THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2019 Term

April Session

2018-0675

APPEAL OF WAYNE PREVE

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

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BRIEF ON BEHALF OF RESPONDENT/APPELLEE TOWN OF EPSOM/EPSOM POLICE DEPARTMENT

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TOWN OF EPSOM/EPSOM POLICE DEPARTMENT

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A. AFTER CONDUCTING AN EVIDENTIARY HEARING THE HEARING OFFICER FOUND AS A MATTER OF FACT THAT THERE WAS NO "DIRECT EVIDENCE" OF RETALIATORY ANIMUS ON THE PART OF THE TOWN AND THIS FINDING IS PRESUMED TO BE *PRIMA FACIE* LAWFUL AND REASONABLE; AND

B. BASED ON THE ABSENCE OF ANY DIRECT EVIDENCE OF RETALIATORY ANIMUS THE HEARING OFFICER APPLIED THE *McDONNELL DOUGLAS* "PRETEXT" ANALYSIS RATHER THAN THE "MIXED MOTIVE" ANALYSIS IN ACCORDANCE WITH THE APPLICABLE LAW UNDER *MONTPLAISIR*; AND

C. AFTER RULING THAT THE APPELLANT MET THE LOW THRESHOLD OF ESTABLISHING A *PRIMA FACIE* CASE UNDER THE "PRETEXT" ANALYSIS BASED ON TEMPORAL PROXIMITY THE HEARING OFFICER FOUND AS A MATTER OF FACT THAT THE TOWN EFFECTIVELY REBUTTED THE PRESUMPTION BY SHOWING THAT THE DISCIPLINARY ACTION WAS TAKEN FOR LEGITIMATE NON-RETALIATORY REASONS BASED ON APPELLANT'S IMPROPER DISCLOSURE OF CONFIDENTIAL INFORMATION; AND

D. THE APPELLANT FAILED TO MEET HIS BURDEN OF PROVING THAT THE TOWN'S LEGITIMATE NON-RETALIATORY REASON WAS A PRETEXT; AND

E. BASED ON THE UNCONTROVERTED EVIDENCE THE TOWN WOULD HAVE REACHED THE SAME CONCLUSION IF IT HAD APPLIED THE "MIXED MOTIVE" ANALYSIS.

RELEVANT STATUTES

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.

RSA 275-E:2. Protection of Employees Reporting Violations.

I. No employer shall harass, abuse, intimidate, discharge, threaten, or otherwise discriminate against any employee regarding compensation, terms, conditions, location, or privileges of employment because:
(a) The employee, in good faith, reports or causes to be reported, verbally or in writing, what the employee has reasonable cause to believe is a violation of any law or rule adopted under the laws of this state, a political subdivision of this state, or the United States; or
(b) The employee objects to or refuses to participate in any activity that the employee, in good faith, believes is a violation of the law; or
(c) The employee, in good faith, participates, verbally or in writing, in an investigation, hearing, or inquiry conducted by any governmental entity, including a court action, which concerns allegations that the employer has violated any law or rule adopted under the laws of this state, a political subdivision of this state, or the United States.

II. An aggrieved employee may bring a civil suit within 3 years of the alleged violation of this section. The court may order reinstatement and back-pay, as well as reasonable attorney fees and costs, to the prevailing party.

RSA 275-E:9. Protection of Public Employees.

No governmental entity shall threaten, discipline, demote, fire, transfer, reassign, or discriminate against a public employee who files a complaint with the department of labor under RSA 275-E:8 or otherwise discloses or threatens to disclose activities or information that the employee reasonably believes violates RSA 275-E:2, represents a gross mismanagement or waste of public funds, property, or manpower, or evidences an abuse of authority or a danger to the public health and safety. Notwithstanding this provision of law, public employers may discipline, demote, fire, transfer, or reassign an employee so long as the action is not arbitrary or capricious and is not in retaliation for the filing of a complaint under this chapter. Any public employee who files such a complaint or makes such a disclosure shall be entitled to all rights and remedies provided by this chapter.

RSA 91-A:5. Exemptions.

The following governmental records are exempted from the provisions of this chapter:

…

IV. Records pertaining to internal personnel practices; confidential, commercial, or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy. Without otherwise compromising the confidentiality of the files, nothing in this paragraph shall prohibit a public body or agency from releasing information relative to health or safety from investigative files on a limited basis to persons whose health or safety may be affected.

21-M:8-k. Rights of Crime Victims.

I. As used in this section:

(a) "Victim" means a person who suffers direct or threatened physical, emotional, psychological or financial harm as a result of the commission or the attempted commission of a crime. "Victim" also includes the immediate family of any victim who is a minor or who is incompetent, or the immediate family of a homicide victim, or the surviving partner in a civil union.

…

II. To the extent that they can be reasonably guaranteed by the courts and by law enforcement and correctional authorities, and are not inconsistent with the constitutional or statutory rights of the accused, crime victims are entitled to the following rights:

…

(m) The right of confidentiality of the victim's address, place of employment, and other personal information.

260:14. Records and Certification.

I. In this section:

…

(c) "Personal information" means information in motor vehicle records that identifies a person, including a person's photograph or computerized image, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information.

…

II.

(a) Proper motor vehicle records shall be kept by the department at its office. Notwithstanding RSA 91-A or any other provision of law to the contrary, except as otherwise provided in this section, such records shall not be public records or open to the inspection of any person.

