

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

CASE NO. 2020-0450

Appeal of New Hampshire Department of Safety, Division of State Police

**MEMORANDUM OF LAW OF *AMICUS CURIAE* AMERICAN  
CIVIL LIBERTIES UNION OF NEW HAMPSHIRE IN SUPPORT  
OF APPELLANT NEW HAMPSHIRE DEPARTMENT OF SAFETY**

Pursuant to Supreme Court Rule 30, *amicus curiae* American Civil Liberties Union of New Hampshire (“ACLU-NH”) submits the following memorandum of law in support of the Appellant New Hampshire Department of Safety (hereinafter, “the Department”).

**INTRODUCTION**

This case concerns the narrow question of whether a law enforcement agency has the ability to maintain the termination of a police officer who has engaged in misconduct implicating the officer’s trustworthiness and credibility. New Hampshire law enforcement agencies must be able to hold their police officers to the highest ethical standards and terminate officers under these circumstances. However, under the Personnel Appeals Board (“PAB”) decision in this case, law enforcement agencies cannot effectively do so.

When a law enforcement agency cannot maintain the termination of an officer who has engaged in misconduct implicating the officer’s credibility or trustworthiness, not only does this impact whether the officer can meaningfully do his or her job as a testifying witness in criminal cases, but it also undermines the public’s faith and confidence in the criminal justice

system more broadly. This is because the public expects officers to be truthful and, if an officer lies, that the department will terminate the officer.

Here, the New Hampshire Department of Safety has tried to maintain the termination of Trooper Thomas Owens given his admission “that he adjusted the hours for October 30, 2018 to avoid a policy violation.” PAB Order, pp. 5-6. Despite this admission, the PAB took it upon itself to overrule the Department’s termination decision and reinstate the officer. But what the PAB failed to recognize is that this is not a garden-variety employment dispute, nor does this appear to be a case concerning mere sloppy recordkeeping. Rather, this is a unique situation where the misconduct at issue concerns the ability of an officer to effectively perform his or her job and serve the community.

It does not appear to be uncommon for arbitrators to reverse the termination decisions of police departments who are trying to fire officers who can no longer effectively serve the public due to misconduct. For example, on December 18, 2019, an arbitrator reversed the decision of the Manchester Police Department to terminate Officer Aaron Brown, despite the general rule that arbitrators should not “second guess” penalties imposed by police departments. *See* Addendum (“ADD”) 21-47 (PELRB, Case No. G-0103-12, Manchester Police Patrolman’s Association Dec. 18, 2019 Arbitration Decision re: Aaron Brown); *see also* ADD 44 (noting general rule).<sup>1</sup> In 2017, Mr. Brown sent text messages to his wife using his

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<sup>1</sup> The Manchester Police Department released this arbitration decision after this Court’s decisions in *Union Leader Corp. v. Town of Salem*, 173 N.H. 345 (2020) and *Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325 (2020).

department-issued mobile phone during work hours in which he joked about shooting Black men and referred to them as “parking tickets.” He specifically texted: “[B]esides, I got this new fancy gun. Take out parking tickets no problem .... FYI ‘parking tickets’ = black fella.” ADD 31. In another text, he stated that he was “putting a stall on a parking ticket,” and “I am stalking him like a big jungle cat.” ADD 32, 43.<sup>2</sup> The arbitrator agreed that misconduct occurred, calling the texts “inappropriate and offensive.” ADD 44. However, despite acknowledging that “[z]ero tolerance for racially insensitive comments is clearly an appropriate response by the Manchester Police Department,” the arbitrator reversed the termination decision and suspended Mr. Brown for 30 days and reinstated him with back pay. *See* ADD 22, 45. As then Manchester Police Chief Carol Capano stated in a September 4, 2020 letter to the community, the Manchester Police Department was “extremely saddened and sickened to see that an arbitrator could rule in this manner after hearing this egregious case.” *See* ADD 49 (Sept. 4, 2020 Manchester Police Department). Following this incident, former Manchester Police Chief Nick Willard also noted: “That’s where we

