THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2018-0296

APPEAL OF STEVEN SILVA

BRIEF FOR APPELLANT
STEVEN SILVA

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I. QUESTIONS PRESENTED FOR REVIEW

A. Whether the PAB erred as a matter of law when it upheld the State's termination of Silva on March 19, 2018, when the NH Personnel Appeals Board (hereinafter "PAB") had already previously reinstated Silva on the merits in a previous and separate hearing/order pursuant to Per 1002.08(d)(1) and (2) and *Appeal of Boulay*, and where the State chose not to appeal that decision? (Certified Record 2017-T-015 hereafter "CR1" at 3-6, 59, 66-67).

B. Did the PAB err as a matter of law when it failed to apply, or even discuss, Silva's arguments pertaining to law of the case, res judicata, collateral estoppel, due process, and equity? (CR1 at 5-6, 66-68, 174-78).

C. Must the State make Silva whole for the period between September 4, 2015 to November 10, 2016 during which the PAB ordered Silva to be reinstated, but did not receive full pay and benefits, or a detailed break-down of said costs? (CR1 at 176 and Appendix to Appeal hereafter "App. to Appeal" at 46-47).

II. STATUTORY PROVISIONS

PER 1002.08 (d) (1) and (2) Dismissal.

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(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;

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Source. (See Revision Notes at chapter heading for Per 100) #8738, eff 10-18-06; ss by #10817, eff 5-17-15

NH RSA 21-I:46 Powers and Duties of Board.

I. The personnel appeals board shall hear and decide appeals as provided by RSA 21-I:57 and 21-I:58 and appeals of decisions arising out of application of the rules adopted by the director of personnel except those related to:

(a) Performance evaluations of classified employees; provided, however, that an employee who is disciplined or has other adverse action taken against him as the result of an evaluation may appeal that action.

(b) The refusal of an appointing authority to grant a leave of absence without pay.

(c) Classification decisions of the director of personnel when the reasons for appeal are based on any of the following:

(1) The personal qualifications of an employee exceed the minimum requirements for the position in question.

(2) The employee has held the position for a long period of time.

(3) Any positions previously held by the employee or any examinations passed by the employee which are not required for the position in question.

(4) The employee has reached the maximum of the assigned salary grade.

(5) The cost of living or related economic factors.

II. The board shall meet as often as necessary to conduct its business, provided that no more than 30 days shall elapse between meetings whenever there is any appeal pending before the board. Two members of the board shall constitute a quorum.

III. In the event that a member of the board is unable, for any reason, to attend a meeting of the board, the chairman shall designate an alternate member to serve in his place. In the absence of the chairman, the vice chairman shall designate the alternate member to serve.

IV. The board shall have the power to subpoena witnesses, and administer oaths in any proceeding before it, and to compel the production of any books, papers or other memoranda or documents by subpoena duces tecum.

V. The board may advise the director with regard to all existing rules of the division. The director shall submit all proposals to adopt rules to the board for their advice prior to filing a notice of proposed rule under RSA 541-A:6.

VI. The board shall by September 1 of each year submit an annual report to the governor, commissioner of administrative services, and director of personnel. This report shall include a narrative summary of the work of the board during the previous fiscal year. The report shall also include a description of problems related to the personnel system and the board's recommendations for dealing with those problems.

VII. The board shall adopt rules under RSA 541-A regarding procedures for the

conduct of its business.

VIII. The board may, with the approval of the governor and council, contract for legal services in any action in which the attorney general determines that he cannot provide such services to the board. The governor shall draw his warrant on funds not otherwise appropriated to cover the costs of such legal services.

VIII-a. The board shall be limited to existing job titles within the classification plan when rendering decisions regarding appeals of denial of reclassification. The board is explicitly prohibited from creating new job classifications or job titles.

IX. The board shall issue final decisions on all appeals within 45 days of the date of hearing or upon the receipt of relevant evidence requested by the board as a result of such hearing, whichever is later. If the board determines that it requires additional time for the proper investigation or determination of the facts or issues involved, it shall notify the employee or employees making the appeal in writing of the reasons for the delay and provide an estimate to such employee or employees of the additional time required.

Source. 1986, 12:1. 1988, 269:2. 1994, 412:6, eff. Aug. 9, 1994.

NH RSA 21-I:58 Appeals.

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

otherwise change or modify any order of the appointing authority, or make such other order as it may deem just.

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

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

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

NH RSA 541:6 Appeal. Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal by petition to the supreme court.

Source. 1913, 145:18. PL 239:4. 1937, 107:17; 133:78. RL 414:6.

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

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

Per-A 208.03 Rehearing.

(a) Pursuant to RSA 541:3, within 30 days after the date of notice of any decision or order of the board, any party to the action or proceeding before the board, or any person directly affected thereby, may apply for rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order.

(b) In order to be considered, such request shall be delivered to the executive secretary of the board within the 30 day period specified in (a) above.

(c) 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.

(d) The opposing party may file an objection within 5 days of the filing of the motion.

(e) The board shall not grant a motion for rehearing for 5 days after the motion is filed in order to permit the opposing party to respond. Thereafter the board shall, within 10 days of the filing of the motion, grant or deny the motion, whether or not it has received a response from the opposing party.

(f) A motion for rehearing in a case subject to appeal under RSA 541 shall be granted if it demonstrates that the board's decision is unlawful or unreasonable.

(g) Following the granting of a motion for rehearing, the board shall issue a notice as described in Per-A 206.11 (b).

Source. (See Revision Note at chapter heading for Per-A 200) #7378, eff 10-23-00; ss by *#9205, eff 10-23-08*

III. STATEMENT OF THE CASE/STATEMENT OF THE FACTS

Silva was first terminated on September 4, 2015 for alleged violations of the State's sexual harassment policies. (CR1 at 3, 77, 184). Silva timely appealed the termination to the PAB and a full hearing on the merits was held on July 27, 2016. (CR1 at 77, 179). The PAB ordered the State to reinstate Silva to his position on September 7, 2016. (CR1 at 77, 179). In its decision and order, the PAB reasoned that the State failed to provide Silva with all of the evidence it relied upon to dismiss him, thus denying him a

meaningful opportunity to refute the evidence against him, as is required under Per 1002.08(d)(1) and (2) and the decision in *Appeal of Boulay*. (CR1 at 77-78, 187-88).

The State did not file a motion for reconsideration to the PAB following its order, nor did it appeal the decision to this Court. (*See* CR1 and Certified Record 2017-D-010 hereafter "CR2" Generally). Regardless, the State did not reinstate Silva in accordance with the PAB's ruling, and to this day, Silva has not yet been made fully whole in regard to pay and benefits owed. (CR1 at 76, 93, 188); (App. to Appeal at 46-50). The State provided back pay to Silva for September 5, 2015 through September 7, 2016, but did not provide full back health benefits for medical costs Silva incurred for that same time period. (CR1 at 176); (App. to Appeal at 46-50).