STATEMENT OF THE CASE

This is an appeal from the decision of the New Hampshire Department of Labor denying Appellant Wayne Preve's ("Chief Preve") claims based on alleged violation of the New Hampshire Whistleblower Protection Act by the Respondent/Appellee Town of Epsom/Epsom Police Department ("Town"). After conducting an evidentiary hearing, the Department of Labor determined that there was no direct evidence of animus or retaliation by the Town and applied a "pretext" analysis to address Chief Preve's Whistleblowers' Protection Act claims. The Hearing Officer concluded that Chief Preve failed to prove that the Town's motivation for imposing a one week suspension without pay was his protected reporting rather than the Town's "legitimate, non-retaliatory reason for his suspension" consisting of his improper disclosure of confidential information contained in police records. The DOL issued its decision denying Chief Preve's Whistleblower claims on October 2, 2018 and denied his application for rehearing on November 9, 2018. The procedural history of this case is set forth below.

On April 17, 2018, Chief Preve filed a Complaint Form for Public Employees with the New Hampshire Department of Labor pursuant to RSA 275-E:8. [App. p. 00042-00056] Chief Preve alleged that he was disciplined by the Town for filing a complaint against Attorney Anthony Soltani related to a courtroom incident in which Attorney Soltani referred to an Epsom police officer, Lieutenant Michael, as a "sex offender." Chief Preve claimed that Attorney Soltani had "a history of negative and obstructive interactions with the Epsom Police" and included police records containing confidential information about Attorney Soltani and other individuals with the complaint which he erroneously sent to the Judicial Conduct Committee. Chief Preve alleged that his suspension without pay was in retaliation for exercising his rights and violated New Hampshire's Whistleblowers' Protection Act, RSA 275-E:2 and RSA 275-E:9.

On May 31, 2018, the Town moved to dismiss the claims because the disciplinary action against Chief Preve was the result of his misconduct in connection with the use of protected information when attempting to file a disciplinary complaint against an attorney who was not affiliated with the Town and was not the result of having reported any alleged violation of law or rule by his employer, as is required in order for RSA 275-E to apply. [App. p. 00099-00116]

On June 5, 2018, the DOL denied the Town's motion on the basis that the facts alleged were not yet in evidence. [App. p. 00097]

The DOL conducted an evidentiary hearing on September 10, 2018. During the hearing, Chief Preve acknowledged that as Chief of Police he represents the Town, that actions he undertakes could expose the Town to liability and that the Town has a legitimate interest in avoiding exposure to liability. [App. p. 00230, Tr. P. 55, l. 4-22] He also testified that information contained in driving records and police records is confidential and must be obtained properly. [App. p. 00234, Tr. p. 59, l. 4-8] Chief Preve admitted that after he became aware of Lt. Michael's incident with Attorney Soltani he did "[e]xactly what it says in the MRI report", including generating the complaint letter and compiling the police records. [App. p. 00236, Tr. p. 61, l. 8-17; App. p. 00251, Tr. p. 76, l. 5-13] Chief Preve testified that he did nothing to remove confidential information prior to releasing the documents. [App. p. 00247-00248, Tr. p. 72, l. 19-25, p. 73, l. 1-12] He acknowledged that he did not seek the advice of town counsel, the county attorney or the attorney general's office prior to submitting the complaint to the Judicial Conduct Committee. [App. p. 00238, Tr. p. 63, l. 10-13] Significantly, Chief Preve admitted during the hearing that he knew the reason he was disciplined by the Town was his attachment of confidential police documents pertaining to Attorney Soltani to the complaint he filed with the Judicial Conduct Committee:

> Q. You understand that attaching these documents to the complaint was the reason that you were disciplined by the town, correct?
>
> MR. LEWIS: Objection.
>
> HEARING OFFICER: I am going to allow it.

A. Yes.

[App. p. 00247, Tr. p. 72, l. 8-13]

On October 2, 2018, the DOL issued its decision in which the Hearing Officer concluded that the Whistleblower claims were invalid because Chief Preve failed to prove by a preponderance of the evidence that he was retaliated against for a protected reporting. [App. p. 00036-00040] The Hearing Officer specifically addressed the applicable standard of review under Appeal of Montplaisir, 147 N.H. 297 (2007), and determined that the absence of any direct evidence of animus or retaliation by the Town mandated application of the "pretext" analysis rather than the "mixed motive" standard. [App. p. 00039] The Hearing Officer proceeded to analyze the evidence under the "pretext" standard and found that although Chief Preve had established a *prima facie* case of retaliation, the Town effectively rebutted that evidence by establishing that it only disciplined Chief Preve after receiving the results of an independent third party's investigation which concluded that Chief Preve's conduct in disclosing confidential information about Attorney Soltani and other individuals to the Judicial Conduct Committee was not only improper, but potentially criminal. [App. p. 00040] The Hearing Officer ruled that Chief Preve "failed to show any persuasive evidence or testimony that the employer's motivation for his suspension was his protected reporting" of Attorney Soltani rather than the Town's "legitimate, non-retaliatory reason for his suspension" consisting of his improper and/or potentially criminal disclosure of confidential police records. [App. p. 00040]

On November 1, 2018, Chief Preve filed an Application for Rehearing pursuant to RSA 541:3. [App. p. 00010-00034] The Town filed a timely Objection to the Application for Rehearing on November 8, 2018. [App. p. 00003-00009]

On November 9, 2018, DOL Commissioner Kenneth Merrifield denied Chief Preve's Application for Rehearing, ruling that there was "no indication that the decision rendered was unlawful or unreasonable." [App. p. 00002] Commissioner Merrifield determined that "[t]he Hearing Officer provided sufficient basis for the application of the

pretext analysis and applied the test accordingly, and provided sufficient discussion relative to the evidence and testimony which relied on in reaching the conclusions rendered." [App. p. 00002]

This appeal followed.

