raised by the State in its pleadings and testimony before the Board after the issuance of the January 11, 2017 Order. The State provided neither evidence nor argument that would support the conclusion that the Board's decision was unlawful and unreasonable and therefore the matter should not be reheard. Accordingly, the State's Motion for Rehearing/Reconsideration should be denied.

4. The State alleges that the Board committed three legal errors in the present Motion for Rehearing/Reconsideration. The State argues that the Board is prohibited, as a matter of law, (a) from issuing clarifying orders; (b) from awarding a reinstatement in the absence of a finding of discrimination or violation of rules; and (c) from issuing a suspension to the Appellant based upon the limitations contained in Per. 1002.06. Finally, the State argues that the Appellant agrees that he is not entitled to reinstatement. The allegations of the State are without merit, both legally and factually.

5. The present Motion for Reconsideration is moot, as Colonel Wagner (the appointing authority) advised, in his May 23, 2017 letter to the Appellant, that he is reinstated effective June 23, 2017 (see, Attachment A). Therefore, the only remaining issue is the extent of damages to be paid the Appellant.

6. The State argues that the Board is prohibited, as a matter of law, from issuing clarifying orders and that the Order of January 11, 2017 could not be amended or clarified by the Board. (See, Motion at p. 5-6). This allegation is unsupportable and the law is to the contrary. On April 19, 2017, a prehearing was held before this honorable Board. The purpose of the prehearing is codified in regulation.

> Pursuant to RSA 541-A: 31, V, prehearing conferences shall be convened narrow the factual issues or to consider matters including, but not limited to, one or more of the following:
>
> (1) Offers of settlement;
> (2) Simplification of the issues;
> (3) Stipulations or admissions as to issues of fact or proof by consent of the parties;
> (4) Limitations on the number of witnesses;
> (5) Changes to standard procedures desired during the hearing by consent of the parties;
> (6) Consolidation of examination of witnesses; or
> (7) Any other matters which aid in the disposition of the proceeding.
>
> See, Per-A 206.03(b).

7. At the prehearing conference of April 19, 2017, scheduled after the Board denied the State's Motion for Rehearing/Reconsideration, which argued, in part, that the Appellant was not reinstated. The State asserted that the Board did not intend to reinstate the Appellant. The Appellant argued that the final Order of January 11, 2017 did in fact reinstate the Appellant and the order of reinstatement was confirmed by the Board's order denying the State's Motion for Rehearing/Reconsideration on March 8, 2017. As a practical matter, it strains credibility that there would be a hearing on damage had the Appellant not been reinstated in whole or in part.

8. As a result of the State's position at the April 19, 2017 prehearing conference, the Board clarified the issue pursuant to Per-A 206.03(b)(2); (5) and (7) and issued the Clarifying Order of May 8, 2017. The Board did not change, amend or revise their position that the

Appellant was reinstated, but only clarified that the Appellant was reinstated pursuant to their January 11, 2017 Order.

9. The only aspect of the Board's clarifying order that was not provided in the initial January 11, 2017 order was that David Appleby was subject to a sixty (60) calendar day suspension. See, Order dated May 8, 2017 at p. 2.

10. The practical application of the State's position deprives this Honorable Board of its jurisdiction under law.

11. As a practical matter, a Board or tribunal may issue clarifying orders or orders necessary for the adjudication of a particular matter within the confines of their jurisdiction. There is nothing in the law that prevents a Board from issuing a clarifying order. The fact that the State chose to disregard the obvious, does not create a bar to the Appellant's reinstatement.

12. As the State has raised no legal impediment to the Board's issuance of the May 8, 2017 Clarifying Order, the Motion for Rehearing/Reconsideration should be denied.

13. The State argues that RSA 21-I:58 prohibits the reinstatement of the Appellant in the absence of discrimination or a violation of a rule. The State's argument is in contravention of the plain language of the law and of the facts as found by this Board.

14. The plain, clear and unambiguous language of RSA 21-I:58 provides that, "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 Board clearly found that the dismissal of David was unjust in light of the facts in evidence in violation of Per-A 207.12(b)(4).

15. As the clear and unambiguous language of the relevant statute, RSA 21-I:58, provides that this Honorable Board is well within their jurisdiction to modify any decision of an

appointing authority and make "such other orders as it deems just" the Board was well within its rights to reinstate the Appellant.