The State further failed to provide a break-down of any back pay provided to remunerate Silva in wages or benefits from September 8, 2016 through November 13, 2016. (CR1 at 176); (App. to Appendix at 46-50). On November 14, 2016, the State simultaneously reinstated Silva and placed him on suspension with pay pending investigation. (CR1 at 93). Silva filed a motion to enforce with the PAB on December 14, 2016, but the PAB did not issue a response. (App. to Appeal at 20). While Silva was on paid suspension, the State, in reality, held no further investigation and relied entirely on the facts and findings from the 2015 investigation concerning allegations of Silva's violation of the sexual harassment policy. (CR1 at 166-70, 180-86). Pursuant to those same facts and findings, the State terminated Silva again on April 21, 2017. (CR1 at 8-12, 172).

On May 2, 2017, SEA filed an appeal of Silva's termination from State service with the PAB complaining, *inter alia*, that the State had violated Per 1002.08(d), and further failed to comply with the PAB's prior order to reinstate Silva and provide back pay and lost benefits. (CR1 at 1-7). It is Silva's contention that when the State decided not to appeal the PAB's decision, the State accepted the PAB's order to reinstate Silva, and by failing to appeal that decision the State has waived all arguments and rights to the contrary. (CR1 at 2-6). SEA filed a Motion for Summary Disposition on May 31, 2017 arguing the same, and requested that the PAB enforce its previous order to reinstate Silva. (CR1 at 59). On August 10, 2017, the PAB summarily, without hearing or discussion, denied Silva's motion. (CR1 at 77-78).

On November 9, 2017, Silva filed another motion to enforce the PAB's order to reinstate Silva. (CR1 at 171-72); (App. to Appeal at 46). On December 15, 2017, the PAB ordered that the State provide all back pay to Silva, that it not deduct wages earned from September 7, 2016 to November 10, 2016, and that it provide a breakdown of all wages. *Order of the Personnel Appeals Board*, Docket No: 2016-T-005 (December 15, 2017); (App. to Appeal at 49-50). A hearing concerning Silva's second termination at the PAB was held on December 20, 2017, and the parties filed Closing Briefs on January 31, 2018. (CR1 at 152, 162, 165). On March 19, 2018, the PAB issued its decision in which it upheld the April 21, 2017 termination. (CR1 at 171-72). In its decision, the Board failed to ever address the arguments raised in Silva's appeal, including those pertaining to due process, enforcing the prior order, and the inequity of re-litigating an issue that was already decided. (CR1 at 165-73).

On April 17, 2018, SEA filed a Motion for Reconsideration/Rehearing alerting the PAB to its failure to uphold its prior order and the underlying authorities including Per 1002.8(d) and the *Appeal of Boulay*. (CR1 at 174-77). In support, the motion also outlined various legal protections against repetitious re-litigation of a matter already decided such as res judicata, collateral estoppel, double jeopardy, law of the case, due process, and equity. (CR1 at 174-77). The PAB issued its decision on the Motion for Reconsideration/Rehearing on May 7, 2018, again summarily denying Silva's claims of error. (CR1 at 193-94). This Appeal now follows and asserts that the PAB erred as a matter of law when it upheld the State's termination of Silva because the PAB had already ruled on his termination on September 7, 2016. (CR1 at 187-88). Further, the State did not appeal the PAB's original decision and has further failed to comply with that order when it failed to fully reinstate Silva, and instead proceeded to terminate him again for the same alleged offenses already decided in the September 7, 2016 order. (CR1 at 8-12, 187-88).

IV. SUMMARY OF ARGUMENT

The PAB erred as a matter of law when it upheld the termination of Steve Silva, even though the PAB had previously ruled on the exact same matter on the merits, and had ordered his reinstatement to his position. By terminating Silva again after being ordered to reinstate him, the State violated the PAB's order as well as Per 1002.8(d)(1) and (2), and RSA 21-I:58 which required that Silva be reinstated once the PAB determined the State had violated the rules adopted by the Director of Personnel. By allowing the State to terminate Silva a second time for the same offense further violates several legal doctrines and rules against repetitious litigation including collateral estoppel, res judicata, law of the case, equity, and due process. Lastly, the State is further in violation of the PAB's previous order to make Silva whole for the

period leading up to his second termination, where the State has failed to provide a full breakdown of wages and benefits paid and owed.

V. ARGUMENT

A. Standard of Review

Appeals from the PAB are reviewed pursuant to the standards of RSA 541:13.

Said statute states as follows:

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

This is an appeal to a final decision from the PAB pursuant to RSA 21-I:58, II and RSA 541:6. N.H. Rev. Stat. Ann. 21-I:58, II (2000); N.H. Rev. Stat. Ann. 541:6 (2007). This Court's review of the interpretation of administrative rules on appeal are *de novo*. *State v. Elementis Chem.*, 152 N.H. 794, 803 (2005). The New Hampshire Supreme Court is the "final arbiter of the intent of the legislature as expressed in the words of the statute considered as a whole". *McDonald v. Town of Effingham Zoning Bd. Of Adjustment*, 152 N.H. 171, 174 (2005). When interpreting the rules in statutes, the standard is to "ascribe the plain and ordinary meaning to words used." *Appeal of Flynn*, 145 N.H. 422, 423 (2000).

In *Appeal of Garrison Place*, the Court stated, "When a statute's language is plain and unambiguous, we need not look beyond [it] for further indications of legislative intent." *Appeal of Garrison* Place, 159 N.H. 539, 542 (2009). Additionally, the Court in *Bennett v. Town of Hampstead* stated, "We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the

legislature did not see fit to include. We interpret a statute in the context of the overall statutory scheme and not in isolation." *Bennett v. Town of Hampstead*, 157 N.H. 477, 483 (2008). Last, this Court has held, "[a]n interpretation which preserves rights or benefits enjoyed under the common law is favored where the result avoids absurdity, retroactivity, unconstitutionality, is in keeping with good policy, is consistent with the purpose of the legislation, or is evident from a consideration of the statute read as a whole and in conjunction with other related statutes. *State v. Etienne*, 163 N.H. 57, 77 (2011).

B. The PAB erred as a matter of law when it heard, and upheld the State's termination of Steven Silva on March 19, 2018 even though the PAB had already previously reinstated Silva after a full hearing on the merits for the same facts.