STATEMENT OF FACTS

On October 16, 2017, Lt. Brian Michael reported to Chief Preve that while he was within a courtroom at the 6th Circuit District Division in Concord, New Hampshire, Attorney Soltani referred to him as a "sex offender." [App. p. 00202; p. 00146-00147] Neither Lt. Michael nor Attorney Soltani was engaged in a court proceeding at the time of the Soltani comment. Chief Preve felt that the Epsom Police Department "had an ongoing issue with Mr. Soltani and his behavior" and decided to file an attorney discipline complaint. [App. p. 00207-00207]

On October 20, 2017, Chief Preve filed the complaint with the New Hampshire Judicial Conduct Committee. Chief Preve submitted the complaint on Epsom Police Department letterhead and personally signed the complaint in his capacity as Chief of the Epsom Police Department. [App. p. 00304] Attached to the letter of complaint were written statements from Lt. Michael, Assistant County Attorney Marianne Ouellette, Officer Matthew Gnatowski and County Deputy Keith Sawyer. [App. p. 00058; p. 00305-00308] Also attached was a "Certification of Copies" signed by Chief Preve, a "grievance" signed under oath by Chief Preve, and 19 pages of un-redacted official police reports and other police records entirely unrelated to the courtroom incident and dating back to 1998. [App. p. 00058; p. 00302-00327] Chief Preve sent the same packet to Attorney Soltani. [App. p. 00058] The un-redacted police records submitted by Chief Preve included: (1) a report relating to a medical call at Attorney Soltani's residence containing his social security number, date of birth, telephone number and street address; (2) reports related to a police call at Attorney Soltani's residence which included his social security number, date of birth, telephone number and street address; (3) reports of a

call to Attorney Soltani's residence disclosing the social security numbers of Attorney Soltani and his son, as well as the personal information, including telephone numbers and dates of birth, of unrelated third persons; and (4) a document listing Attorney Soltani's date of birth, place of birth, his parents' names, his telephone numbers, his dog license registrations, his vehicle registrations, his arrests, his citations, and his "other activity" including incidents involving his minor children.[1] [App. p. 00126-00127; p. 00302-00327] All of the records pertained to Attorney Soltani's personal matters rather than his conduct as an attorney. [App. p. 00243-00244, Tr. p. 68-69]

On October 24, 2017, the Judicial Conduct Committee returned the documents submitted by Chief Preve with a cover letter stating that it did not have jurisdiction over attorneys and that the appropriate forum for review of attorney conduct complaints was the New Hampshire Supreme Court's Attorney Discipline Office. [App. p. 00329-00330]

Upon receiving a copy of the packet sent by Chief Preve to the Judicial Conduct Committee, Attorney Soltani wrote to the Town to express his concerns. Attorney Soltani stated that he had "no problem with anyone wishing to file a professional complaint against me, nor speaking their mind", but that he did have a problem with the use of "town assets to disseminate restricted information about me, my family, and especially my kids." [App. p. 00241, Tr. p. 66, l. 10-19; App. p. 00331-00332] Attorney Soltani threatened to take legal action against the responsible Town agents as the result of the improper disclosure of private information. [App. p. 00331]

Immediately upon receipt of Attorney Soltani's letter, Town counsel Mitchell Municipal Group hired Municipal Resources, Inc. ("MRI") to conduct an independent investigation of Chief Preve's submission of the complaint and documentation to the Judicial Conduct Committee. MRI's investigation included interviews of Chief Preve

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[1] This Court has recognized an individual's privacy interest in his or her social security number:

> "…a person's interest in maintaining the privacy of his or her SSN has been recognized by numerous federal and state statutes. As a result, the entities to which this information is disclosed and their employees are bound by legal, and, perhaps, contractual constraints to hold SSNs in confidence to ensure that they remain private. [citation omitted] Thus, while a SSN must be disclosed in certain circumstances, a person may reasonably expect that the number will remain private."

Remsburg v. Docusearch, Inc., 149 N.H. 148, 156, 816 A.2d 1001 (2003).

and Lt. Michael, as well as a review of the complaint and documents that were submitted by Chief Preve to the Judicial Conduct Committee. Both Chief Preve and Lt. Michael acknowledged Chief Preve's active involvement in retrieving the confidential documents from the Police Department's records management system, printing the documents, and submitting the un-redacted documents to the Judicial Conduct Committee. [App. p. 00058-00062]

On November 22, 2017, Adam S. Gould, President of MRI, released the results of the investigation. [App. p. 00057-00064] MRI found that "[t]he Epsom Police documents submitted by Chief Preve to the New Hampshire Judicial Conduct Committee contained very sensitive and personal information pertaining not only to Attorney Soltani, but to others within and outside his family." [App. p. 00062] During his testimony before the DOL, President Gould described the submission as "pretty much a record dump, everything that they had, and it appeared to be everything that they had in their local computer" dating back to 1998 and relating to Attorney Soltani as a citizen in the town, "among other people." [App. p. 00261-00262, Tr. p. 86, l. 9-25; p. 87, l. 1-2] In some of the documents it could not be discerned whether Attorney Soltani was a suspect, a witness or a victim. [App. p. 00263-0264, Tr. p. 88-89] In his report, President Gould noted that Chief Preve's failure to recognize the sensitive nature of the information being released and failure to exercise better judgment in handling the matter was particularly "troubling" in light of his 17 years of experience as a police officer and 13 years serving as Chief of Police. [App. p. 00062] During the DOL hearing, President Gould testified that his "concern was that the release of that information was inappropriate", some of the information was "highly protected" and its disclosure "may have been criminal in some cases." [App. p. 00266, Tr. p. 91, l. 1-8]

