THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2020-0216

Tejasinha Sivalingam

v.

Town of Ashland, Board of Selectmen

and

Frances Newton and Leigh Sharpes[1]

BRIEF OF THE APPELLANT/DEFENDANT, TOWN OF ASHLAND BOARD OF SELECTMEN

Interlocutory Appeal Pursuant to Supreme Court Rule 8

From the Order of the Superior Court of Grafton County in

Docket No. 215-2018-CV-396

Laura Spector-Morgan, Esquire
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To Be Argued By:
Laura Spector-Morgan, Esquire

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[1]Members Newton and Sharps are not parties to this interlocutory appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3
QUESTIONS PRESENTED FOR REVIEW 4
STATUTE INVOLVED IN THE CASE 5
STATEMENT OF THE CASE 6
STATEMENT OF THE FACTS 7
SUMMARY OF THE ARGUMENT 9
ARGUMENT 10
I. STANDARD OF REVIEW 10
II. RSA 91-A:3, II(C) DOES NOT REQUIRE INDIVIDUALIZED NOTICE TO THE INDIVIDUAL TO BE DISCUSSED 11
CONCLUSION 15
REQUEST FOR ORAL ARGUMENT 16
COPY OF DECISION BEING APPEALED 18

TABLE OF AUTHORITIES

CASE LAW

Appeal of Plantier, 126 N.H. 500 (1985) 13

Brown v. Bedford School Board, 122 N.H. 627 (1982) 12

Johnson v. Nash, 135 N.H. 534 (1992) 11, 12, 14, 15

NH Civil Liberties Union v. City of Manchester, 149 N.H. 437 (2003) . . . 13

Paul v. Davis, 424 U.S. 693 (1976) 13

Rankin v. South Street Downtown Holdings, Inc.,
___ N.H. ___, 215 A.3d 882 (2019) 10, 14

Stoneman v. Tamworth School Dist., 114 N.H. 37 (1974) 12

STATUTES

RSA 91-A . . . . *passim*

RSA 105:2-a 13

Mass. Gen. Laws ch. 30A, §21(a)(1) 14

MISCELLANEOUS

March 20, 2015 Attorney General's Memorandum on
New Hampshire's Right-To-Know Law, RSA Chapter 91-A 12

New Hampshire Municipal Association's "Knowing the Territory," 13

Legislative History of HB 1163 (1992) 13

QUESTIONS PRESENTED FOR REVIEW

I. Does RSA 91-A:3, II(c) require that the public body provide some type of individualized prior notice to the individual it intends to discuss in nonpublic session:

Preserved for Appeal in Town's Motion to Dismiss Count I for Failure to State a Claim.

STATUTE INVOLVED IN THE CASE

RSA 91-A:3 Nonpublic Sessions. –

II. Only the following matters shall be considered or acted upon in nonpublic session:

(c) Matters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the public body itself, unless such person requests an open meeting. This exemption shall extend to any application for assistance or tax abatement or waiver of a fee, fine, or other levy, if based on inability to pay or poverty of the applicant.

STATEMENT OF THE CASE

This interlocutory appeal is taken by the Town of Ashland from the ruling issued on May 30, 2019 by the Grafton County Superior Court (Macleod, Jr., J.) that denied the town's motion to dismiss Count I of the underlying complaint ("the Order").[2] See Appendix to Brief of Appellant/Defendant, Town of Ashland Board of Selectmen, ("App.") at 3. Count I of the underlying complaint asserted that the town board of selectmen ("board") violated RSA 91-A:3, II(c) by not providing personal notice to the plaintiff of the board's intention to enter nonpublic session at the June 4, 2018 meeting to safeguard against adversely affecting the plaintiff's reputation. Order at 2, App. at 4. The town moved to dismiss on the basis that the clear, unambiguous language of the statute did not require personal advance notice. Id.