On September 7, 2016, the PAB issued a decision overturning the termination of Steve Silva, and ordered that he be reinstated in accordance with RSA 21-I:58, which states in relevant part:

> "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." RSA 21-I:58 (1998); (CR1 at 188-89).

As a result, the State of New Hampshire was required by way of the order and by way of the law to reinstate Silva. *See* RSA 21-I:58; (CR1 at 188-89). It failed to do so. (CR1 at 1-7, 59); (Appeal App. at 46-50). Rather, the State refused to reinstate Silva until

November 14, 2016 when it reinstated Silva in name only, and placed him on paid leave pending investigation, and then subsequently terminated him again for the same reasons that the PAB had issued a decision on in its September 7, 2016 order. (CR1 at 59). Such action directly contradicts the order of the PAB, Per 1002.08(d)(1) and (2), and RSA 21-I:58. *See* RSA 21-I:58; *see* Per 1002.08(d)(1) and (2); (CR1 at 59, 187-89).

First, the order by the PAB was a final and binding decision on the merits which still stands as a matter of law. *See Taylor v. Nutting*, 133 N.H. 451, 454 (1990) (Finding that a question decided in the first staged of litigation becomes binding on the parties in subsequent litigation); (CR1 at 187-89). The State never challenged said decision by way of motion for reconsideration or further appeal. (*See* CR1 and App. to Appeal Generally). In that order, the PAB ordered that Silva be reinstated. (CR1 at 187-89). The State has instead simply suspended Silva's termination, by terminating him again for the same reason. (CR1 at 93-97). By terminating Silva for the same allegations heard and decided upon by the Board, the State has in reality not reinstated Silva and thus is in violation of that original order. *See Taylor*, 133 N.H. at 454; (CR1 at 93-97, 187-89).

Additionally, the States action to terminate Silva again for the same reasons raised in the original termination is a plain violation of RSA 21-I:58, which requires that if the PAB determined that the action taken by the State 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". RSA 21-I:58; (CR1 at 93-97, 187-89). The PAB's final and binding decision and order in 2016 determined that the State violated Per 1002.08(d)(1) and (2) so there is no question as to whether the State violated a rule, and the prescribed remedy is reinstatement. *See* RSA 21-I:58; Per 1002.08(d)(1) and (2); (CR1 at 187-89). The State's action of

terminating Silva again for the same reasons is a direct violation of this statutory requirement to reinstate Silva. *See* RSA 21-I:58; (CR1 at 93-97, 187-89). Silva was not reinstated, but rather his sentence for his conduct was merely commuted to a later date. (CR1 at 93-97).

By upholding the second termination, the PAB is rendering large sections of the requirements in RSA 21-I:58 and Per 1002.08(d)(1) and (2) meaningless. *See* RSA 21-I:58; Per 1002.08(d)(1) and (2); (CR1 at 171-73). Such interpretation is a violation of the long held rule for statutory interpretation where this Court has held "[w]e will not interpret the rule in such a way as to render a significant portion of it meaningless". *Appeal of Murdock*, 156 N.H.732, 737 (2008); *see also Hanover Inv. Corp. v. Town of Hanover*, 142 N.H. 812, 814 (1998) (Finding that the Court would not presume that "the legislature would pass an act leading to an absurd result and nullifying to an appreciable extent the purpose of the statute").

If the PAB is correct in its interpretation, then the State would need not follow the procedural requirements for termination, nor must it abide by the requirement to reinstate an employee under RSA 21-I:58 for violation of the Personnel Rules because the State would be allowed to simply terminate the employee again for the same action. (*See* CR1 at 171-73). At the very least, the consequences for violating the Personnel Rules would be far less severe than before, as there would be no finality to the reinstatement. (*See* CR1 at 171-73). Had the legislature intended for the State to be able to simply make the employee whole up until the point that it correctly follows the Personnel Rules, it would have said that. Instead it ordered reinstatement when the State has violated the rules. *See* RSA 21-I:58. To read otherwise would allow the State to circumvent the true intention of

the rules and the Statute, which is to return the employee to work when the State fails to follow its own rules as adopted by the Director of Personnel. *See* RSA 21-I:58; *see* Per 1002.08(d)(1) and (2).

C. The PAB erred as a matter of law when it failed to apply or even discuss Silva's arguments pertaining to law of the case, res judicata, collateral estoppel, due process, and equity.

Law of the Case

The doctrine of law of the case is the principal that once an issue has been ruled upon by an appellate body, that ruling and finding becomes binding upon the parties in any subsequent appeal or retrial of the same litigation. *Taylor v. Nutting*, 133 N.H. 451, 454 (1990). Question once decided are not ordinarily reexamined in a subsequent appeal. *Taylor*, 133 N.H. at 454. In fact, this Court has held, "where an appellate court states a rule of law, it is conclusively established and determinative of the rights of the same parties in any subsequent appeal or retrial of the same case." *Id.* Where the parties are the same and where the identity of the subject matter and cause of action are the same, the doctrine of law of the case will apply. *Saunders v. Town of Kingston*, 160 N.H. 560, 567 (2010).

In the situation with Silva, the doctrine of law of the case should have precluded the second PAB hearing from taking place and the PAB should have granted Silva's motion for summary disposition. *See Taylor*, 133 N.H. at 454; *see Saunders*, 160 N.H. at 567; (CR1 at 59-68, 77-78, 171-73). The doctrine applies because the parties are the same, and the identity of the subject matter and cause of action were the same in both actions that being the termination of Silva for alleged violation of the sexual harassment policy. *See Saunders*, 160 N.H. at 567; (CR1 at 162-73, 180-89). Just as in *Taylor v. Nutting*, the PAB heard all issues in the first hearing and issued a decision in consideration of all the facts

based on the merits of the case regarding the legality of the termination of Silva. *See Saunders*, 160 N.H. at 567; (CR1 at 180-89). Because the PAB made such findings, its decision was binding on the parties, and should have been held as such in any subsequent hearing. *See Taylor*, 133 N.H. at 454; *see Saunders*, 160 N.H. at 567; (CR1 at 59-68, 77-78, 171-73).

Res Judicata

Res Judicata is the legal principle that once an issue has been heard and decided by a court or administrative board, then that the issue cannot again be relitigated at a later time. *Sleeper v. Hoban Family Partnership*, 157 N.H. 530, 533 (2008). In order for the test of res judicata to be met the following must be true: (1) the parties must be the same or in privity with one another; (2) the same cause of action must be before the administrative agency in both instances; and (3) a final judgment on the merits must have been rendered in the first action. *Id*; *Appeal of City of Nashua*, No: 2009-0114, 2* (2010); *see also Cook v. Sullivan*, 149 N.H. 774, 777 (2003).