MRI concluded that the documents "should never have been released, redacted or un-redacted." [App. p. 00062] In addition, Chief Preve should have referred the complaint to, or at least sought legal advice from, either the County Attorney or the Town's legal counsel. [App. p. 00062] Notably, MRI found that Chief Preve's conduct may have violated one or more statutes enacted to protect the confidentiality of private

information. MRI found that: (1) the release of the Epsom Police Department records pertaining to Attorney Soltani was improper; (2) the release of information pertaining to the Department of Motor Vehicle records may have violated RSA 260:14;[2] (3) the release of information pertaining to juvenile matters may be a violation of RSA 169-D:25 or RSA 169-C:25; (4) the release of information pertaining to Attorney Soltani's status as a "victim" in some of the Epsom Police Department records may be a violation of RSA 21-M:8-k(m);[3] and (5) the release of confidential information may be a violation of the Town's Code of Ethics.[4] [App. p. 00063-00064]

On January 3, 2018, the Town of Epsom Selectmen's Office wrote to Chief Preve to inform him of the findings and conclusions of MRI, and to notify him that he would receive a one week unpaid suspension as the result of his direct involvement in gathering, duplicating and conduct in disclosing confidential police records containing private information about Attorney Soltani and his children, including social security numbers, addresses, birth dates and birth places. [App. p. 00065-00067] The letter advised Chief Preve that his conduct, undertaken without any thought or concern for privacy rights, not

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[2] The Driver Privacy Act restricts the disclosure of motor vehicle records and defines "personal information" as including "information in motor vehicle records that identifies a person, including a person's photograph or computerized image, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information." RSA 260:14; Devere v. Attorney General, 146 N.H. 762, 781 A.2d 24 (2001).

[3] RSA 21-M:8-k(m) protects the rights of crime victims and provides:

> II. To the extent that they can be reasonably guaranteed by the courts and by law enforcement and correctional authorities, and are not inconsistent with the constitutional or statutory rights of the accused, crime victims are entitled to the following rights:
>
> …
>
> (m) The right of confidentiality of the victim's address, place of employment, and other personal information.

[4] The Town of Epsom's Code of Ethics adopted by the Epsom Board of Selectmen as quoted in MRI's report provides:

> E. No misuse of confidential information, paragraph 2 – In addition, no official or employee of the Town of Epsom shall violate the privacy of others by publicizing, gossiping, or discussing information confidentially acquired in the course of official duties without a legitimate reason to do so.

[App. p. 00064]

only violated the Town Code of Ethics and RSA 91-A:5, IV,[5] but was also in potential violation of various criminal statutes. [App. p. 00065] The letter also informed Chief Preve that his conduct potentially exposed the Town to civil liability. [App. p. 00066]

On January 10, 2018, Chief Preve submitted an appeal of the one week suspension to the Epsom Board of Selectmen. [App. p. 00068-00082]

On March 6, 2018, the Town's attorney formally requested an investigation by the Public Integrity Unit of the Attorney General's office into whether there was a misuse of official position by either Chief Preve or Lt. Michaels in accessing the police records system and including un-redacted records with the complaint. [App. p. 00362] In that letter Town counsel stated that the Epsom Board of Selectmen took no issue with the filing of the complaint against Attorney Soltani, but they were concerned about the inclusion of the police reports. [App. p. 00362] On March 9, 2018, the Board of Selectmen wrote to Chief Preve's attorney stating that since he was disputing the illegality of his accessing and releasing un-redacted police records in conjunction with the complaint, it was referring the matter to the Public Integrity Unit for review and possible investigation. [App. p. 00364] That investigation remains pending at this time.

SUMMARY OF ARGUMENT

As argued by the Town in its Objection to Complaint filed with the Department of Labor and its Motion to Dismiss the Complaint, and subsequently reasserted in its Objection to Motion for Rehearing, Chief Preve did not assert valid claims under the Whistleblowers' Protection Act because the conduct which resulted in the disciplinary action against him did not involve his reporting of any illegal acts on the part of his employer as is required by the statute, the supporting regulations and legislative history, but were instead related to his inappropriate use of the personal and protected

[5]"The Right-to-Know Law specifically exempts from disclosure 'files whose disclosure would constitute invasion of privacy,'" including "financial information and personnel files and other information necessary to an individual's privacy." N.H. Right to Life v. Director, N.H. Charitable Trusts Unit, 169 N.H. 95, 110, 143 A.3d 829 (2016), *quoting* RSA 91-A:5, IV. *See, also,* Lamy v. N.H. PUC, 152 N.H. 106, 110, 872 A.2d 1006 (2005) ("disclosing a person's name and address implicates that person's privacy rights 'because [the disclosure] serves as a conduit into the sanctuary of the home'"), *quoting* Brent v. Paquette, 132 N.H. 415, 428, 567 A.2d 976 (1989).

information concerning a third party, Attorney Soltani. [App. p. 00099-00116; p. 00124-00140; p. 00003-00009] As a result, the Department of Labor should have dismissed the claims as not asserting a Whistleblowers' Protection Act violation.