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<sup>2</sup> He also sent his wife a video of a “crackbunny fight” and wrote: “I am certainly not a racist. I have my proclivities about people ... but those folks are straight up n’s ... no two ways about it. Serve no place in life or society. And yet they are completely taking over all parts of daily life.” *See* Mark Hayward, “Police Chief: ‘Saddened and Sickened’ by Ruling About Cop Texting Racist Statements,” *Union Leader* (Sept. 4, 2020), [https://www.unionleader.com/news/politics/local/police-chief-saddened-and-sickened-by-ruling-about-cop-texting-racist-statements/article\\_97dc13f4-8336-55b8-a65a-1fc37eccfa50.html](https://www.unionleader.com/news/politics/local/police-chief-saddened-and-sickened-by-ruling-about-cop-texting-racist-statements/article_97dc13f4-8336-55b8-a65a-1fc37eccfa50.html).

need serious consideration of police reform, but it hasn't been discussed. No one's talked about it.”<sup>3</sup>

In another arbitration decision that was released after this Court's ruling in *Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325 (2020), an arbitrator found that the Portsmouth Police Department wrongfully fired Portsmouth Police Officer Aaron Goodwin. *See* ADD 51-175 (City of Portsmouth/Aaron Goodwin Arbitration Decisions). The Portsmouth Police Department fired Officer Goodwin in June 2015 for several violations related to his accepting a \$2 million-plus inheritance from the late Geraldine Webber, an elderly Portsmouth resident with dementia. His inheritance was overturned the same year by Judge Gary Cassavechia, who found that Officer Goodwin had unduly influenced Webber. Officer Goodwin petitioned for his job back and/or back pay, which resulted in the arbitration decisions. *See Geraldine W. Webber Revocable Living Trust*, No. 318-2013-EQ-00694 (7th Cir. – Probate Div. – Dover Aug. 20, 2015), *available* *at*  
<https://www.courts.state.nh.us/caseinfo/pdf/webber/08202015webber-order.pdf>.<sup>4</sup> Despite Judge Cassavechia's finding, the arbitrator concluded that the Portsmouth Police Department improperly fired Officer Goodwin,

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<sup>3</sup> *See* Mark Hayward, “Manchester Chief Fighting Officer's Return to Force,” *Union Leader* (Sept. 6, 2020), [https://www.unionleader.com/news/politics/local/manchester-chief-fighting-officers-return-to-force/article\\_b3114683-1fd1-5b04-a265-3d9627c581b2.html](https://www.unionleader.com/news/politics/local/manchester-chief-fighting-officers-return-to-force/article_b3114683-1fd1-5b04-a265-3d9627c581b2.html).

<sup>4</sup> *See also* Elizabeth Dinan, “Fired Cop Loses \$2 Million Inheritance,” *Seacoast Online*, Aug. 20, 2015, <https://www.fosters.com/article/20150820/NEWS/150829878>.

and that Officer Goodwin was entitled to two years of back pay. There likely are more instances of arbitrators reversing decisions to terminate police officers, but—at least prior to this Court’s decisions in *Union Leader Corp. v. Town of Salem*, 173 N.H. 345 (2020) and *Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325 (2020)—government agencies often treated such arbitration decisions as confidential “personnel” matters.<sup>5</sup>

This case is important because it could have a significant impact on the ability of police departments to maintain the termination of officers who have engaged in misconduct affecting their credibility and trustworthiness. Here, the PAB did not appreciate the magnitude of the misconduct Owens engaged in. Instead, the PAB viewed such misconduct as essentially trivial in the context of a standard employment dispute. But when an officer engages in dishonest behavior, this behavior can never be viewed as trivial given their unique role in the criminal justice system. For these reasons, this Court should reverse the PAB’s decision.

#### **QUESTION PRESENTED**

Did the Personnel Appeals Board err by overturning the dismissal of a State Trooper who admitted “that he adjusted the hours for October 30, 2018 to avoid a policy violation” pursuant to the dominant public policy supporting the removal from service of law enforcement officers who have engaged in misconduct affecting their credibility.