The court denied the town's motion to dismiss, construing all reasonable inferences in plaintiff's favor, finding that the plaintiff's complaint did state a claim for violation of RSA 91-A:3 because, in part, the statute implies at least some form of notice so that the right to an open meeting is not rendered meaningless without an opportunity to exercise that right. See Order at 2-3, App. at 4-5. This interlocutory appeal followed.

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[2]Count II, which is the subject of a separate, consolidated appeal, alleged that two members of the board breached their respective oaths of office pursuant to RSA 42:1-a, II(a) by disclosing information from the sealed nonpublic session of June 4, 2018.

STATEMENT OF FACTS

On November 6, 2017, the BOS considered the appointment of Kathleen DeWolfe to the zoning board. See November 6, 2017 Meeting Minutes at 4, App. at 7. The plaintiff, who was at the time a member of the Board of Selectmen, questioned Mrs. DeWolfe as to why she had resigned from the town's conservation commission and whether that might occur again if she were appointed to the zoning board. She indicated she had stepped away for personal reasons. The Board of Selectmen voted to appoint her to the zoning board, 4-1, with plaintiff voting in the negative. See November 6, 2017 Minutes at 4, App. at 10.

At the next regularly scheduled meeting, held on November 20, 2017, two members of the Board of Selectmen, Frances Newton and Leigh Sharps took issue with Plaintiff's questioning of Mrs. DeWolfe, even though Plaintiff was not in attendance at that meeting. See November 20, 2017 Meeting Minutes at 3, App. at 14.

Subsequent to those two November 2017 meetings, Plaintiff resigned from the Board of Selectmen. Thereafter, he submitted numerous Citizen Inquiries to the town, including one dated May 12, 2018, in which he criticized Members Newton and Sharps for "their tirade of derision" at the November 20, 2017 meeting, characterizing their earlier criticism of him as "an act of prejudice," and requested that the Board of Selectmen formally censure Members Newton and Sharps and for each of them to offer him a public apology. See May 12, 2018 Citizen Inquiry, App. at 18.

Town counsel was asked to review the May 12th Citizen Inquiry and provide guidance on the request for formal censure and a public apology. Town Counsel responded via email on May 21, 2018 to Town Administrator Mr. Smith.

At the June 4, 2018 Board of Selectmen meeting, the Board considered plaintiff's May 12, 2018 Citizen Inquiry as well as town counsel's email addressing the same. The Board of Selectmen went into nonpublic session pursuant to RSA 91-A:3, II(c) to discuss these matters out of concern for potential harm to plaintiff's reputation. No prior personal notice was given to the plaintiff of the board's discussion of the citizen inquiry. While in nonpublic, the Board of Selectmen agreed to read into the public minutes: the plaintiff's May 12th Citizen Inquiry; a portion of town counsel's email; the decision reached during nonpublic session to not censure Members Newton and Sharps, and the Board's decision to no longer publicly address personal attacks contained in citizen inquiry submissions. See June 4, 2018 Meeting Minutes at 3-4, App. at 21-22.

SUMMARY OF ARGUMENT

The interpretation of a statute is a question of law, which this Court reviews *de novo*. In construing a statute's meaning, this Court first examines the language found in the statute, and when possible, ascribes the plain and ordinary meanings to the words used. The plain and ordinary meaning of the language used in RSA 91-A:3, II(c) does not require individualized notice to the person whose reputation is potentially affected. Instead, the entire context of the overall statutory scheme requires only that general notice be given to the public of the board of selectmen's meeting and possible non-public session. There is no contention that such general notice was not given here. Moreover, this Court will not add language that the legislature did not see fit to include. Here, had the legislature intended to require particularized notice, it could have done so at any time, just as Massachusetts does in its statute regulating executive sessions of public bodies. It did not, and therefore, the town complied with RSA 91-A's only notice requirement.