However, having proceeded with the evidentiary hearing, it was the Hearing Officer's responsibility as the trier of fact to initially determine whether or not Chief Preve met his burden of introducing "direct evidence" of retaliatory animus. The only evidence upon which Chief Preve relied was the suspension letter informing him that disciplinary action was being taken not simply because he signed and was involved in writing the letter, but because he was involved in "*gathering documents to be appended to it, all without any thought or concern about Attorney Soltani and his children's privacy rights*." The Hearing Officer found as a matter of fact that this letter did not constitute "direct evidence" of animus and, therefore, ruled as a matter of law that the "pretext" analysis rather than the "mixed motive" analysis applied. This Court must presume that this factual finding is *prima facie* lawful and reasonable since it is amply supported by the statements in the suspension letter itself, the blatant impropriety of the confidential information disclosed by Chief Preve about Attorney Soltani and his family, and Attorney Soltani's letter stating that it was the disclosure of confidential information rather than the filing of the complaint which gave rise to his threat of legal action against the Town. Perhaps most significantly, the finding is supported by Chief Preve's own testimonial admission that he was disciplined because he attached the confidential documents to the complaint, documents that in fact had nothing to do with the professional conduct of Attorney Soltani.

Applying the "pretext" analysis, the Hearing Officer gave Chief Preve great latitude in ruling that he alleged a *prima facie* case based on temporal proximity. While the Town does not agree that Chief Preve effectively asserted a *prima facie* case, based on the above facts the Hearing Officer correctly ruled that the Town successfully rebutted Chief Preve's case by producing evidence that the adverse employment action was taken for legitimate, non-retaliatory reasons, namely, the improper disclosure of confidential information about Attorney Soltani and his family, potentially exposing the Town to civil

liability. The Hearing Officer also properly ruled that the Town's concerns about the disclosure of confidential information, validated by the findings of the independent investigation conducted by MRI, were not a pretext for unlawful retaliation.

For the forgoing reasons as addressed more fully below, this Court should affirm the decision of the Department of Labor.

ARGUMENT

I. STANDARD OF REVIEW

This Court will not set aside the DOL's decision except for errors of law unless it is "satisfied, by a clear preponderance of the evidence, that such order is unjust or unreasonable." Appeal of Montplaisir, 147 N.H. 297, 300, 787 A.2d 178, 181 (2001). The Court will "presume the DOL's factual findings are *prima facie* lawful and reasonable and will not overturn them unless the record does not contain sufficient evidence to support them." Appeal of Seacoast Fire Equipment Co., 146 N.H. 605, 777 A.2d 869 (2001). *See, also,* RSA 541:13 ("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", all findings upon all questions of fact shall be deemed to be prima facie lawful and reasonable, and the order or decision 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, that such order is unjust or unreasonable").

II. CHIEF PREVE ELECTED TO PURSUE HIS WHISTLEBLOWERS' PROTECTION ACT CLAIMS THROUGH THE DEPARTMENT OF LABOR THEREBY DESIGNATING THE HEARING OFFICER AS THE TRIER OF FACT

New Hampshire's Whistleblowers' Protection Act prohibits employers from retaliating against an employee for reporting or refusing to participate in what he or she reasonably believes is a violation of the law, or for participating in an investigation into allegations that the employer has violated the law. Clark v. New Hampshire Dept. of Employment Security, N.H. Sup. Ct., No. 2017-0658, 2019 N.H. LEXIS 5, *28 (January

11, 2019), *citing* RSA 275-E:2, I(a)-(c); Appeal of N.H. Dept. of Employment Security, 140 N.H. 703, 708 (1996).

The Whistleblowers' Protection Act provides two avenues by which an aggrieved employee may obtain relief for a whistleblower violation. Clark v. New Hampshire Dept. of Employment Security, 2019 N.H. LEXIS at *28. Under RSA 275-E:2, II, the employee "may bring a civil suit within 3 years of the alleged violation." Id. Under RSA 275-E:4, I, an employee may "obtain a hearing with the commissioner of labor or a designee appointed by the commissioner" after the employee "has first made a reasonable effort to maintain or restore such employee's rights through any grievance procedure or similar process available at such employee's place of employment." Id. at *28-29.

Having elected to pursue his Whistleblowers' Protection Act claims through the Department of Labor, Chief Preve designated the Hearing Officer as the trier of fact. All findings upon all questions of fact as determined by the Hearing Office are deemed to be prima facie lawful and reasonable.

III. THE HEARING OFFICER CORRECTLY APPLIED THE "PRETEXT" ANALYSIS DUE TO THE ABSENCE OF DIRECT EVIDENCE OF RETALIATION

A. The Hearing Officer Determines Whether To Apply The "Mixed Motive" Analysis Or The "Pretext" Analysis Based On The Quality Of The Evidence

This Court has noted that "the federal standards used to evaluate retaliation claims under Title VII are useful in resolving claims under RSA 275-E." Appeal of Seacoast Fire Equipment Co., 146 N.H. at 608. "Under federal law, there are two basic ways for an employee to prove retaliation: the 'pretext' approach and the 'mixed motive' approach." Appeal of Montplaisir, 147 N.H. at 300. In the context of a Whistleblower action such as this, "both methods may be used to assess whether the employee participated in a protected activity and whether, because of the employee's participation, the employer discharged, threatened, or otherwise discriminated against the employee." Id.