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<sup>5</sup> Indeed, this case highlights the importance of transparency and this Court’s decisions in *Town of Salem* and *Seacoast Newspapers*. Disclosure of arbitration decisions is vital to not only inform the public about police misconduct and how arbitrators make decisions, but also about how police departments may be stymied in their efforts to terminate officers.

### **INTEREST OF AMICUS CURIAE**

The ACLU-NH is the New Hampshire affiliate of the ACLU—a nationwide, nonpartisan, public-interest civil liberties organization with over 1.75 million members (including over 9,000 New Hampshire members and supporters). The ACLU-NH regularly participates before this court through direct representation or as *amicus* in cases involving police accountability. *See e.g., Union Leader Corp. v. Town of Salem*, 173 N.H. 345 (2020); *Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325 (2020); *N.H. Center for Pub. Interest Journalism v. N.H. D.O.J.*, 173 NH. 648 (2020).

### **SUMMARY OF ARGUMENT**

This memorandum raises two arguments. *First*, this Court should reverse the Personnel Appeal Board’s decision because it violates the dominant public policy supporting the removal from service of law enforcement officers who have engaged in misconduct affecting their credibility. Here, the State Police terminated Owens for, in part, intentionally falsifying his timecard to avoid a policy violation. As the PAB noted, Owens admitted “that he adjusted the hours for October 30, 2018 to avoid a policy violation.” PAB Order, pp. 5-6. Indeed, the PAB had to have found misconduct, as it (i) suspended Owens for 20 days, and (ii) recommended that Owens not work on details for the first 60 days following his return to duty. The PAB’s decision to reinstate Owens despite his admission undermines the State Police and its general public policy that its troopers must be credible, honest, and trustworthy.

*Second*, PAB decisions to reinstate sworn officers despite evidence of dishonesty and untrustworthiness should be more closely scrutinized than those concerning unsworn officers as in cases like *In Re Town of Pelham*,

154 N.H. 125 (2006). Unlike unsworn officers, sworn officers have the power to deprive Granite Staters of their liberty in the regular course of their employment.

### **ARGUMENT**

The Personnel Appeals Board hears and decides appeals of adverse employment actions concerning state employees which arise out of the personnel rules. RSA 21-I:46, I. The PAB consists of 3 members appointed by the Governor with at least 2 members possessing at least 5 years of experience in labor relations or as a personnel professional. *See* N.H. Admin Code Per-A 103.01; Per-A 103.03. PAB members are not required to have law enforcement experience.

In reviewing a disciplinary action like termination, the PAB holds an evidentiary hearing to determine the propriety of the disciplinary action. At these hearings, the appellant/employee must show by a preponderance of the evidence that the disciplinary action was unlawful, the appointing authority violated the rules of the division of personnel by imposing the disciplinary action under appeal, the disciplinary action was unwarranted by the alleged conduct or failure to meet the work standard in light of the facts in evidence, or the disciplinary action was unjust in light of the facts in evidence. Per-A 207.12 (b)(1)-(4).

Following a PAB order, any party to the action can apply for a rehearing subject to PAB discretion. RSA 541:3. The applicant may appeal the PAB decision to the New Hampshire Supreme Court upon the PAB's denial of application for rehearing or, if it was granted, upon the PAB's order following the rehearing. RSA 541:6.

The appealing party has the burden of proof to show that the PAB's decision is "clearly unreasonable or unlawful." RSA 541:13. This Court will not vacate or set aside the PAB's decision except for errors of law, unless there is a clear preponderance of the evidence that the PAB's order is unjust or unreasonable. *Appeal of N.H. Div. of State Police*, 171 N.H. 262, 266 (2018) (citing *Appeal of Alexander*, 163 N.H. 397, 401 (2012)).