Plaintiff's efforts to rely on this Court's decision in Johnson v. Nash, 135 N.H. 534 (1992) to compel a contradictory result misapprehend the basis for that decision. That decision involved the right of a public employee to receive notice before the board of selectmen conducted a termination hearing. Because this Court held that that employee had a protected interest in his employment, it determined that prior notice of such a meeting was required; a holding the legislature moved to limit before the decision was even released. The legislative history of that amendment makes clear that RSA 91-A was not intended to create any substantive rights. Plaintiff here has no independently protected interest in his reputation which must be furthered by prior notice, and therefore, the holding of Johnson v. Nash does not apply.

This Court should therefore reverse the holding of the superior court and find that RSA 91-A:3, II(c) does not require individualized notice to the affected

individual before a public body may enter nonpublic session to discuss a matter that may affect that person's reputation.

ARGUMENT

I. STANDARD OF REVIEW

As this Court has explained on numerous occasions:

> The interpretation of a statute is a question of law, which we review de novo. In matters of statutory interpretation, we are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole. In construing its meaning, we first examine the language found in the statute, and when possible, we ascribe the plain and ordinary meanings to the words used. 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 statutory provisions in the context of the overall statutory scheme. Absent an ambiguity, we will not look beyond the language of the statute to discern legislative intent.

Rankin v. South Street Downtown Holdings, Inc., ___ N.H. ___, 215 A.3d 882, 885 (2019)(quoting Bank of N.Y. Mellon v. Dowgiert, 169 N.H. 200, 204 (2016) (citations omitted)).

II. RSA 91-A:3, II(C) DOES NOT REQUIRE INDIVIDUALIZED NOTICE TO THE INDIVIDUAL TO BE DISCUSSED

When construing the meaning of statutes, this Court begins with the plain language of the statute. See id. Here, that language is:

> Only the following matters shall be considered or acted upon in nonpublic session:
>
> (c) Matters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the public body itself, unless such person requests an open meeting.

RSA 91-A:3, II(c).

Nothing in this language required the board to notify the plaintiff of its intention to enter nonpublic session to discuss a matter which would like adversely affect his reputation. In fact, there is no reference to notice at all in this section of the statute. Instead, notice requirements are found in RSA 91-A:2. Absent an emergency, notice of the time and place of all meetings, including nonpublic sessions, must be posted in 2 appropriate places, one of which may be the town's website; or shall be printed in a newspaper of general circulation at least 24 hours prior to the meeting. See RSA 91-A:2, II. There is no dispute in this case that the board complied with this notice provision. The board therefore provided all of the notice to which plaintiff was entitled.

Relying on this Court's decision in Johnson v. Nash, 135 N.H. 534 (1992), plaintiff alleged before the superior court that if individualized notice is not required in this situation, the provision of the statute which allows the affected individual to request the meeting to be held in public is rendered meaningless. Johnson v. Nash is inapposite in this matter. In Johnson v. Nash, the Town of Middleton Board of Selectmen entered nonpublic session to discuss the dismissal of the police chief. No prior notice was given to the chief that his employment would be discussed at that meeting. The question raised in that case was

whether the chief was entitled to individualized notice given the then language of RSA 91-A:3, II(a), which allowed boards to enter nonpublic sessions to discuss the dismissal of any public employee "unless the employee affected requests an open meeting."

This Court held that the chief was entitled to individualized notice, but that holding was based on the Court's conclusion that RSA 91-A:3, II(a) was "grounded in 'a legislative concern for protecting the public employee from improper official conduct by compelling the government to make public the considerations on which its actions are based.'" Id. at 537 (quoting Stoneman v. Tamworth School Dist., 114 N.H. 371, 374 (1974)). This concern does not extend to those who have no protected employment rights. See Stoneman, supra, at 374; see also Brown v. Bedford School Board, 122 N.H. 627, 631 (1982)(holding that probationary employees were not entitled to personal notice of a nonpublic session where their contracts were not renewed, but that generalized notice, as well as notice provided to the teachers' union representative as required by the collective bargaining agreement, was sufficient to meet the requirements of the statute), and March 20, 2015 Attorney General's Memorandum on New Hampshire's Right-To-Know Law, RSA Chapter 91-A at 10 ("If the body decides to go into non-public session during an open meeting, the notice for the open meeting will suffice. If both public and non-public sessions are planned in advance, the notice should so state."), App. at 29.