"The quality of the evidence determines whether a 'pretext' or a 'mixed motive' analysis applies." Appeal of Montplaisir, 147 N.H. at 300. The "pretext" approach applies if there is "only circumstantial evidence of retaliation." Id. The "mixed motive" approach only applies when there is "direct evidence of retaliation." Id. "Based upon the availability or unavailability of the proffered evidence, the hearing officer or trial court channels the case into one approach or the other." Id.

The hearing officer's "channeling of case into the mixed motive format occurs, not when there is simply *some* quantity of direct evidence, but when the hearing officer determines there is direct evidence that retaliation played a substantial role in the particular employment decision." Appeal of Hardy, 154 N.H. 805, 814, 917 A.2d 1237 (2007).[6] In the absence of such a determination, the case must proceed under the "pretext" analysis. Id.

B. Chief Preve Failed To Produce "Direct Evidence" That Retaliation Played A Substantial Role In The Disciplinary Decision As Required In Order For The "Mixed Motive" Analysis To Apply

The "mixed motive" approach applies only when the employee "produces *direct evidence* that retaliation 'played a substantial role in a particular employment decision.'" Appeal of Montplaisir, 147 N.H. at 301 [emphasis added], *quoting* Price Waterhouse v. Hopkins, 490 U.S. 228, 277-78, 9 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) (O'Connor, J., concurring). "Evidence is considered to be direct only if 'it consists of statements by a decisionmaker that directly reflect the alleged animus and bear squarely on the contested employment decision.'" Id. at 301, *quoting* Febres v. Challenger Caribbean Corp., 214 F.3d 57, 60 (1st Cir. 2000) (comments which demonstrate that a decision maker made, or intended to make, employment decisions based on forbidden criteria constitute direct evidence of discrimination). "The phrase 'direct evidence' … refers to evidence which, *if believed by the factfinder*, would warrant a burden shift." Febres v. Challenger

[6] In *Hardy*, this Court noted that direct evidence is no longer required to trigger a mixed motive analysis in the context of Title VII discrimination cases, but declined to decide whether the same should hold true for Whistleblowers' Protection Act claims. Appeal of Hardy, 154 N.H. at 815.

Caribbean Corp., 214 F.3d at 60, n. 3. "If the trier of fact believes the employee's direct evidence, the burden of persuasion shifts to the employer to show that despite the retaliatory animus, it would have made the same adverse employment decision for legitimate, non-retaliatory reasons." Id.

In Febres, one of the three executives in charge of deciding which employees were to be "shown the door" as part of a production line shutdown at the defendant's manufacturing facility had listed "age" as one of the pertinent criteria that would be used in making some of the decisions. 214 F.3d at 59. The Court ruled that this express admission by a decision maker that a protected characteristic would be used as a criterion in deciding whether to take an adverse employment action directly reflected the alleged animus and bore squarely on the contested employment decision thereby warranting a "mixed motive" analysis. Id. at 60. *See, also,* Darbouze v. Toumpas, 2011 U.S. Dist. LEXIS 145811, 2011 WL 6300702 (D.N.H. 12/16/11) (describing "direct evidence" as a "smoking gun" showing that the decision-maker relied on improper criteria in taking an employment action), *quoting* PowerComm, LLC v. Holyoke Gas & Elec. Dept., 657 F.3d 31, 35 (1st Cir. 2011). There was no such "direct evidence" or "smoking gun" in this case.

The Hearing Officer found as a matter of fact that "[n]othing in the evidence presented suggests animus on the part of the employer or retaliation based on the claimant's protect reporting." [App. p. 00039] This factual finding was supported by the additional undisputed facts as found by the Hearing Officer that: (1) the information collected by Chief Preve from the Police Department's database included "all reports in which [Attorney Soltani] or his family was listed, regardless of whether they were victims, witnesses, or an accused"; (2) Chief Preve mailed the letter of complaint together with the records to the Judicial Conduct Committee instead of the Attorney Discipline Office; (3) Attorney Soltani informed the Town that he did not take issue with a complaint being made about him, but threatened the Town with a lawsuit based on the improper and criminal misuse of confidential information about himself and his family; and (4) the Town immediately sought an independent investigation into Chief Preve's

conduct in order to determine whether any actions taken were criminal and did not take disciplinary action until it received the results from MRI. [App. p. 00037]

The sole evidence upon which Chief Preve relies in support of his position that he presented "direct evidence" of retaliation is the Town's suspension letter stating: "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.*"[7] [App. p. 00341] In his brief, Chief Preve completely ignores the italicized language in a misguided effort to support his claim that it was simply his "protected reporting" of Attorney Soltani that resulted in the disciplinary action. This, however, is directly contradicted not only by the express reference to the improper disclosure within the suspension letter itself, but also by Chief Preve's own admission during the Labor Department hearing that he was disciplined because he attached the confidential police documents to the complaint. [App. p. 00247, Tr. p. 72, l. 8-13]

Based on the absence of any evidence of retaliatory animus on the part of the Town, the Hearing Officer made the factual determination that there was no "direct evidence" of retaliation. This Court may not reverse a hearing officer's findings of fact or decisions based upon such findings where, as in this case, they are supported by competent evidence in the record. Petition of Croteau, 139 N.H. 534, 536, 658 A.2d 1199, 1201 (1995). Since the evidence presented by Chief Preve was no more than circumstantial, the Hearing Officer properly concluded that the "pretext" analysis rather than the "mixed motive" analysis applied.