**I. The PAB's decision contradicts the dominant public policy supporting the removal from service of law enforcement officers who have engaged in misconduct affecting their credibility.**

The PAB, as a quasi-judicial agency, must adhere to "strong and dominant public policy" in issuing its decisions. *In Re Appeal of Amalgamated Transit Union*, 144 N.H. 325, 327-28 (1999). In deciding whether the PAB erred as a matter of law by issuing a decision in contravention of public policy, this Court must assess whether the PAB's order contravenes a "strong and dominant public policy as expressed in controlling statutes, regulations, common law, and other applicable authority." *In re Town of Pelham*, 154 N.H. 125, 129 (2006) (quoting *In Re Appeal of Amalgamated Transit Union*, 144 N.H. 325, 327-28 (1999)). Here, the PAB's decision contradicts the dominant public policy supporting the removal from service of law enforcement officers who have engaged in misconduct affecting their credibility. This is not an abstract or general public interest, but rather is grounded in law and policy.

First, under RSA 21-1:58, I, the PAB 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 21-1:58, I (emphasis added). This



statute specifically identifies impermissible bases for termination, such as reasons related to politics, religion, age, sex, gender identity, and others. *Id.* But when, as here, the PAB overturns a disciplinary action in a manner that is clearly unjust or unreasonable, this Court reverses the PAB's determination. In this case, the PAB's decision was clearly unjust, as it would allow an officer who admitted "that he adjusted the hours for October 30, 2018 to avoid a policy violation," *see* PAB Order, pp. 5-6, to remain on the State Police.

Sworn police officers are empowered with significant authority. They can make arrests and deprive people of liberty based largely on the officers' words. But with this tremendous power comes a need for integrity. The state and federal constitutions require that prosecutors turn over exculpatory evidence to defendants, including evidence that tends to diminish a police officer witness's credibility. *See Brady v. Maryland*, 373 U.S. 83 (1963), *State v. Laurie*, 139 N.H. 325 (1995). The Attorney General's Office accordingly maintains a schedule of officers with potential credibility problems, *see N.H. Ctr. For Pub. Interest Journalism v. N.H. D.O.J.*, 173 N.H. 648, 651 (2020) (describing "Exculpatory Evidence Schedule"), and an officer who has admitted to falsifying records while on the job may never be able to be credible in the courtroom. Arguably more important, the public expects the highest levels of integrity in law enforcement and demands that law enforcement agencies do everything they can to promote that end. In short, the New Hampshire State Police—like other police departments in New Hampshire—must be able to ensure that it employs officers who have not engaged in dishonesty.

Second, the New Hampshire State Police Professional Standards of Conduct contain a written policy that explicitly includes an integrity requirement. The requirement states: “No Division Member shall, under any circumstances, make any false official statement or intentional misrepresentation of facts.” ADD 178 (New Hampshire State Police Professional Standards of Conduct, Chapter 1: Rules and Regulations, p. 7, 1.4.8). A violation of the integrity requirement is a terminable offense according to the New Hampshire Administrative Code. Similarly, personnel rules 1002.08(b)(10) and (12) state the following: “An appointing authority may dismiss an employee” for “(10) [o]bstructing an internal investigation” and “(12) [f]alsification of any agency records received, maintained or utilized by the agency.” N.H. Code Admin. R. Per 1002.08(10), (12).

Third, state and local leaders have recognized the need to only employ police officers whose honesty cannot reasonably be questioned. Reports of those completed by commissions like the New Hampshire Commission on Law Enforcement, Accountability, Community and Transparency<sup>6</sup> (“LEACT”) and organizations like the International Association of Chiefs of Police (“IACP”) have concluded that maintaining the integrity of the police force and individual officers plays a critical role in creating public trust in the police.

Following the May 25, 2020 murder of George Floyd, Governor Chris T. Sununu created the LEACT Commission on June 16, 2020 to examine, in part, “training curriculum, procedures and policies throughout the State; procedures related to the reporting and investigation of police misconduct;

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<sup>6</sup> *Amicus* ACLU-NH served on LEACT.