16. The application of the restrictive language within RSA 21-I:58 reinstatement for a violation of the rules by the appointing authority or that the acts were taken as a result of discrimination merely provides mandatory reinstatement in those categories. It does not prohibit reinstatement in other circumstances.

17. However, the appointing authority did, in fact, violate the rules adopted by the director in that the Board found in its January 11, 2017 decision (by unanimous vote) that they granted the appeal and found that the decision to dismiss the Appellant was unjust in light of the facts in evidence. See, decision at p. 24. The finding demonstrations a violation of Per-A 207.12(b). Further, the Appointing Authority also violated the personnel rules by misapplying certain aspects of the personnel rules, including but not limited to, Per 1002.08(b)(10) "Obstructing an Internal Investigation and Per 1002.08(b)(12) "Falsifying an Agency Record". See, Decision at p. 23.

18. Thus, the Board was well within its jurisdiction and powers provided by RSA 21-I:58 when it reinstated the Appellant.

19. The State also argues that this Honorable Board may not order a sixty (60) calendar day suspension as the personnel rules limit the authority of an Appointing Authority to suspending an individual for a limited period of time unless certain criteria are met. See, 1002.06(b) and (c).

20. Based on the clear and unambiguous language of the regulations, the argument of the State is in contravention of the law. In fact, assuming arguendo, the argument was valid it would merely reduce the suspension from sixty (60) calendar days to less than twenty (20).

21. However, a plain reading of the cited regulation provides a restriction on the issuance of discipline by an "appointing authority". See, Per 1002.06. The rule puts no restrictions on the ability of this Board to modify or amend the order of an appointing authority.

22. In fact, any such limitation in the regulation would have violated RSA 21-I:58 (I) and as such, have been deemed invalid.

23. Finally, the State attempts to argue that the Appellant agrees that he was not reinstated by the January 11, 2017 decision. The State and the Board are well aware of the Appellant's position that he believes he was reinstated as of January 11, 2017 and this was verified by the Board in its Clarifying Order dated May 8, 2017. See, Order at p. 2. At best, the State attempts to capitalize on a sentence or two, taken out of context, in a responsive pleading and disregards arguments and all of the pleadings in almost two years of litigation attempting to reinstate the Appellant. There can be no dispute at this point in time that the Appellant sought reinstatement and believes that he was reinstated as of January 11, 2017.

24. The State incorporated by reference its initial Motion for Rehearing/ Reconsideration (see, Motion at p. 10). As a result, the Appellant incorporates by reference the Appellant's Objection to Motion for Rehearing Consideration filed on February 15, 2017 with the clarifications and refinements provided in subsequent pleadings and arguments before this Board.

WHEREFORE, the Appellant respectfully requests this Honorable Board grant the following relief:

A. Deny the Motion for Rehearing/Reconsideration;

B. Schedule a hearing on damages as soon as the calendar allows; and

C. Grant such other and further relief as is just and equitable.

Respectfully Submitted,
David Appleby
By and Through Counsel,

MILNER & KRUPSKI, PLLC

June 7, 2017

By: _____

John S. Krupski, Esquire
NH Bar #11309
1 Pillsbury Street, Ste. 204
Concord, NH 03301
(603) 410-6011
jake@milnerkrupski.com

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was this date mailed to Marta Modigliani, Esquire and Karen Schlitzer, Esq.

_____
John S. Krupski, Esquire

Attachment A

State of New Hampshire

DEPARTMENT OF SAFETY
John J. Barthelmes, Commissioner of Safety
Division of State Police
James H. Hayes Safety Building, 33 Hazen Drive, Concord, NH 03305
Telephone: 603-223-8813

Colonel Christopher J. Wagner
Director

May 23, 2017

David Appleby
PO Box 236
Thornton, NH 03223

RE: Reinstatement

Dear David:

In accordance with the Board's Clarifying Order dated May 8, 2017, this letter serves to notify you that effective June 23, 2017, you will be reinstated to your position as State Police Trooper II, subject to a background check as required by Police Standards and Training Council rules. We have selected June 23 because it is the beginning of the next Garcia period. I have enclosed a copy of the Pre-employment questionnaire that you will need to fill out covering the period of separation from the Division of State Police, as well as the requisite consent form. Please return the executed consent form to Lt. Marasco within 7 calendar days of the date of this letter.