IV. IN THE ABSENCE OF DIRECT EVIDENCE OF RETALIATORY ANIMUS THE HEARING OFFICER PROPERLY APPLIED THE *McDONNELL DOUGLAS* "PRETEXT" ANALYSIS AND CONCLUDED THAT THERE WAS NO VIOLATION OF THE WHISTLEBLOWERS' PROTECTION ACT

[7] The October 20, 2017 complaint letter addressed to the Judicial Conduct Committee and signed by Chief Preve specifically referenced the attached documents related to police contact dating back to 1998. [App. 00304]

Where "there is only circumstantial evidence of retaliation", the "pretext" approach applies. Appeal of Montplaisir, 147 N.H. at 300. The analytical framework to be applied in a "pretext" case was established in McDonnell Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Under the "pretext" analysis, "the burden of persuasion remains with the plaintiff throughout the case." Febres v. Challenger Caribbean Corp., 214 F.3d at 57.

Under the "pretext" analysis, "the employee bears the initial burden of establishing a *prima facie* case of unlawful conduct." Appeal of Montplaisir, 147 N.H. at 300-301. In order to establish a prima facie case of retaliation, the employee must demonstrate that: (1) he engaged in an act protected by the whistleblowers' protection statute; (2) he suffered an employment action proscribed by the whistleblowers' protection statute; and (3) there was a causal connection between the protected act and the proscribed employment action. Id. at 301.

The *prima facie* burden under the *McDonnell Douglas* analysis has been described as a relatively "low threshold" and "quite easy to meet." Fountain v. First Data Merchant Services, 2016 U.S. Dist. LEXIS 9422, * (D.N.H. 1/27/16), *citing* Hodgens v. General Dynamics Corp., 144 F.3d 151, 169 (1st Cir. 1998). Simply establishing a "'[v]ery close' temporal proximity between protected activity and an adverse employment action can satisfy a plaintiff's burden of showing causal connection" for purposes of the *prima facie* case analysis. Sanchez-Rodriguez v. AT&T Mobility P.R., Inc., 673 F.3d 1, 15 (1st Cir. 2012). *See, also* Febres v. Challenger Caribbean Corp., 214 F.3d at 57 (referring to the showing required to establish a *prima facie* case under the "pretext" approach as "*de minimis*"). Contrary to Chief Preve's unsupported argument, a ruling that a claimant has met the low *prima facie* case threshold is not the equivalent of finding the "direct evidence" of retaliatory animus that is required in order to trigger the "mixed motive" analysis.

The Hearing Officer noted that "temporal proximity alone can suffice to meet the relatively light burden of establishing a *prima facie* case of retaliation." [App. p. 00039] She found that Chief Preve met the low threshold of establishing a *prima facie* case by

simply showing that he was given a one week suspension after filing the report with the Judicial Conduct Committee. [App. p. 00039] Notably, the case upon which the Hearing Officer relied involved significantly different facts relative to temporal proximity. In Collazo v. Bristol-Myers Squibb Mfg., Inc., 617 F.3d 39 (1st Cir. 2008), the plaintiff was fired within 11 days after helping a co-employee report and pursue a sexual harassment claim. In this case, the Town did not take immediate disciplinary action against Chief Preve, but instead consulted with legal counsel and hired an outside consulting company to conduct an investigation. Attorney Soltani contacted the Town to express his concerns on October 24, 2017. [App. p. 00331-00332] MRI released its report a month later on November 22, 2017. [App. p. 00333-00340] The Town Selectmen issued the suspension letter over a month later on January 3, 2018. [App. p. 00341-00342] Thus, the Hearing Officer granted Chief Preve significant latitude with regard to establishing a *prima facie* case based on temporal proximity.

"Establishing a *prima facie* case of retaliation creates a presumption that the employer unlawfully retaliated against the employee." Appeal of Montplaisir, 147 N.H. at 301. The presumption places a burden on the employer to rebut the *prima facie* case by producing "evidence that the adverse employment action was taken for legitimate, non-retaliatory reasons." Id. However, "[t]he burden placed upon the employer is only a burden of production; the employee retains the burden of persuasion." Id. *See, also,* Appeal of Seacoast Fire Equipment Co., 146 N.H. at 609 (the burden placed on the employer at step two of the *McDonnell Douglas* framework is a burden of production only and "the ultimate burden of persuading the trier of fact that the [employer] intentionally discriminated against the [employee] remains at all times with the [employee]"), *quoting* St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993).

The Hearing Officer found that the Town effectively rebutted Chief Preve's assertion that he was disciplined in retaliation for having simply filed a complaint. She based her decision on the following findings of fact:

> The employer, from the very beginning of this issue, focused on the

> potential impropriety and/or criminality of the claimant's actions. They made no reprimand or discipline simply because the claimant reported TS to the JCC, or for his error in sending it to the JCC rather than the PCC. They hired a third party to investigate the claimant's actions. As a result of the report issued by MRI for improper actions and potential criminal conduct on the part of the claimant, the employer disciplined the claimant. The claimant is still under investigation as of the date of the hearing.

[App. p. 00040] The Hearing Officer distinguished between the act of reporting an alleged violation of the law, which must be lawful and proper in order to maintain a protected status, and a reporting which the employer reasonably believes involves potential impropriety and/or criminality, such as occurred in this case. [App. p. 00040] The latter does not qualify for protected status under the Whistleblowers' Protection Act.