In considering the case of Silva, the first element for res judicata is clearly met as the parties to both actions are the State of New Hampshire and Steve Silva. *See Sleeper*, 157 N.H. at 533; (CR1 at 165, 179). The second element is met because the cause of action is likewise the same in both instances, that being the termination of Silva due to allegations that he violated the sexual harassment policy during the winter and spring of 2015. *See Sleeper*, 157 N.H. at 533; (CR1 at 166-70, 180-86). New Hampshire uses a broad interpretation when analyzing whether a cause of action is the same, and for the purposes of res judicata, a cause of action is the same if the "alleged causes of action arise out of the same transaction or occurrence." *Sleeper*, 157 N.H. at 534. This Court has further held

"[r]es judicata will bar a second action even though the plaintiff is prepared in the second action to present evidence or grounds or theories of the case not presented in the first action". *Id*; *see also Brzica v. Trustees of Dartmouth College,* 147 N.H. 443, 455-56 (2002).

Therefore, in the case at hand, the cause of action is the same in both actions. *See Sleeper*, 157 N.H. at 534; (CR1 at 166-70, 180-86). The question at hand in both actions was whether or not Silva was properly terminated for allegations of sexual harassment during the winter and spring of 2015 in accordance with the Personnel Rules. (CR1 at 166-70, 180-86). The factual pattern was thus the same, and meets the definition of being the same cause of action for purposes of res judicata. *See Sleeper*, 157 N.H. at 534; (CR1 at 166-70, 180-86). The fact that the State may have raised new or different legal theories or evidence is insufficient to overcome this bar against repetitious litigation because "[r]es judicata will bar a second action even though the plaintiff is prepared in the second action to present evidence or grounds or theories of the case not presented in the first action". *Id.*

The third requirement for res judicata is also met, as there was a full hearing on the merits of the case in the first action, which resulted in a final decision on the merits. *See Sleeper*, 157 N.H. at 534; *see Appeal of* Hampers, 166 N.H. 422, 429 (2014); *see also Innie v. W & R, Inc.*, 116 N.H. 315, 316 (1976); (CR1 at 180-89). This Court has previously held that in making this determination, the Court is looking to see if a competent court has issued a final decision that is conclusive upon the parties. *Appeal of* Hampers, 166 N.H. at 429. Such judgment need not be based on substantive conclusions, as this Court has held that even default judgments satisfy the finality requirement for the third required element of res judicata. *Id*; *McNair v. McNair*, 151 N.H. 343, 353 (2004); *see also Innie*, 116 N.H. at

316 (Finding that a default judgment was a final judgment on the merits which was conclusive to the rights of the parties).

In the case at hand, the parties had a full hearing on the merits by a competent administrative board empowered to decide the question of termination at hand. *See* RSA 21-I:58; (CR1 at 180-89). That Board then issued a binding decision and order. *See Innie*, 116 N.H. at 316; (CR1 at 180-89). The State had the right to ask the PAB to reconsider its decision, and then subsequently could have appealed to this Court. *See* RSA 541; Per-A 208.03 (2008). It did neither. *See* CR1, CR2, and App. to Appeal Generally). Instead, the State slept on its right to appeal, opting instead to re-terminate Silva for the same reason. (CR1 at 93-97). When the State failed to raise any appeal, the PAB's decision from September 7, 2016 became not only binding, but also final. *See Taylor v. Nutting*, 133 N.H. 451, 454 (1990); (CR1 at 180-89).

Because Silva and the State were the parties in both actions in question; because the cause of action, that being the validity of the termination of Silva due to allegations of sexual harassment, were the same; and because the first action resulted in a final and binding decision on the merits, the doctrine of res judicata applies to this case. *See Taylor*, 133 N.H. at 454; *see Saunders*, 160 N.H. at 567; (CR1 at 59-68, 77-78, 171-73). As a result, the PAB erred as a matter of law when it failed to enforce its prior decision and failed to grant Silva's motion for summary disposition, and then subsequently upheld the termination of Silva in its decision on March 19, 2018. *See Taylor*, 133 N.H. at 454; *see Saunders*, 160 N.H. at 567; (CR1 at 59-68, 77-78, 171-73). The proper remedy is to reverse the PAB's latter decision, and return Silva to work with full back pay and benefits

in accordance with RSA 21-I:58. *See Taylor*, 133 N.H. at 454; (CR1 at 59-68, 77-78, 171-73).

Collateral Estoppel

Collateral estoppel is a principle prohibiting repetitious litigation of the same issue between the same parties. *Stewart v. Bader*, 154 N.H. 75, 80 (2006). The test for whether Collateral Estoppel applies is as follows: (1) the issue subject to estoppel must be identical in each action; (2) the first action must have resolved the issue finally on the merits; and (3) the party to be estopped must have appeared as a party in the first action, or have been in privity with someone who did so. *Id* at 80-81. Further, findings by an administrative board can satisfy the requirement for collateral estoppel. *Farm Family Mut. Ins. Co. v. Peck*, 143 N.H. 603, 605 (1999). In *Farm Family Mut. Ins. Co. v. Peck*, this Court determined that "under appropriate circumstances, collateral estoppel may preclude the relitigation of findings by an administrative board. *Farm Family Mut. Ins. Co. v. Peck*, 143 N.H. 603, 605 (1999). "Even where a party has won on an issue in an earlier case, then, it is consistent with this general policy to estop him from relitigating the issue to reach an inconsistent result". *Caouette v. Town of New Ipswich*, 125 N.H. 547, 555 (1984).

In the case at hand, the elements to satisfy collateral estoppel have been met. *See Stewart*, 154 N.H. at 80 (2006); (CR1 at 166-70, 180-86). The issue is identical in both cases, which involved a termination from State employment for alleged sexual harassment from the winter and spring of 2015. (CR1 at 166-70, 180-86). Specifically, in both PAB decisions, the PAB made findings of fact relevant to allegations of Silva making comments about a dog licking sugar from a coworker's body, making a gesture to

a coworker imitating a sexual act, and stating to a coworker that "I would tap that" or "I could slap that one or grab that one". (CR1 at 166-70, 180-86). In both cases, the State had terminated Silva as the result of these allegations, and therefore the issue being relitigated was identical in both cases. *See* Stewart, 154 N.H. at 80; (CR1 at 166-70, 180-86).