You shall report to Lt. John Marasco in Training and Recruitment at 8:00 a.m. where you will be issued a cruiser, uniforms, and all other Division issued equipment. Lt. Marasco will work with you to insure that you are provided the requisite training that you have missed during your absence.

Your assignment is Troop F, Patrol 9 – I-93 North (Exit 28 North through Franconia Notch to Franconia/Lincoln town line), Campton, Ellsworth, Lincoln, Livermore, Thornton, Waterville Valley, Woodstock.

Based on your prior discipline, including the major suspension you have received, you will not be reinstated to the SWAT team, Field Training Officer program, Peer to Peer or any other ancillary duties that will detract you from focusing on your primary duties as a State Police Trooper II. As a result of the Board's modified discipline, you are also suspended from any 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; and successful administrative recordkeeping, as reported in random audits.

Although your termination letter has been removed from your personnel file, the PAB decision modifying the termination to a 60-day suspension has been placed in your file. In addition, there is exculpatory evidence in the Internal Investigation (IA) file underlying the discipline. Under the Exculpatory Evidence Protocol and Schedule (EES) policy, the IA file falls within the definition of

"personnel file." Pursuant to Part VI of the EES memo, we need approval from the Attorney General or his designee before removing you from the EES list. We are in the process of seeking that approval.

If you have any questions regarding this letter, please do not hesitate to contact me.

Regards,

Colonel Christopher J. Wagner
Director, NH State Police

Enclosure

Cc: John S. Krupski, Esq.
Marta A. Modigliani, Esq.

State of New Hampshire

PERSONNEL APPEALS BOARD
25 Capitol Street
Concord, New Hampshire 03301
Telephone (603) 271-3261

Appeal of David Appleby

Docket #2016-T-002

Department of Safety, Division of State Police

New Hampshire Personnel Appeals Board's Decision on Appellee's Motion for Rehearing/Reconsideration of the Board's May 8, 2017 Clarifying Order

June 29, 2017

The New Hampshire Personnel Appeals Board met in public session on April 19, 2017 for a Prehearing Conference. The Board believed the parties were present to schedule a hearing so that each could present arguments regarding damages/sanctions as the Board reinstated the Appellant.

During the Prehearing Conference, the State asserted that its interpretation of the Final Order did not specifically state that the Appellant be reinstated. The Appellant argued the opposite and asserted that the State was arguing against the obvious, that the Appellant was to be reinstated. The Appellant further argued that the Board found, in its January 11, 2017 Order, that the State's decision to dismiss the Appellant was unjust in light of the evidence and, as a result, termination was outside the realm of possible sanctions. After arguments from the parties and discussion amongst Board members, it was decided, without objection from either

party, that the Board would issue an order clarifying the January 11, 2017 Final Order. On May 8, 2017 the Board issued a Clarifying Order. The Order states, "[a]lthough the Board did not use the word "reinstatement" explicitly in its final order, the Board's intent was to reinstate the Appellant." The Board reiterates that its intent all along was to reinstate the Appellant.

The Board found that the State's arguments in the Motion for Rehearing/Reconsideration of the Clarifying Order are essentially the same arguments raised by the State in its pleadings and arguments before the Board. The State offered neither evidence nor argument that would support the conclusion that the Board's decision was unlawful or unreasonable, and that the appeal should be reconsidered and/or reheard. Accordingly, the Board voted unanimously to DENY the State's Motion for Rehearing/Reconsideration of the Board's May 8, 2017 Clarifying Order.

THE PERSONNEL APPEALS BOARD

Chair, Charla Stevens, Esq.

Vice Chair Norman Patenaude, Esq.

Commissioner Christopher Nicolopolous, Esq.

Commissioner David Goldstein

cc: Sara Willingham, Director of Personnel, 25 Capital Street, Concord, NH 03301
Marta Modigliani, Esq., Department of Safety, Office of the Commissioner, 33 Hazen Drive, Concord, NH 03305
John S. Krupski, Esq., Milner & Krupski, PLLC, 1 Pillsbury Street, Suite 204, Concord, NH 03301