Essentially, then, this Court held in Johnson v. Nash that public employees have a procedural due process right to be heard before they are terminated. This holding raised a concern with the New Hampshire Legislature, which quickly moved to amend the statute before this Court even issued its decision. The legislative history of that amendment, App. at 30, expresses a concern that public employee rights not be defined by RSA 91-A, but instead be defined in other statutes. RSA 91-A:3, II(a) was therefore amended to provide that public

employees have a right to require an open meeting to discuss their termination only if they already had a right to a pre-termination hearing; it was not amended to add a notice provision. Importantly, this language would have denied the Middleton Police Chief of the right to demand that the non-public session in Johnson v. Nash be held in public because police chiefs do not have a right to a pre-termination hearing. See RSA 105:2-a; see also Testimony of Maura Carroll of the New Hampshire Municipal Association before the Senate Committee on Judiciary, App. at 45.

Clearly the legislature did not intend language in RSA 91-A to create rights or obligations where none exist. See, e.g., Appeal of Plantier, 126 N.H. 500 (1985)(holding that doctor's right to open hearing before his license was revoked stemmed not from RSA 91-A, but from RSA 329:17, X").[3] As the United States Supreme Court has held, reputation alone, absent a more tangible interest such as employment, does not implicate any interests sufficient to invoke a right to procedural due process. See Paul v. Davis, 424 U.S. 693, 708-09 (1976). Consistent with that, the New Hampshire Municipal Association has noted in its most recent edition of "Knowing the Territory," that "the person affected does not have the right to attend" a nonpublic session convened to discuss him or her. App. at 67. Since plaintiff had no independent right to an open meeting to discuss matters affecting his reputation, he had no right that needed to be protected by individualized notice of the nonpublic session where matters affecting his reputation were discussed.

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[3]Such a finding is also consistent with this Court's decisions in cases regarding the disclosure of documents. See, e.g., NH Civil Liberties Union v. City of Manchester, 149 N.H. 437, 439-40 (2003)(RSA 91-A does not require towns to create documents; only to provide access to documents which already exist).

In the almost 30 years since Johnson v. Nash was decided, the legislature has never amended RSA 91-A:3,II(a) or (c) to require individualized notice to individuals. The only notice which is required under either section is that which is afforded to a person under other statutes or rights. As is oft stated, this Court will not add words to a statute where the legislature failed to do so. See, e.g., Rankin, supra. Here, had the legislature intended to require individualized notice under either section, it could have easily done so. Massachusetts, for example, requires that the individual to be discussed be given at least 48 hours prior notice of the proposed nonpublic session. Mass. Gen. Laws ch.30A, §21(a)(1), App. at 68. Such an individualized notice provision has never been adopted in New Hampshire.

RSA 91-A was enacted to provide the public with access to governmental proceedings. It was not intended to create any substantive rights, or to provide a tool for disgruntled citizens to punish elected officials for what they may consider to be unkind actions. Yet this would be precisely the outcome if this Court were to find that the plain language of RSA 91-A requires individualized notice to anyone who a public body discusses pursuant to RSA 91-A:3, II(c). This Court should therefore reverse the decision of the superior court and find that no such individualized notice is required.

CONCLUSION

This Court should reverse the superior court and find that RSA 91-A:3, II(c) does not require individualized notice to the affected individual before a public body may enter nonpublic session to discuss a matter that may affect that person's reputation. Nothing in the plain and ordinary meaning of the language used in RSA 91-A:3, II(c) requires individualized notice. Instead, the statute requires only that general notice be given to the public of the board of selectmen's meeting and possible non-public session. Had the legislature intended to require particularized notice, it could have done so at any time. It did not; therefore, the town complied with RSA 91-A's only notice requirement.

