

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2018-0296

APPEAL OF STEVEN SILVA

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APPEAL BY PETITION PURSUANT TO RSA 541:6

(New Hampshire Personnel Appeals Board)

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BRIEF FOR THE STATE OF NEW HAMPSHIRE  
DEPARTMENT OF HEALTH AND HUMAN SERVICES

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THE STATE OF NEW HAMPSHIRE  
DEPARTMENT OF HEALTH AND HUMAN  
SERVICES

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## **ISSUES PRESENTED**

Whether Mr. Silva established that DHHS's decision to dismiss him from state employment was clearly unlawful and unreasonable when DHHS made procedural errors in a prior termination, but subsequently terminated Mr. Silva in accordance with New Hampshire Administrative Rule Per 1002.08(d)?

## **STATEMENT OF THE CASE**

This appeal arises out of a decision of the Personnel Appeals Board (“Board”) dated March 19, 2018. R 165-73<sup>1</sup>. Appellant, Steven Silva, appealed to the Board his April 21, 2017 dismissal from employment by the Department of Health and Human Services (DHHS). In his appeal to the Board, Silva contested the dismissal on a number of grounds; however, he raises only one issue on appeal before this Court. Both before the Board and now on appeal, Silva argues that DHHS was precluded from taking disciplinary action against him because its previous termination of Silva for the same conduct was procedurally flawed. AB 1.

Silva moved for summary disposition before the Board arguing that the prior reinstatement by the Board as a result of DHHS’s procedural errors precluded DHHS from dismissing him again for the same conduct. R 59-68. The Board denied the motion because the prior reinstatement decision was based solely on DHHS’s procedural violation. R 77-78. The Board conducted an evidentiary hearing on the matter on December 20, 2017. R 165. The Board concluded, by order dated March 19, 2018, that DHHS’s April 21, 2017 dismissal of Silva was lawful and upheld the decision. R 165-73.

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<sup>1</sup> “R” refers to the certified record on appeal filed by the Personnel Appeals Board; “AB” refers to Appellant’s Brief; “T” refers to transcript of the December 20, 2017 hearing; “NOA” refers to Notice of Appeal; “NOA Appdx” refers to the Appendix to the Notice of Appeal.

On April 17, 2018, Silva filed a motion for rehearing of the Board's March 19, 2018 decision. R 174-89. DHHS filed an objection to the motion. R 190-91. The Board denied the motion. R 193. This appeal followed.

## **STATEMENT OF FACTS**

### **A. Mr. Silva's prior proceeding before the Board.**

Mr. Silva began his employment with DHHS on February 19, 1999, as a Mental Health Worker at New Hampshire Hospital. R 166. During the summer of 2015, DHHS's Ombudsman's office conducted an investigation into complaints alleging Silva violated the State's Sexual Harassment Policy. R 98. Following the investigation, the Ombudsman's office determined that: 1) in or around February 2015, Silva told Nurse Fields to meet him in the back bathroom and made a gesture simulating oral sex; 2) Silva made other comments of a sexual nature at the work place, including repeatedly stating that he "would tap that" when referring to Supervisor Pike, meaning he would have sex with her; and 3) on March 22, 2015, Silva overheard another Mental Health Worker, Kim Truchon, discussing an exfoliating treatment that involved putting sugar on a facecloth. Silva stated "I bet you put sugar and peanut butter all over you and let your dog lick it all off." R 98-137. Following this investigation, DHHS met with Silva on August 27, 2015, to discuss the investigation and Silva was dismissed from employment on September 9, 2015, for violations of the Sexual Harassment Policy, which he appealed to the Board. R 166; R 179-89.

On September 7, 2016, the Board overturned the dismissal solely because DHHS failed to provide all of the information that was the basis for the termination to Silva at his pre-termination meeting on August 27, 2015, in

violation of New Hampshire Administrative Rules, Per 1002.08(d)(1) and (2). R 179-89; R 77-78; AB 5-6. The Board ordered DHHS to reinstate Silva and provide him back pay retroactive to the date of his dismissal. R 167. DHHS reinstated Silva, but immediately suspended him with pay pending an investigation. R 167.

On November 9, 2017, Silva filed a Motion to Enforce the Board's September 7, 2016 reinstatement decision. NOA Appdx 46. As part of that motion, Silva made a number of allegations regarding not being properly compensated or having the information to assess the adequacy of the back pay he received. NOA Appdx 46. On December 15, 2017, the Board ordered the State to issue all retroactive pay within 15 days of the order and to provide Silva a breakdown of all wages. NOA Appdx 49. DHHS's compliance with the orders issued by the Board in the prior proceeding is not currently before this Court and Silva has not sought further relief from the Board in that proceeding.