The second element of collateral estoppel is likewise met because the first action resolved the issue finally on its merits. *Stewart*, 154 N.H. at 80 (2006); (CR1 at 180-89). In the first action, the PAB held a full evidentiary hearing on July 27, 2016, where the Parties had a full and fair opportunity to litigate the dispute. *See Warren v. Town of East Kingston*, 145 N.H. 249, 253 (2000); (CR1 at 179-89). The PAB then issued an eleven-page decision on September 7, 2016, which contained 20 separate paragraphs of findings of fact, where it made determinations as to the testimony, documentary evidence, and substantive and procedural fact. (CR1 at 180-86). The Board further issued a three-page discussion and order where the PAB determined that the State violated Per 1002.08(d)(1) and (2) when it failed to provide Silva with all of its evidence "it relied upon in order to provide him with a meaningful opportunity to refute the evidence against him" prior to termination. (CR1 at 187-88). Because the State had violated Silva's rights under the Personnel Rules, the PAB granted the appeal and ordered that Silva be reinstated, consistent with *Appeal of Boulay*. (CR1 at 187-89).

The State did not file a motion to reconsider with the PAB, nor did it otherwise attempt to appeal this decision. (*See* CR generally). Therefore, because there was a full hearing on the merits that resulted in a full and fair opportunity to litigate the dispute, because the PAB issued a lengthy decision with numerous findings of fact on the merits,

and because neither party appealed, the decision was resolved finally on its merits. *See Stewart*, 154 N.H. at 80 (2006); *see Warren*, 145 N.H. at 253 (2000); (CR1 at 179-89).

Lastly, the third element of collateral estoppel is met because the party to be estopped (the State) appeared as a party in the first action. *See Stewart*, 154 N.H. at 80-81 (2006); (CR1 at 165, 179). The only parties to both actions in question are the State of New Hampshire and the Steve Silva, so the final requirement is clearly met. *See Stewart*, 154 N.H. at 80-81 (2006); (CR1 at 165, 179). As a result, the PAB erred as a matter of law when it failed to grant Silva's motion for summary disposition and motions to enforce, and then subsequently held an additional hearing which resulted in a contradictory opinion from a previously litigated matter. (CR1 at 59-68, 77-78 165-73, 179-89); (App. to Appeal at 20-21, 46-47).

Due Process

The PAB erred when it upheld the termination of Silva because such decision violates his regulatory and constitutional rights to due process. Per 1002.08(d)(1) and (2); *see Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542-43 (1985); (CR1 at 171-73). Per 1002.08(d) states in relevant part as follows:

> "(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".
> Per 1002.8(d)(1) and (2).

The above provision establishes a regulatory due process requirement, which mandates that any employee being dismissed for cause be provided whatever evidence the State is using to support its conclusion for termination prior to the dismissal, and that said employee be given a meaningful opportunity to respond to that evidence. *See* Per 1002.08(d)(1) and (2). This process was violated when the State first attempted to terminate Silva in 2015 without providing him whatever evidence it was using to support the dismissal prior to termination. *See* Per 1002.08(d)(1) and (2); (CR1 at 187-89). That violation is not cured by simply terminating him over a year later for the same reason, but then actually providing the due process. *See* RSA 21-I:58. This is clear by the language in RSA 21-I:58, where such violation requires reinstatement. *See* RSA 21-I:58.

A meaningful hearing prior to dismissal of a public employee is not only required by the Personnel Rules of the State of New Hampshire, but is also required by the Fourteenth Amendment to the United States Constitution under the Due Process Clause. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542-43 (1985). The case of *Cleveland Board of Education v. Loudermill* established that when an employee has a continued expectation of employment, such as requiring cause for dismissal, then said employee has a property interest in his or her employment, and cannot be dismissed without due process. *Cleveland Board of Education*, 470 U.S. at 542-43 (1985). As a result, the United States Supreme Court determined that such public employees are entitled to a pre-termination meeting before being terminated. *Id.* The court further stated that while said pre-termination hearing need not be "elaborate", such employee, at minimum, is "entitled to oral or written notice of the charges against him, an explanation

of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 545-46.

In the case at hand, Silva is entitled to the same due process rights as the employee in *Loudermill. See id.* at 538, 542-43, 545-46; *see* Per 1002.08; (CR1 at 187-189). Like the employee in *Loudermill*, Silva had a property interest in his continued employment. *See id.* at 542-43, 545-46; *see* Per 1002.08; (CR1 at 187-189). Personnel Rule 1002.08 states the specific reasons for which a State employee may be dismissed from service with the State of New Hampshire, which establishes that Silva could only be terminated for cause, just like the employee in *Loudermill. See Cleveland Board of Education*, 470 U.S. at 538; *see* Per 1002.08; (CR1 at 187-189). As a result, prior to terminating Silva, the State was required to hold a pre-termination hearing where at minimum he was "entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story". *See Cleveland Board of Education*, 470 U.S. at 538; *see* Per 1002.08; (CR1 at 187-189).

However, upon his initial termination Silva was never told of the specific charges against him, he was not provided an explanation of the State's evidence being used against him, and thus could not have a meaningful opportunity to present his side of the story. (CR1 at 187-89). As a result, Silva was deprived of his constitutional right to due process when he was terminated in 2015. *See Cleveland Board of Education*, 470 U.S. at 538; *see* Per 1002.08; (CR1 at 187-189). He is therefore entitled to reinstatement, as is required by state and federal law, and re-termination is not an option. *See Cleveland*

Board of Education, 470 U.S. at 538; *see* RSA 21-I:58; *see* Per 1002.08; (CR1 at 187-189).

Equity

In addition to all of the above, upholding the PAB's decision would lead to an inequitable and absurd result. In interpreting statutory intent, this Court has held that it will not assume that the legislature has enacted a statute that leads to an absurd result. *Grenier v. Barclay Square Commercial Condominium Owners' Ass'n*, 150 N.H. 111, 116 (2003). Furthermore, this Court has held that "it is not to be presumed that the legislature would pass an act leading to an absurd result and nullifying to an appreciable extent the purpose of the statute". *Hanover Inv. Corp. v. Town of Hanover*, 142 N.H. 812, 814 (1998).

The PAB's decision in the case of Silva nullifies the requirements under RSA 21-I:58 and Per 1002.08(d)(1) and (2) because the combinations of those two rules requires that violation of Personnel Rules by the State result in the reinstatement of the affected employee. *See* RSA 21-I:58; *see* Per 1002.08(d)(1) and (2); (CR1 at 165-72). If we are to accept the PAB's interpretation, it would change the requirement from reinstatement of the employee to merely a suspended sentence. *See* RSA 21-I:58; *see* Per 1002.08(d)(1) and (2); (CR1 at 165-72). Such a reading of the statute would invalidate the requirements under Per 1002.08(d)(1) and (2), and would alter the prescribed remedy for such violation under RSA 21-I:58. *See* RSA 21-I:58; *see* Per 1002.08(d)(1) and (2); (CR1 at 165-72). Such an absurd and inequitable result must be prohibited. *See* RSA 21-I:58; *see* Per 1002.08(d)(1) and (2); *see Grenier*, 150 N.H. at 116; *see Hanover Inv. Corp.*, 142 N.H. at 814; (CR1 at 165-72).