the current state of relationships between law enforcement and the communities they serve; and any other subject matter the Commission deemed relevant” to the overall mission of enhancing transparency, accountability, and community relations in law enforcement. N.H. Aug. 31, 2020 LEACT Final Report, p. 1.<sup>7</sup> In an extensive 10-week investigation into New Hampshire police reforms, the Commission heard from 24 subject matter experts, including Commission members and 25 members of the public. In addition, the Commission received more than 50 written submissions. *Id.* After considering the community needs and expert opinions, the Commission concluded that “there was [...] unequivocal agreement that law enforcement has no room or tolerance for officers who engage in unethical, abusive, or oppressive conduct. There was no stronger voice for this sentiment than those in law enforcement who strive each and every day to do the best job possible.” LEACT Final Report, p. 28.<sup>8</sup>

The IACP has also expressed the paramount importance of integrity in policing. The organization is a group dedicated to advancing the police profession worldwide. The New Hampshire Police Standards and Training Council (“PSTC”) often looks to the IACP for best practices. LEACT Final Report, p. 9. After conducting listening sessions with communities across the country, the IACP found common concerns communities had regarding

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<sup>7</sup> <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/2020-09/accountability-final-report.pdf>; *see also* Gov. Exec. Order 2020-11, *available at* <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/2020-11.pdf>.

<sup>8</sup> <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/2020-09/accountability-final-report.pdf>

their local and state police departments. As detailed in IACP's 2018 Trust Initiative Report, two of those concerns were transparency and accountability.<sup>9</sup> The IACP found that "a large source of frustration for communities is when their loved ones or associates experience poor treatment by a police officer or when something systemic occurs within the department and no apparent action is taken to hold those parties accountable." This lack of accountability can make the community feel "at the mercy of a police department with unlimited power." *Id.* at 6.

In this case, Owens admitted "that he adjusted the hours for October 30, 2018 to avoid a policy violation," PAB Order, pp. 5-6, and the PAB ultimately imposed a sanction. However, later in its order, the PAB incorrectly minimized this dishonesty as "an example of inattention to detail and poor time management." *Id.* at p. 6. Owens' admission highlights how this was not an issue of mere sloppy recordkeeping; rather, this misconduct implicated a deliberate lie. *See* Notice of Appeal 25-44 (describing the record below). As a result, the PAB's decision to reinstate Owens disregards the State Police's Professional Standards of Conduct for integrity and, furthermore, contravenes public policy by ignoring evidence of dishonesty and untrustworthiness.

In this case, the New Hampshire State Police is attempting to hold both itself and Trooper Owens accountable by terminating an officer who has been found to falsify his timecard. The PAB's decision to overturn Owens' termination is preventing the State Police from following its own explicit

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<sup>9</sup> <https://www.theiacp.org/sites/default/files/2018-10/Final%20Trust%20Initiative%20Report.pdf>

policies of ensuring that their officers are trustworthy and credible. In doing so, the PAB also puts the community and State Police's relationship at risk. The aforementioned reports from IACP and LEACT shine a light on the importance of the State Police's standards for integrity and trustworthiness found in positive law documents like the State Police Standards of Professional Conduct. The State Police recognizes the importance of community trust and the credibility of their officers as indicated by their internal policies and procedures, which is why this Court must reverse the PAB's decision. If, despite its best efforts, the State Police cannot hold its own officers accountable for dishonesty and misconduct, one cannot expect the community to trust the State Police as a department, as well as law enforcement at large.

Beyond the police/community relationship, the PAB's decision casts a shadow over the justice system as a whole. State Troopers are sworn officers who often find themselves testifying in criminal prosecutions. The involvement of an officer in a criminal case who has engaged in dishonesty potentially jeopardizes the integrity of that prosecution. If this Court upholds the PAB's decision, every case in which Owens is involved may be questioned due to his admitted dishonesty. By seeking Owens' termination based on his dishonesty—and by appealing the decision to reinstate him—the State Police is attempting to protect the integrity of criminal prosecutions.

**II. *In Re Town of Pelham* is distinguishable because it did not concern a sworn police officer.**

In *In Re Town of Pelham*, the New Hampshire Public Employee Labor Relations Board (“PELRB”) ordered the Town of Pelham to comply with an arbitrator's award ordering the town to reinstate a terminated police union

member to the force. 154 N.H. 125, 126-27 (2006). The employee in question was a police dispatcher who was found to have solicited and accepted police discounts at McDonalds. *Id.* at 127. The Pelham Police Department (“PPD”) launched an investigation into these allegations and found that her testimonies did not match those of McDonalds employees. *Id.* at 127-28. PPD subsequently launched another investigation into whether the dispatcher had lied during the investigation. *Id.* During the investigation, PPD found that the dispatcher had violated the PPD’s General Rules of Conduct, which require PPD employees not to make knowingly false statements, and terminated her. *Id.* at 128.

