

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

NO. 2018-0675

APPEAL OF WAYNE PREVE

**Appeal Pursuant to Rule 10 From a Final Decision
of the New Hampshire Department of Labor**

REPLY BRIEF OF WAYNE PREVE, APPELLANT

Respectfully submitted,

WAYNE PREVE

By his Attorneys,

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ARGUMENT

I. THE TOWN'S BRIEF IGNORES THE TOWN'S STATED REASONS FOR PUNISHING CHIEF PREVE.

In his opening brief, Chief Preve identified the location of the Town's explanation for its negative employment decision, the January 3, 2018 letter of the Town suspending Chief Preve. *See* Resp. Br. at 10-11 (block quoting App. at 00341). At page 22 of the Town's brief, the Town references the same portion of the suspension letter, containing the same direct evidence of retaliation, while italicizing and underlying portions of the letter as if the retaliatory text, coming before it, may be ignored. *See* Resp. Br. at 22 (citing App. at 00341.) (emphasis provided by Town).

Italicizing and underlying some text does not and cannot have the effect of rendering retaliatory text out of existence, as the Town's briefing implies. Indeed, when undersigned counsel's equal skill with the italics and bold functions of the word processor are brought to bear on the same text, the same language may be rendered as follows: "*You signed the letter that was ultimately mailed, and you were involved in writing it, and gathering documents to be appended to it,* all without any thought or concern about Attorney Soltani and his children's privacy rights." (App. at 00341) (emphasis added to the parts of the text that are direct evidence of retaliation against protected activity).

Absent from the Town's brief is any argument that distinguishes this evidence of retaliatory motive within the Town's official pronouncement from the sort that requires the imposition of the mixed-motive test in this case. *Cf. See Febres v. Challenger Caribbean Corp.*, 214 F.3d 57, 61 (1st

Cir. 2000) (“Domenech listed ‘age’ among the pertinent criteria, signifying that this protected characteristic would be used as a criterion in some of those transfer decisions.”); *see also Piotrowski v. Boulard*, 534 B.R. 62, 75 (D.N.H. Bnkr. 2015) (retaliatory decision was based, in part, on protective activity mandating the application of the “mixed motive” test).

Moreover, though the Town would have the Court believe that this direct evidence is all of the evidence presented at the trial, the record also contains unchallenged evidence that the Town prevented Chief Preve from continuing with his efforts to engage in protected activity by reporting Attorney Soltani to disciplinary authorities, in addition to other evidence of retaliation. Op. Br. at p. 10 (citing App. 00208-213, 00333).

The Town also argues that Chief Preve’s testimony before the DOL removes this case from those that require reversal, as if Chief Preve was the decision-maker in regard to his own employment fate and knew the mind of the Town differed from what it stated in the suspension letter.

This argument, and the Town’s continued, imprecise and speculative assertions regarding other legal questions (confined to footnotes containing partial citations to statutes), by operation of principles of negative implication, further demonstrate that the Town’s true motive was to penalize Chief Preve for engaging in protected activity against an attorney who had threatened the Town.

II. THE DOL’S FAILURE TO APPLY THE CORRECT LEGAL TEST INFECTS THE OUTCOME OF THIS CASE AND IS NOT HARMLESS.

The Town, alternatively, would have this Court apply harmless error analysis to affirm the DOL’s decision. The Town has not supplied authority justifying such a result on this record.

The public relies upon the judiciary to monitor and ensure that the laws of New Hampshire are applied in a correct fashion by the other branches of government. N.H. Const., Part II, Art. 72-a (“The judicial power of the state shall be vested in the supreme court, a trial court of general jurisdiction know as the superior court, and such lower courts as the legislature may establish.”). Indeed, the public has emphasized this expectation through an amendment to the New Hampshire Constitution, Part I, Article 8. Under that provision of our state constitution, “The public . . . has a right to an orderly, lawful and accountable government.” N.H. Const. Part I, Art. 8.

A ruling that would permit a state agency, in this case an adjudicator at DOL, to misapply basic evidentiary standards in a manner that alters the burden of persuasion in a case, shifting the burden to the party against whom the DOL ruled, in violation of the law, would not comply with the mandates of Part I, Art. 8. Far from ensuring the public, Chief Preve included, that the government will act in an orderly, lawful and accountable manner, such a ruling would promote the opposite result, affirming a decision that rests on a series of substantial legal errors around baseline legal concepts. It would do so where this Court has reaffirmed the importance of the correct articulation and application of correct legal

standards to the legitimacy of adjudicative process as a matter of constitutional due process. *See State v. Boggs*, 171 N.H. 115, 123-24 (2018) (reversing trial court decision in criminal case where trial court shifted burden of proof through jury instructions).

This Court should not expand the harmless error doctrine to permit such a result. In pressing the opposite view, the Town, a municipality subject to Part I, Article 8, ignores that *Appeal of Mary Ellen Montplaisir*, 147 N.H. 147 (2001) did not permit harmless error analysis to save the DOL under similar circumstances. The Town also relies on *Piotrowski*, *supra*, where the bankruptcy court properly found that evidence like the evidence Chief Preve presented to the DOL triggered a “mixed motive” analysis and where the court then analyzed the case under the “mixed motive” test. Here, contrary to the approach of the court in *Piotrowski*, the DOL applied the wrong standard, altering the burden of persuasion in the case, all while misapprehending the baseline evidentiary and burden of proof and persuasion standards announced by this Court.

The sort of analysis DOL applied to Chief Preve’s claim in this case is only “harmless” if this Court is willing to permit executive agencies to ignore and misapply law to the detriment of the public in a manner that not only harms individual litigants seeking relief, but downstream litigants who can have only deteriorating confidence in the legal capacities of executive adjudication. *Cf.* Adrian Vermuele, *Law’s Abnegation: From Law’s Empire to Administrative State* (2016) (“...[T]he administrative state has at least five features that cannot be squared with the original Constitution” including “the vesting of adjudicative power in executive agencies, subject only to deferential review by Article III Judges.”).

This Court has not permitted an error of this sort to be considered “harmless” in other applicable circumstances. *Cf. Rallis v. Demoulas Super Markets*, 159 N.H. 95, 102 (2009) (trial court instruction that improperly shifted the burden of proof in premises liability case constituted substantial, reversible error). It should not do so here.

CONCLUSION

For the reasons set forth above, this Court must vacate the decision below and remand for proceedings consistent with its decision.

Dated: May 10, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing reply brief has been provided to counsel of record by electronic filing and through prepaid U.S. Mail.

Dated: May 10, 2019

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I, Michael S. Lewis, hereby certify that this brief contains a total of 1,130 words and meets the requirements of 3,000 words or less for this reply brief.

Dated: May 10, 2019

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