D. The PAB erred as a matter of law when it failed to uphold its previous decision, and order the State to make Silva whole between September 4, 2015 to November 10, 2016 during which the PAB ordered Silva to be reinstated, but did not receive full pay and benefits, or a detailed break-down of costs.

The PAB erred as a matter of law when it failed to address the funds owed to Silva by the State, and the breakdown thereof. (CR1 at 165-73). Silva has not yet been made whole as to all back pay, wages, and benefits owed to him by way of the PAB's prior order and the law, and insufficient breakdown of monies owed or paid has been provided to Silva by the State. *See* RSA 21-I:58; (CR1 at 188-89); (App. to Appeal at 49-50). Employees that are ordered to be reinstated to work by the PAB are entitled to back wages after subtracting the difference of outside employment gained after the employee's termination. RSA 21:I-58. RSA 21-I-58 states in relevant part:

> "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." RSA 21-I:58.

On September 7, 2016 the PAB ordered that the State return Silva to work. (CR1 at 188-89). On or about July 7, 2017, the State issued Silva payment for retroactive wages intended to make Silva whole for the period of September 5, 2015 through September 7, 2016. (App. to Appeal at 47). The State has further failed to fully compensate Silva, or provide him a breakdown of money owed for the period of September 8, 2016 through November 10,

2016. (App. to Appeal at 46-47). During that time, Silva had been ordered back to work by the PAB, but the State failed to reinstate him until November 11, 2016 when it simultaneously suspended Silva with pay. (CR1 at 5). From September 8, 2016 to November 10, 2016, the State was required to pay Silva his full wage, not to be offset by other income because the State had been ordered to return him to work. RSA 21-I:58; (App. to Appeal at 49-50). By failing to follow the PAB's orders and the law, the State has willfully failed to mitigate its own damages. RSA 21-I:58; (App. to Appeal at 49-50). Although, Silva has received some remuneration for this period, there has been no breakdown of the pay offered, nor any assurance that proper withholdings and payments were made by the State for purposes of the retirement system and any taxes owed. *See* RSA 21-I:58; (*see* CR1 and CR2 Generally); (*see* App. to Appeal at 46-50).

Silva is, at the very least, entitled to receive all back pay, wages, and benefits owed to him from the time of his initial termination on September 5, 2015 through November 10, 2016, which was the last day prior to his reinstatement. *See* RSA 21-I:58; (App. to Appeal at 49-50). Specifically, Silva is owed back pay and benefits, including health insurance, after deducting outside income for the period between September 5, 2015 through September 7, 2016, and then is owed his full wages and benefits from September 8, 2016 through November 10, 2016. *See* RSA 21-I:58; (App. to Appeal at 46-50). Because the State has either failed to provide those full benefits enumerated by the law and PAB's order, and/or at least a breakdown of such payment owed, the State is in violation of the law and the PAB's previous orders. *See* RSA 21-I:58; (App. to Appeal at 46-50). Therefore, this Honorable Court should reverse the PAB's March 19, 2018 order where it failed to address these concerns, and instead

upheld Silva's second termination. *See* RSA 21-I:58; (CR1 at 171-73, 187-89); (*see* App. to Appeal at 46-50).

E. CONCLUSION

For the reasons set forth above, the Appellant requests this Honorable Court reverse the decision of the NH Personnel Appeals Board, and/or in the alternative remand for further proceedings.

F. CERTIFICATE OF COMPLIANCE

In accordance with New Hampshire Supreme Court Rule 21, the undersigned hereby certifies that this brief has been electronically filed with the Supreme Court on this 17th day of December, 2018.

In accordance with New Hampshire Supreme Court Rule 21, the undersigned hereby certifies a copy of this brief has been electronically submitted to Attorney Jill Perlow, opposing counsel; and Steven Silva, appellant.

In accordance with New Hampshire Supreme Court Rule 16 (10), the undersigned hereby requests that this matter be heard on oral argument and, further, that Gary Snyder, Esq. be designated as the attorney to argue its merits on behalf of the State Employees' Association of New Hampshire, SEIU Local 1984. Counsel respectfully requests fifteen (15) minutes for argument.

In accordance with New Hampshire Supreme Court Rule 16(3), the undersigned hereby certifies that the decision being appealed is in writing and is attached to this brief.

Dated: December 17, 2018

Gary Snyder, SEA/SEIU 1984 General Counsel

State of New Hampshire

ATTACHMENT A

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

Appeal of Steven Silva

Docket #2017-T-015 and Docket #2017-D-010

Department of Health and Human Services

New Hampshire Hospital

March 19, 2018

The New Hampshire Personnel Appeals Board met in public session on Wednesday, December 20, 2017, 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 Steven Silva, the Appellant. The following commissioners sat for this hearing: Chair Charla Stevens, Esq., Vice-Chair Norman Patenaude, Esq., Commissioner Christopher Nicolopoulos Esq., and Commissioner David Goldstein. Mr. Silva, who was represented at the hearing by Sean Bolton, SEA Grievance Representative and John S. Krupski, Esq., appealed his termination as a Mental Health Worker II at New Hampshire Hospital. Robert Berry, Esq., appeared on behalf of the Department of Health and Human Services.

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, and documents admitted into evidence.

THE FOLLOWING PERSONS GAVE SWORN TESTIMONY:

Lisa Fields, Registered Nurse II

Kim Truchon, Mental Health Worker II

Justin Souther, Nurse Coordinator

ISSUES OF LAW:

Per 1002.08 (b)(7)

Per 1002.08 (b)(24)

New Hampshire Hospital Policy and Procedure: Sexual Harassment Policy (see Appellant's Exhibit #5)

BACKGROUND

The Appellant began his employment as a Mental Health Worker for New Hampshire Hospital (hereinafter NHH) on February 2, 1999. He received a Memorandum of Counsel on February 10, 2013 for violating the Sexual Harassment Policy and a Letter of Warning on June 16, 2015 for disruptive, disorderly and disrespectful conduct in the workplace. The Appellant was dismissed from employment on September 9, 2015 for violations of the Sexual Harassment Policy which he appealed to the Personnel Appeals Board. In the Personnel Appeals Board's decision dated September 9, 2016, the Board overturned the dismissal because the state did not comply with the procedure for dismissing an employee per the Administrative Rules. The Appellant was reinstated retroactively to the date of his dismissal.

The Appellant, however, did not return to work but instead was suspended with pay pending an investigation into allegations made against him by coworkers. After the investigation was complete, the Appellant was dismissed on April 21, 2017.