Plaintiff's efforts to rely on this Court's decision in Johnson v. Nash, 135 N.H. 534 (1992) to compel a contradictory result misapprehend the basis for that decision, which was grounded in a public employee's procedural due process rights. In response to that litigation, the legislature moved to amend the statute to clarify that RSA 91-A was not intended to create any substantive rights. Since plaintiff here has no independently protected interest in his reputation, the holding of Johnson v. Nash does not apply.

REQUEST FOR ORAL ARGUMENT

The Town of Ashland Board of Selectmen does not believe oral argument is necessary to resolve the issues before the Court; however, should the Court determine that such argument would be helpful, the Town of Ashland Board of Selectmen requests oral argument not to exceed 15 minutes, to be presented by Laura Spector-Morgan, Esquire.

CERTIFICATIONS

The appealed decisions were in writing and are appended to this Brief.

This document complies with the 9,500 word limit established by the Court's rules. It contains 3,259 words, inclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters.

I have forwarded copies of the foregoing brief to Stephen T. Martin, Esquire and Charles P. Bauer, Esquire via the Court's electronic filing system's electronic service.

Respectfully submitted,

TOWN OF ASHLAND BOARD OF SELECTMEN

By Its Attorneys
MITCHELL MUNICIPAL GROUP P.A.

Date: October 20, 2020 By: */s/ Laura Spector-Morgan*

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STATE OF NEW HAMPSHIRE
SUPERIOR COURT

GRAFTON, SS. Docket No. 18-CV-396

Tejasinha Sivalingam

v.

Town of Ashland, Board of Selectmen,
Frances Newton, in her official capacity as Selectwoman, and
Leigh Sharps, in her official capacity as Selectwoman

ORDER ON TOWN OF ASHLAND'S MOTION TO DISMISS COUNT 1

On November 9, 2018, the plaintiff, Tejasinha Sivalingam, brought suit against the defendants, the Town of Ashland Board of Selectmen, Selectwoman Frances Newton ("Newton"), and Selectwoman Leigh Sharps ("Sharps"). Sivalingam's complaint comprises two counts: (1) violation of RSA 91–A:3 against the Town of Ashland's Board of Selectmen and (2) breach of office against Newton and Sharps. The case is now before the court on the Town's motion to dismiss Count 1 of Sivalingam's complaint, to which Sivalingam objects. Based on the pleadings and the applicable law, the court finds and rules as follows.

The following facts are taken from the complaint, and the court assumes their truth. From March 2017 to January 7, 2018, Sivalingam served as a Selectman for the Town of Ashland along with Newton and Sharps. (Compl. ¶¶ 8, 14.) After his resignation from the Board of Selectmen ("BOS"), on June 4, 2018, the BOS voted unanimously to meet in nonpublic session. During the nonpublic session, the BOS discussed Sivalingam and a citizen inquiry he had submitted the month prior. (*Id.* ¶¶ 32–33.) Relying on RSA chapter 91–A, the BOS justified entering nonpublic session to discuss information pertinent to Sivalingam "which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the public body itself, unless such person requests an

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open meeting." RSA 91-A:3, II(c); (Compl. ¶ 32.) The BOS provided Sivalingam with no notice of its intention to discuss him or issues pertaining to him.