**B. Board proceeding at issue in this appeal.**

On or about November 2017, Justin Souther, Nurse Coordinator, commenced an investigation into allegations that Silva violated the State's Sexual Harassment Policy. R 167; T 29, 44. Mr. Souther's investigation consisted of reviewing a prior memo of counsel and a prior letter of warning issued to Silva, reviewing the complaints about Silva that were filed with the Ombudsman's office, reviewing the Ombudsman's investigation and findings relative to those complaints, and interviewing three witnesses. R 167-68; T 29.



On March 21, 2017, Mr. Souther met with Silva to present the evidence he relied upon in determining Silva should be dismissed. R 169. In addition, Silva was provided an opportunity to refute the evidence at that meeting and identified a number of employees he believed Mr. Souther should interview. R 169. After the meeting, Mr. Souther interviewed two of the four people identified by Silva. R 169. Mr. Souther did not interview the other two individuals because they were not scheduled to work on the days of the incidents under investigation. R 169.

On April 18, 2017, Mr. Souther met with Silva again to inform him of the outcome of his additional interviews. R 169. Following that meeting, Mr. Souther dismissed Silva from employment by letter dated April 21, 2017. R 93-97.

## **SUMMARY OF THE ARGUMENT**

DHHS properly dismissed Mr. Silva in accordance with Per 1002.08(d) on April 21, 2017, for violations of the State's Sexual Harassment Policy. Silva does not challenge the basis for his termination; instead, he claims that the Board's reversal of his earlier termination based solely on procedural grounds immunizes him from ever being disciplined for the conduct underlying that termination. Neither the plain language of RSA 21-I:58 nor due process support this claim. DHHS's previous failure to follow the correct procedures does not preclude it from addressing the underlying conduct, so long as it does so in accordance with the applicable rules. Neither RSA 21-I:58 nor due process precludes DHHS from implementing the correct pre-termination procedure and terminating Silva for the same underlying conduct. In addition, the doctrines of law of the case, res judicata and collateral estoppel are not applicable because the issues addressed by the Board in the two separate proceedings were not the same. Finally, Silva's claims regarding his back pay are not properly before the Court as they relate to his first termination, which is not currently on appeal.

## ARGUMENT

### I. STANDARD OF REVIEW

Any appeal from a decision of the Personnel Appeals Board is reviewed under the standards as set forth in RSA 541:13. This statute provides:

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.

*Id.*; see also *Appeal of Murdock*, 156 N.H. 732, 735 (2008); *Appeal of Waterman*, 154 N.H. 437, 439 (2006). It is also well established that the findings and conclusions of the Personnel Appeals Board are “entitled to great weight and cannot be set aside lightly.” See *Peabody v. Personnel Commission*, 109 N.H. 152, 155 (1968) (predecessor Commission to the Personnel Appeals Board).

Additionally, an agency will be given deference in interpreting its regulations. *Appeal of Morin*, 140 N.H. 515, 518 (1995). While that deference is not total, the reviewing court will determine whether the agency’s interpretation “is consistent with the language of the regulation and with the purpose which the regulation was intended to serve.” *Id.* (citing *Appeal of Alley*, 137 N.H. 40, 42 (1993)).

**II. SILVA’S DISMISSAL WAS LAWFUL, REASONABLE AND CONSISTENT WITH DIVISION OF PERSONNEL RULES**

**A. The Board properly determined that Silva was terminated in accordance with the Personnel Rules.**

The process required for dismissing an employee is set forth in New Hampshire Administrative Rules, Per 1002.08. The rules provide that “[a]n appointing authority may dismiss an employee without prior warning” for certain types of offenses. N.H. Admin. Rules, Per 1002.08(b). Two grounds for termination without prior warning are “[v]iolation of a posted or published agency policy or procedure, the text of which warns that violation of same may result in dismissal,” N.H. Admin. Rules, Per 1002.08(b)(7), and “[s]exually harassing conduct, including unwelcome sexual advances, requests for sexual favors, or other verbal, non-verbal or physical conduct of a sexual nature,” N.H. Admin. Rules, Per 1002.08(b)(24). DHHS terminated Mr. Silva under these rules for his sexually harassing conduct and violating the State’s Sexual Harassment Policy. R 93.

Silva does not claim that he did not violate the State’s Sexual Harassment Policy or contest the sufficiency of the evidence supporting his termination. AB 1. Further, Silva acknowledges that DHHS followed all proper procedures leading up to the April 21, 2017 dismissal. AB 20. As a result, Mr. Silva fails to demonstrate that the Board was clearly unreasonable or unlawful, and its decision should be affirmed. RSA 541:13.