FINDINGS OF FACT

1. The Appellant began his employment with NHH as a Mental Health Worker on February 19, 1999, and was dismissed from state service at NHH on April 21, 2017. (Appellant's Letter of Dismissal and Testimony of Mr. Souther).

2. The Appellant was dismissed from employment on September 9, 2015 for violations of the Sexual Harassment Policy which he appealed to the Personnel Appeals Board. In the

Personnel Appeals Board's decision dated September 9, 2016, the Board overturned the dismissal because the state did not comply with the proper procedure for dismissing an employee per the Administrative Rules. The Appellant was reinstated retroactively to the date of his dismissal. Prior to his return to work, the Appellant was suspended with pay for purposes of conducting an investigation. Nurse Coordinator, Justin Souther, conducted the investigation. (Testimony of Mr. Souther)

3. The Appellant and Lisa Fields, Registered Nurse II, worked the same shift at NHH. In or around February 2015, Ms. Fields and the Appellant had a verbal disagreement and the Appellant told Ms. Fields to meet him in the back bathroom and made a gesture simulating oral sex. Ms. Fields was very upset and offended by the Appellant's behavior. Ms. Fields left the area where the Appellant was and did not speak to him the rest of the evening. Ms. Fields reported the Appellant's behavior to her supervisor and the Ombudsman. (Testimony of Ms. Fields)

4. The Appellant had made comments of a sexual nature in the past about a supervisor at NHH whom he found attractive. The Appellant stated, "I would tap that", referring to supervisor Bonita Pike. Ms. Fields heard the Appellant make this comment numerous times. At first, she did not know what he meant but came to realize that it meant that he would have sex with Ms. Pike. (Testimony of Ms. Fields)

5. Kim Truchon, Mental Health Worker II, had been employed by NHH for approximately twenty-four (24) years. She typically worked the 11:00pm-7:00am shift and worked with the Appellant for approximately fifteen (15) years. In or around February 2015, Ms. Truchon was speaking with a fellow employee about an exfoliating treatment she had seen on television that involved putting sugar on a facecloth. The Appellant was within hearing distance and told Ms. Truchon, "I bet you put sugar all over your body and let the dog lick it all off." Ms. Truchon called the Appellant a "pig" and walked away as the Appellant laughed. Ms. Truchon did not speak with the Appellant again. Ms. Truchon spoke to Nurse Coordinator, Rosemary Costanza, who then reported it to the Ombudsman's office. An investigator from the Ombudsman's office contacted and interviewed Ms. Truchon. The

Appellant made other comments in the past few years preceding the above remark to Ms. Truchon regarding women's buttocks. He would say, "I could slap that one or grab that one". (Testimony of Ms. Truchon)

6. The Appellant was issued a Letter of Dismissal on April 21, 2017 by Nurse Coordinator, Justin Souther. Prior to issuing the dismissal letter, Mr. Souther conducted an investigation which consisted of reviewing the Ombudsman's findings regarding the complaints against the Appellant. Mr. Souther also reviewed a Memorandum of Counsel that was issued to the Appellant on or about February 10, 2013 for a violation of NHH's sexual harassment policy and a letter of warning on June 16, 2015 for being disruptive, disorderly and disrespectful in the workplace. (Testimony of Mr. Souther)

7. Mr. Souther interviewed Lisa Fields, Kim Truchon, Joseph Perry, Sheryl Melville, Christyne Jones and the Appellant prior to issuing the letter of dismissal to the Appellant. Ms. Fields did not recall speaking with Mr. Souther before April or May 2017 and Ms. Truchon did not recall speaking to Mr. Souther until a few weeks before the hearing on the merits. However, Mr. Souther interviewed Ms. Fields briefly, during his investigation, at the end of one of her shifts and they reviewed the Ombudsman's report. Ms. Fields reaffirmed that the Appellant made the inappropriate sexual gesture that she reported previously. Mr. Souther found Ms. Fields to be credible because she appeared genuine and was visibly upset that she was being asked about this incident again. (Testimony of Mr. Souther)

8. Mr. Souther also interviewed Kim Truchon after one of her shifts, during his investigation, and she reported that the Appellant did state that he bet she put sugar all over her body and let her dog lick it off of her. Ms. Truchon was almost tearful when describing what the Appellant said to her. Ms. Truchon told Mr. Souther that another nurse, Sheryl Melville, heard the comment the Appellant made to her. Ms. Melville reported that she does not like to get involved in personnel issues but told Mr. Souther the Appellant crossed the line and confirmed that the Appellant did make the statement alleged by Ms. Truchon. Mr. Souther believed Ms. Melville to be credible as she works part time and is known for not engaging in personnel issues/personality conflicts on the unit. (Testimony of Mr. Souther)

9. Mr. Souther met the Appellant on March 21, 2017 and held a meeting on April 18, 2017. Present during the March 21, 2017 meeting was the Appellant, the Appellant's representative, Sean Bolton, and Nurse Coordinator, Cynthia Place. During the March 21, 2017 meeting, Mr. Souther presented the evidence that he relied upon in making his decision to dismiss the Appellant. Mr. Souther then gave the Appellant an opportunity to refute the evidence. Mr. Souther understood there was a lot to review and offered to meet with the Appellant at a later date so the Appellant could have a chance to carefully review the documents but the Appellant declined. The Appellant asked Mr. Souther to speak with several people as part of his defense. Mr. Souther interviewed two of the people requested by the Appellant, Christyne Jones and Joseph Perry, as the others were not on duty when it was alleged that the Appellant made the comments to Ms. Truchon. (Testimony of Mr. Souther)

10. Christyne Jones told Mr. Souther that she did not hear the comment about the sugar and dog. Mr. Souther did not know or have a rapport with Ms. Jones; his first interaction with her was his questioning about this incident. Ms. Jones did not report that the Appellant did not make the comment; instead, she simply stated that she did not hear it. Joseph Perry neither heard the conversation between Ms. Truchon and the employee about the facial scrub nor did he hear the Appellant's remarks because he was attending to the needs of the patients on the unit. (Testimony of Mr. Souther)

11. Mr. Souther met with the Appellant again on April 18, 2017. In attendance at this meeting were the Appellant, his representative, Sean Bolton, and Nurse Coordinator, Cynthia Place. Mr. Souther informed the Appellant that he did not obtain any contradictory evidence than he already had. As a result of the information Mr. Souther obtained from his investigation, he concluded that the Appellant violated NHH's Sexual Harassment Policy as well as the state's sexual harassment policy. Specifically, the Appellant's comments and behavior had the purpose or effect of unreasonably interfering with an individual's work performance or created an intimidating, hostile or offensive working environment. (Appellant's Exhibit #1, #5 and #6 and Testimony of Mr. Souther)