When ruling on a motion to dismiss, the court must determine whether the plaintiff's allegations stated in the complaint "are reasonably susceptible of a construction that would permit recovery." *Plourde Sand & Gravel Co. v. JGI E., Inc.*, 154 N.H. 791, 793 (2007) (quoting *Berry v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 152 N.H. 407, 410 (2005)). In doing so, the court must "assume all facts pled in the plaintiff's writ are true, and . . . construe all reasonable inferences drawn from those facts in the plaintiff's favor." *Id.* (brackets omitted) (quoting *Berry*, 152 N.H. at 410). However, the court need not "assume the truth of statements . . . that are merely conclusions of law" not supported by "predicate facts." *Gen. Insulation Co. v. Eckman Constr.*, 159 N.H. 601, 611–12 (2010). The court should test these facts against the applicable law and deny the motion to dismiss "[i]f the facts as alleged would constitute a basis for legal relief." *Starr v. Governor*, 148 N.H. 72, 73 (2002). Dismissal is appropriate if the facts alleged in the complaint do not constitute a basis for relief. *Jay Edwards, Inc. v. Baker*, 130 N.H. 41, 46–47 (1987).

Sivalingam contends that the BOS violated RSA 91-A:3, II(c) when it entered nonpublic session without first notifying Sivalingam of its intention to do so. The Town maintains that this count should be dismissed on the ground that the BOS had no obligation to provide Sivalingam with notice that it would be entering nonpublic session. In response, Sivalingam points to the provision in RSA 91-A:3, II(c), which includes the qualifier, "unless such person requests an open meeting." Sivalingam avers that this part of the statute "cannot be given effect unless the individual whom the public body intends to discuss in non-public session knows about the non-public session and the public body's intention to discuss him." (Sivalingam's Obj. Mem., 1.) Construing all reasonable

inferences in Sivalingam's favor, the court finds that Sivalingam's complaint does state a claim for violation of RSA 91–A:3, II(c).

RSA 91–A:3 provides, in relevant part:

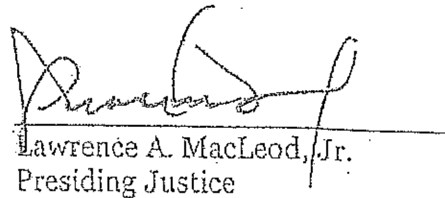
> I. (a) Public bodies shall not meet in nonpublic session, except for one of the purposes set out in paragraph II. No session at which evidence, information, or testimony in any form is received shall be closed to the public, except as provided in paragraph II. No public body may enter nonpublic session, except pursuant to a motion properly made and seconded.
>
> . . .
>
> II. Only the following matters shall be considered or acted upon in nonpublic session:
>
> a. The dismissal, promotion, or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him or her, unless the employee affected (1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted.
>
> b. The hiring of any person as a public employee.
>
> c. Matters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the public body itself, unless such person requests an open meeting. . . .
>
> . . .

RSA 91–A:3, I–II. The BOS entered nonpublic session to discuss Sivalingam under RSA 91–A:3, II(c), to protect Sivalingam's reputation. According to Sivalingam's complaint, the Town did not, however, notify Sivalingam of its intent to discuss him during a nonpublic session and, therefore, Sivalingam had no opportunity to request that the discussion about him be held in public.

A plain reading of the statute implies at least some form of notice. According to the statute, "[m]atters which, if discussed in public, would likely affect adversely the reputation of any person" may be considered in nonpublic session "unless such person requests an open meeting." *Id.* Clearly, Sivalingam's right to request an open meeting on matters pertaining to him "is rendered meaningless if [he] does not get an opportunity to exercise this right." *Johnson v. Nash*, 135 N.H. 534, 538 (1992). Furthermore, the purpose

for entering nonpublic session under section (c) is to protect the affected person's reputation. If the individual's being discussed is not concerned for his reputation, then it seems disingenuous for the BOS to justify entering nonpublic session to review the matter. Because the plain language of the statute implies some type of notice requirement and because Sivalingam alleges that no such notice was provided, the court rules that Sivalingam's complaint does state a claim for violation of the Right-to-Know Law, RSA 91-A:3. Accordingly, the Town's motion to dismiss is DENIED.

SO ORDERED, this 24th day of May 2019.



Lawrence A. MacLeod, Jr.
Presiding Justice