In support of this termination, upon appeal of the PELRB’s decision to reinstate the officer, the Town of Pelham argued that there is a “‘strong and dominant public policy’ against the reinstatement of police department employees who are found to be untruthful and who may, however unlikely the possibility, be required to testify in future criminal matters.” *Id.* at 129. This Court rejected this argument noting, “We do not mean to suggest that the town’s assertion of a ‘public policy’ against the reinstatement of police department employees whom as a result of certain misconduct, are deemed to be untrustworthy is, on an intuitive level, incorrect.” *Id.* at 131. This Court, however, ruled that the public policy needed to be something more persuasive than arguing that the employee may be required to testify regardless of the likelihood of that possibility. *See id.* In its holding, this Court ruled that the PELRB did not err as a matter of law by ordering the Town to comply with the arbitrator’s award to reinstate the dispatcher. *Id.*

*In re Town of Pelham* is distinguishable in one crucial respect. The employee at issue in the case was a dispatcher, rather than a sworn police

officer. As a sworn officer and State Trooper, Owens is much more likely to testify in a judicial proceeding than a non-sworn dispatcher like the one in *In Re Town of Pelham*. According to the 2020 New Hampshire Law Enforcement Manual,<sup>10</sup> “police officers are often called upon to appear as witnesses at depositions, pre-trial hearings, and trials.” p. 376. Furthermore, the manual states that the most important rule for presenting effective testimony is “that law enforcement officers must tell the truth.” *Id.* at p. 378.

An officer’s ability to tell the truth and remain credible is predicated on that officer’s history of truthfulness. An officer’s history of falsification of documents raises serious questions as to that officer’s ability to tell the truth and the stability of the cases with which he is involved. As a non-sworn officer, the dispatcher in *In Re Town of Pelham* is unlikely to ever provide such testimony, which is why the Court found that there was no strong or dominant policy to support her termination. With the increased probability of testifying that comes with the job description of a sworn State Police officer—testimony that can, by itself, deprive persons of their liberty—there is strong dominant public policy based on *In Re Town of Pelham*’s reasoning.

Indeed, as a sworn state trooper, Owens has the authority to deprive people of their liberty during the course of carrying out his duties. A dispatcher does not have such power. The authority to deprive someone of their liberty is powerful, and, as a result, a police officer should not (and cannot) be subjected to the same standard as a non-sworn officer who lacks this authority. Dishonesty and untrustworthiness in an officer with such

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<sup>10</sup> <https://www.doj.nh.gov/criminal/documents/law-enforcement-manual.pdf>

capabilities must be scrutinized at a higher standard, and therefore the consequences for untrustworthiness must be more severe.

**CONCLUSION**

For these reasons, this Court should reverse the PAB's decision.



Respectfully Submitted,

American Civil Liberties Union of New  
Hampshire,

By and through its attorneys<sup>11</sup>,

/s/ Gilles Bissonnette

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Dated: April 26, 2021

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<sup>11</sup> Amicus and its counsel wish to acknowledge the contributions to the memorandum of Teresa Farley, a law student at the University of New Hampshire School of Law and legal extern at ACLU-NH.

### **STATEMENT OF COMPLIANCE**

Counsel hereby certifies that pursuant to New Hampshire Supreme Court Rule 26(7), this brief complies with New Hampshire Supreme Court Rule 26(2)-(4). Further, this memorandum complies with New Hampshire Supreme Court Rule 16(4)(b), which states that memoranda of law may not exceed 4,000 words. Counsel certifies that the memorandum contains 3,893 words (including footnotes).