Once the employer satisfies its burden of production, "the presumption raised by the *prima facie* case is rebutted and 'drops from the case.'" Appeal of Montplaisir, 147 N.H. at 301, *quoting* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255, n. 10, 67 L.Ed.2d 207, 101 S. Ct. 1089 (1981). The employee then has the burden of showing that retaliation rather than the employer's stated reason, was the true reason for the adverse employment action. The employee may do this indirectly by showing that the employer's stated reasons were not credible, or indirectly by showing that the adverse employment action was more likely motivated by retaliation. Id. "Under the 'pretext' approach, the employee retains the ultimate burden of persuading the trier of fact" that he was the victim of unlawful retaliation. Id. "Pretext can be demonstrated by 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons … that a reasonable factfinder could rationally find them unworthy of credence and [with or without the additional evidence and inferences properly drawn therefrom] infer that the employer did not act for the asserted non-discriminatory reasons." Dennis v. Osram Sylvania, Inc., 549 F.3d 851, 857 (1st Cir. 2008) (applying New Hampshire law). A "slight suggestion of pretext" does not meet the employee's ultimate burden. Weston-Smith v. Cooley Dickinson Hospital, Inc., 282 F.3d

60, 70 (1st Cir. 2002), *quoting* Zapata-Matos v. Reckitt & Colman, Inc., 277 F.3d 40, 47 (1st Cir. 2002).

The Hearing Officer found that Chief Preve "failed to show any persuasive evidence or testimony that the employer's motivation for his suspension was for his protected reporting of TS, rather than their proffered legitimate, non-retaliatory reason for his suspension." [App. p. 00040] This decision was consistent with the evidence, including Chief Preve's own testimonial admission that he was suspended for submitting the confidential police department records.

V. THE HEARING OFFICER WOULD HAVE REACHED THE SAME CONCLUSION EVEN IF IT HAD APPLIED THE "MIXED MOTIVE" ANALYSIS SUCH THAT ANY ERROR WOULD BE HARMLESS

"If the employee produces direct evidence that retaliation 'played a substantial role in a particular employment decision,' then the 'mixed motive' approach applies." Appeal of Montplaisir, 147 N.H. at 301. "If the trier of fact believes the employee's direct evidence, the burden of persuasion shifts to the employer to show that despite the retaliatory animus, it would have made the same adverse employment decision for legitimate, non-retaliatory reasons." Id. at 301, *citing* Price Waterhouse v. Hopkins, 490 U.S. at 277-78 (O'Connor, J., concurring).

"In a mixed-motive case, the burden of persuasion does not shift merely because the plaintiff introduces sufficient direct evidence to permit a finding that a discriminatory motive was at work; the burden shifts only if the direct evidence in fact persuades the [trier of fact] that a discriminatory motive was at work." Febres v. Challenger Caribbean Corp., 214 F.3d at 64. "Put another way, the burden of persuasion does not shift unless and until the [trier of fact] accepts the 'direct evidence' adduced by the plaintiff and draws the inference that the employer used an impermissible criterion in reaching the disputed employment decision." Id.

In the case it is clear that the Hearing Officer did not accept Chief Preve's claim, based merely on the reference in the suspension letter to his having signed the complaint

submitted to the Judicial Conduct Committee, that the fact of the reporting played any role in the decision to impose disciplinary action. Rather, based on the testimony and evidence, including Chief Preve's own admission, the Hearing Officer found that the reason for the suspension was the improper and potentially criminal inclusion of the confidential, inappropriately disclosed documents. *See*, Piotrowski v. Boulard, 534 B.R. 62, 2015 Bankr. LEXIS 2376 (D.N.H. 7/20/15) (applying "mixed motive" analysis and finding that despite direct evidence of retaliatory animus under Whistleblowers' statute, employer would have terminated the employee for legitimate, non-retaliatory reasons based on job performance). This was a legitimate, non-retaliatory reason that would have satisfied the Town's burden of persuasion and resulted in the same conclusion even if the "mixed motive" analysis had been applied. *See*, Fat Bullies Farm, LLC v. Devenport, 170 N.H. 17, 29, 164 A.3d 990 (2017) ("[a] harmless error is an error that does not affect the outcome").

REQUEST FOR ORAL ARGUMENT

The Respondent/Appellee, Town of Epsom/Epsom Police Department, respectfully requests that its attorney, Stephen J. Schulthess, Esq., be afforded an opportunity to present a fifteen minute oral argument.

CONCLUSION

For the foregoing reasons, the Respondent/Appellee, Town of Epsom/Epsom Police Department, respectfully requests that this Honorable Court:

A. Affirm the October 2, 2018 Decision of the Hearing Officer and the November 9, 2018 denial of the Application for Rehearing;

B. Deny Appellant's request to vacate the decision and remand for further proceedings; and

C. Grant such other relief as may be just and equitable.

CERTIFICATE OF SERVICE

I hereby certify that a copy of Respondent/Appellee's Brief has this date been provided to Michael S. Lewis, Esq. by electronic filing and prepaid U.S. Mail.

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I hereby certify that this brief contains a total of 6,857 words and meets the requirement of 9,500 words or less for Appellee's responsive brief.

Respectfully submitted,

TOWN OF EPSOM/EPSOM POLICE DEPARTMENT

By Its Attorneys,

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Dated: April , 2019

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief on Behalf of Respondent/Appellee Town of Epsom have been mailed first class to Michael J. Lewis, Esq.

Dated: April , 2019

/s/ Stephen J. Schulthess
Stephen J. Schulthess, Esq.