**B. The Board's decision is consistent with the requirements of RSA 21-I:58 and due process.**

Instead of challenging the basis for the April 21, 2017 termination, Mr. Silva argues that, because the Board previously found his September 4, 2015 termination to violate the procedural pre-termination meeting requirement in the personnel rules, RSA 21-I:58 and due process precludes DHHS from implementing the correct pre-termination procedure and terminating him for the same underlying conduct. AB 10-13. This argument is without merit because state employees are not entitled to constitutional due process protections, there is no such prohibition in the statute, and DHHS's actions were consistent with the statute and implementing regulations.

It is well established that a State employee has no expectation of continued employment that qualifies as a property right protected by the due process clause of the Federal or State Constitution. *Desmarais v. Personnel Commission*, 117 N.H. 582, 588 (1977); *see also Colburn v. Personnel Commission*, 118 N.H. 60, 64 (1978). Accordingly, "the procedure the State chooses to afford [an employee] accords with the mandates of the due process clause." *Colburn*, 118 N.H. at 64. Thus, to the extent Mr. Silva argues that his termination violates his constitutional due process rights and the due process requirements set forth in *Cleveland Board of Education v. Loudermill*, 470 U.S. 534 (1985), these arguments are inapplicable to State employment.

The State provides an employee the right to appeal the application of certain personnel rules, including disciplinary rules, to the Board. RSA 21-I:58, I.

In relevant part, the statute provides:

If the personnel appeals board finds that the action complained of was taken by the appointing authority for any reason related to politics, religion, age, sex, race, color, ethnic background, marital status, or disabling condition, or on account of the person's sexual orientation, or was taken in violation of a statute or of rules adopted by the director, the employee shall be reinstated to the employee's former position or a position of like seniority, status, and pay.... 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.

RSA 21-I:58.

When interpreting a statute, the Court will “first examine the language of the statute and ascribe the plain and ordinary meanings to the words used” and only “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.” *Attorney General, Director of Charitable Trusts v. Loreto Publications, Inc.*, 169 N.H. 68, 74 (2015). Further, statutory construction requires that all words of a statute be given meaning and presumes that the legislature did not adopt meaningless phrases. *O'Brien v. NH Democratic Party*, 166 N.H. 138, 145 (2014) (“This interpretation would contravene the principle of statutory construction that meaning was intended by every word used by the legislature, and that effect must be given to every word and clause.”). Finally, the

Court’s “goal is to apply statutes in light of the legislature’s intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme. Accordingly, we interpret a statute in the context of the overall statutory scheme and not in isolation.” *State v Etienne*, 163 N.H. 57, 72 (2011).

There is nothing in RSA 21-I:58 that precluded DHHS from taking the April 21, 2017 disciplinary action.<sup>2</sup> Each disciplinary action stands on its own and the fact that the prior action was overturned solely on procedurally grounds does not bar DHHS from addressing the underlying behavior in a distinct disciplinary action. To hold otherwise results in adding language to the statute. *Attorney General, Director of Charitable Trusts v. Loreto Publications, Inc.*, 169 N.H. 68, 74 (2015) (The court will “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.”). In addition, such a result would provide an unwarranted and unnecessary windfall to the employee who, because of a technical rule violation, would be above reproach from his employer, regardless of

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<sup>2</sup> To the extent Silva is also challenging his non-disciplinary suspension, his argument that the suspension violated RSA 21-I:58’s requirement that he be reinstated to his “former position or a position of like seniority, status, and pay” lacks merit. In response to the Board’s decision in the earlier proceeding, DHHS reinstated Silva to his position and paid him accordingly. In that position, Silva remained subject to the Personnel rules, which includes the ability of an appointing authority to place an employee on a non-disciplinary suspension with pay pending an investigation. N.H. Admin. Rules Per 1001.01. The suspension was non-disciplinary, and Silva suffered no loss in pay or benefits while on suspension. Accordingly, the Board correctly found that Silva’s suspension pending investigation was consistent with the statute and rules.

how egregious the underlying conduct. Furthermore, holding that the statute prevents the State from curing procedural defects would provide greater protections to State employees than those held by other public employees with a property interest in their employment and associated constitutional due process rights. *See, e.g., Scott v. County of Richardson*, 789 N.W.2d 44, 51-52 (Neb. 2010) (recognizing that “courts have held that due process violations may be cured” and citing federal and state court cases holding that “errors in pre-termination procedures can be cured by subsequent post-termination proceedings.”).