12. As a result of Mr. Souther's investigation and the conclusions made therefrom, Mr. Souther believed it was appropriate to dismiss the Appellant from state service. Mr. Souther did not believe that a lesser form of discipline was appropriate considering the severity of the Appellant's comments and behavior, the Appellant's absolute denial of making said comments, and the Appellant's history of inappropriate behaviors towards his colleagues. (Testimony of Mr. Souther)

RULINGS OF LAW:

A. Per 1002.08(b)(7) An appointing authority may dismiss an employee without prior warning for offenses such as, but not necessarily limited to, the following: violation of a posted or published agency policy or procedure, the text of which warns that violation of same may result in dismissal;

B. Per 1002.08 (b)(24) An appointing authority may dismiss an employee without prior warning for offenses such as, but not necessarily limited to, the following: Sexually harassing conduct, including unwelcome sexual advances, requests for sexual favors, or other verbal, non-verbal or physical conduct of a sexual nature;

C. New Hampshire Hospital Policy and Procedure: Sexual Harassment Policy (see Appellant's Exhibit #5)

D. 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

Ms. Fields testified that Mr. Silva made a lewd gesture to her during a disagreement they were having. She testified that she did not speak with him for the rest of the evening and reported his behavior to her supervisor and the Ombudsman. Ms. Fields also testified that the Appellant would make comments of a sexual nature about their supervisor insinuating that he would have sex with her. The Board found Ms. Fields to be credible.

Ms. Truchon testified that she was speaking with a fellow employee about an exfoliating scrub she had seen on television that involved using sugar. The Appellant heard Ms. Truchon describing the scrub and made a comment that was sexual in nature. Ms. Truchon was very upset, called the Appellant a "pig," and did not speak to the Appellant again. She reported the Appellant's behavior to Nurse Coordinator, Rosemary Costanza, who then reported the Appellant's actions to the Ombudsman. Ms. Truchon testified that she has heard the Appellant make remarks of a sexual nature about other woman in her presence. The Board also found Ms. Truchon's testimony to be credible.

Upon the Appellant's reinstatement, the Appellant was immediately suspended with pay pending an investigation into his alleged conduct. Nurse Coordinator, Justin Souther, conducted the investigation. Mr. Souther interviewed Ms. Fields, Ms. Truchon, Sheryl Melville, the Appellant, Christyne Jones and Joseph Perry. Although Ms. Field and Ms. Truchon could not recall being interviewed by Mr. Souther during his investigation, he was sure that he met with them briefly after their shifts had ended. Although Ms. Fields and Ms. Truchon may not have understood they were being interviewed during their brief meeting with Mr. Souther, the Board found Mr. Souther credible and believed that he did interview the complainants for purposes of the investigation.

Mr. Souther testified that he believed that Ms. Fields was credible because she appeared genuine and was visibly upset that she was being asked to recall the incident again. Mr. Souther also found Ms. Truchon to be credible as she almost became tearful when she had to describe what

the Appellant said to her. Mr. Souther also spoke with another nurse, Sheryl Melville, who overheard the discussion between Ms. Truchon and her co-workers about the exfoliating scrub and the Appellant's remarks. Ms. Melville reported to Mr. Souther that she did overhear the Appellant and confirmed Ms. Truchon's account of what the Appellant said to her. Mr. Souther described Ms. Melville as a part-time employee who does not like to engage in personnel issues/personality conflicts but she told Mr. Souther that the Appellant's comment crossed the line. Mr. Souther found Ms. Melville to be credible due to her history of not engaging in conflicts at work.

The Appellant requested that Mr. Souther interview four (4) people on his behalf. Mr. Souther interviewed two (2) of the witnesses who were working on the same shift that was the focus of the investigation: Christyne Jones and Joseph Perry. Mr. Souther testified that he did not have a rapport with Ms. Jones and did not know her well so it was difficult to gauge her credibility. However, he did testify that Ms. Jones told him only that she did not hear the comment and she did not affirmatively state that the Appellant did not make the comment. Mr. Souther said that Mr. Perry offered no information about the incident as he was not in the vicinity where the Appellant made the comment.

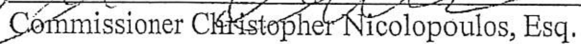
The Board believed that the state had every intention of conducting an investigation into the comments made by the Appellant towards Ms. Field's and Ms. Truchon. Additionally, the Board found that the state did, in fact, conduct an investigation and based its decision to terminate the Appellant on the evidence gathered during the pendency of its investigation.

Having considered the evidence and arguments presented, the Board voted unanimously to DENY the appeal under Docket # 2017-T-015 and Docket #2017-D-010.

THE PERSONNEL APPEALS BOARD

Chair, Charla Stevens, Esq.

Vice Chair, Norman Patenaude, Esq.



Commissioner Christopher Nicolopoulos, Esq.

Commissioner David Goldstein

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ATTACHMENT B

State of New Hampshire

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

Appeal of Steven Silva

Docket #2017-T-015 & Docket #2017-D-010

Department of Health and Human Services

New Hampshire State Hospital

New Hampshire Personnel Appeals Board's Decision on Appellant's Motion for Reconsideration and/or Rehearing of the Board's Order

May 7, 2018

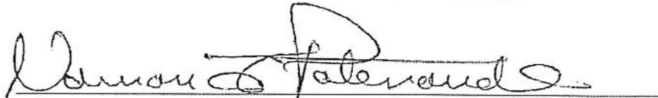
The New Hampshire Personnel Appeals Board met in public session on December 20, 2017, to hear the appeal of Steven Silva. The Board issued its decision on March 19, 2018. The Appellee filed a Motion for Reconsideration and/or Rehearing on April 17, 2018 and the Appellee filed its Objection on April 23, 2018. On April 25, 2018 the parties were advised that the Board was invoking Per-A 208.02(b), due to the Board's schedule, and informed the parties that the Board anticipated issuing a decision on the Motion for Reconsideration and/or Rehearing on or before May 11, 2018.

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 held a full and fair hearing on the merits. During deliberations, the Board considered the parties' pleadings, evidence, arguments, and testimony of the parties and witnesses and gave each the weight it deserved when the Board reached its final decision. The Appellant 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.

After reviewing the Appellee's Motion for Reconsideration and/or Rehearing, the Board finds that the arguments in said Motion are essentially the same arguments raised by the Appellant during the hearing on the merits before the Board. Accordingly, the Board voted unanimously to DENY the Appellant's Motion for Reconsideration and/or Rehearing.

THE PERSONNEL APPEALS BOARD



Vice Chair Normand Patenaude, Esq.

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