As a result, Mr. Silva has failed to demonstrate that the Board’s decision to uphold his termination was clearly unreasonable or unlawful and its decision should be affirmed. RSA 541:13

**C. The Board’s decision is consistent with the doctrines of law of the case, res judicata, and collateral estoppel.**

Mr. Silva argues that because his September 2015 termination for violating the State’s Sexual Harassment Policy was reversed, the doctrines of law of the case, res judicata and collateral estoppel preclude DHHS from correcting the procedural error and terminating him for the same underlying conduct. AB 13. These arguments are inapposite.

The doctrines asserted by Mr. Silva all arise from the principal that the same issue that has already been decided should not be relitigated within the same case or at a later time in a subsequent case. *Taylor v. Nutting*, 133 N.H. 451, 454-



55 (1990)(“The law of the case doctrine does not apply, however, where different evidence is presented on the subsequent appeal or where the issue before the court was not ‘fully briefed and squarely decided’ when the case was previously before the court.”); *Sleeper v. Hoban Family Partnership*, 157 N.H. 530, 533 (2008)(“Res judicata precludes the litigation in a later case of matters actually decided, and matters that could have been litigated, in an earlier action between the same parties for the same cause of action.”); *Cook v. Sullivan*, 149 N.H. 774, 778 (2003)(“The doctrine of collateral estoppel bars a party to a prior action, or a person in privity with such a party, from relitigating any issue or fact actually litigated and determined in the prior action.”). These doctrines are inapplicable here because the same facts and issues were not before the Board in the two different proceedings.

In September 2016, the Board determined that the process DHHS followed leading up to the September 4, 2015 dismissal of Mr. Silva, specifically the meeting held on August 27, 2015 to discuss the reasons for termination, did not sufficiently meet the requirements of N.H. Admin. R. Per 1002.08(d)(1) and (2). R NOA Appdx 8. The Board’s September 2016 decision ordering reinstatement of Mr. Silva was solely based upon the procedural error that occurred at the August 27, 2015 meeting and the Board did not make any conclusions regarding the underlying basis for the termination. R 77-78.

DHHS reinstated Mr. Silva, conducted a new investigation, and held two meetings with him regarding the outcome of the investigation. R 167-68; T 29. Following the March 21, 2017 and April 18, 2017 meetings with Mr. Silva, DHHS dismissed Mr. Silva by letter dated April 21, 2017. R 169; 93-97. Although the underlying conduct that violated the sexual harassment policy was the same, that conduct was never addressed by the Board in the prior hearing on the September 2015 dismissal letter. Further, the April 2017 dismissal letter at issue in this appeal resulted from a distinct procedure provided to Mr. Silva in March and April 2017, which he concedes was consistent with the rules. AB 20.

Because the issues presented to the Board in this proceeding were not the same as those presented to the Board in the earlier proceeding, the doctrines of law of the case, res judicata, and collateral estoppel do not apply. Accordingly, Mr. Silva has failed to demonstrate that the Board was clearly unreasonable or unlawful and its decision should be affirmed. RSA 541:13.

### **III. SILVA'S ARGUMENTS REGARDING BACKPAY ARE NOT PROPERLY BEFORE THE COURT**

Mr. Silva argues that the Board erred as a matter of law because it failed to address his allegations that the State did not fully compensate him once he was reinstated. R 23. This issue is not properly before the Court in this appeal.

Throughout his brief, Silva raises a number of issues relating to whether he has received all of the back pay to which he is entitled under the prior decision of

the Board. While the State disputes the claims made by Silva, those claims relate to the prior Board proceeding and are not at issue in this appeal. Moreover, Silva did not raise this claim with the Board in this proceeding; therefore, there is no factual record of the issue, and it is not properly before this court for review. *See Bean v. Red Oak Prop. Mgmt., Inc.*, 151 N.H. 248, 250 (2004) (“It is a long-standing rule that parties may not have judicial review of matters not raised in the forum of trial.”).

This issue was not raised with the Board in this proceeding, is a distinctly factual question, and there has been no final action by the Board. Accordingly, it is not properly before the Court at this time.

**CONCLUSION**

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment of the Personnel Appeals Board.

The State does not believe oral argument is necessary. In the event the Court seeks oral argument, Senior Assistant Attorney General Jill A. Perlow will present oral argument on behalf of the State.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE  
DEPARTMENT OF HEALTH AND  
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**CERTIFICATE OF COMPLIANCE**

This brief complies with the word limitation set out in Supreme Court Rule 16(11), and contains 3,374 words.

**CERTIFICATE OF SERVICE**

I hereby certify that this brief will be served on Steven Silva by way of the New Hampshire Supreme Court's Electronic Filing System through his attorney, Gary J. Snyder, Esquire on this 17<sup>th</sup> day of January, 2019.

/s/ Jill A. Perlow  
Jill A. Perlow