*/s/ Gilles Bissonnette*  
Gilles Bissonnette, Esq.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of forgoing was served this 26th day of April, 2021 through the electronic-filing system on all counsel of record.

/s/ Gilles Bissonnette  
Gilles Bissonnette, Esq.

**ADDENDUM**

1. PELRB, Case No. G-0103-12, Manchester Police Patrolman’s Association Dec. 18, 2019  
Arbitration Decision re: Aaron Brown.....21
2. Sept. 4, 2020 Manchester Police Department Statement re: Aaron Brown.....48
3. City of Portsmouth/Aaron Goodwin Arbitration Decisions .....51
4. Excerpts of New Hampshire State Police Professional Standards of Conduct.....176

**PELRB, Case No. G-0103-12, Manchester Police  
Patrolman's Association Dec. 18, 2019  
Arbitration Decision re: Aaron Brown**

**State of New Hampshire  
Public Employee Labor Relations Board  
Case No. G-0103-12**

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**IN THE MATTER OF ARBITRATION BETWEEN  
MANCHESTER POLICE PATROLMAN'S ASSOCIATION  
&  
CITY OF MANCHESTER**

**Grievant: Aaron Brown**

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**AWARD OF THE ARBITRATOR**

The Undersigned Arbitrator, having been designated in accordance with the arbitration agreement entered by the above named parties and having been duly sworn and having duly heard the proofs and allegations of the parties AWARDS as follows:

For the reasons set forth in the attached Decision, the discharge of the grievant shall be reduced to a thirty day disciplinary suspension. In addition the grievant shall not be awarded back pay for the period of this thirty day suspension. Under this award the grievant is to be made whole for lost compensation until he returns to work pursuant to this Award, minus thirty days' pay for the period of the suspension. In addition, his back pay shall be offset by any compensation that the grievant received during this time period. The grievant will have no entitlement to his former position in the Special Enforcement Unit, and his reinstatement can be to a position determined to be appropriate by the Chief of the Department.

December 18, 2019  
Boston, Massachusetts

  
\_\_\_\_\_  
Gary D. Altman

**State of New Hampshire  
Public Employee Labor Relations Board  
Case No. G-0103-12**

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**IN THE MATTER OF ARBITRATION BETWEEN  
MANCHESTER POLICE PATROLMAN'S ASSOCIATION  
&  
CITY OF MANCHESTER**

**Grievant: Aaron Brown**

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**ARBITRATION DECISION AND AWARD**

**Introduction**

The City of Manchester ("City" or "Employer") and the Manchester Police Patrolman Association ("Union") are parties to a Collective Bargaining Agreement ("Agreement"). Under the Agreement, grievances not resolved during the grievance procedure may be submitted to arbitration. The parties presented their case in Arbitration before Gary D. Altman, Esq., on August 21, 2019. The Union was represented by John S. Krupski, Esq., and the City was represented by Mark T. Broth, Esq. The parties had the opportunity to examine and cross-examine witnesses and to submit documentary evidence. The parties submitted written briefs after completion of the testimony.

**Issue**

The parties agreed that the issue to be decided is:

Whether the City of Manchester had just cause to terminate the employment of the grievant, Aaron Brown? If not, what shall the remedy be?

**Facts**

The grievant, Aaron Brown, was hired as a full-time police officer with the City of Manchester Police Department on July 6, 2007. Officer Brown was assigned to the Special Enforcement Division ("SED") in 2013, which is investigates drug activity. When Officer Brown entered the SED he was issued a Department cell-phone.<sup>1</sup> During his tenure with the Department, up to the time of his discharge, Officer Brown had no discipline. Introduced into the record were a number of commendations received by Officer Brown during his employment with the Department.

[REDACTED]

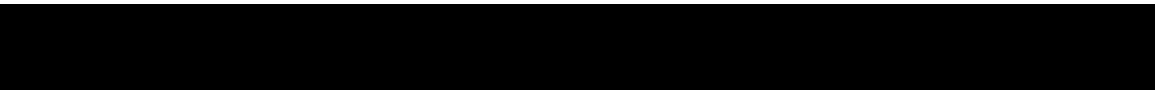
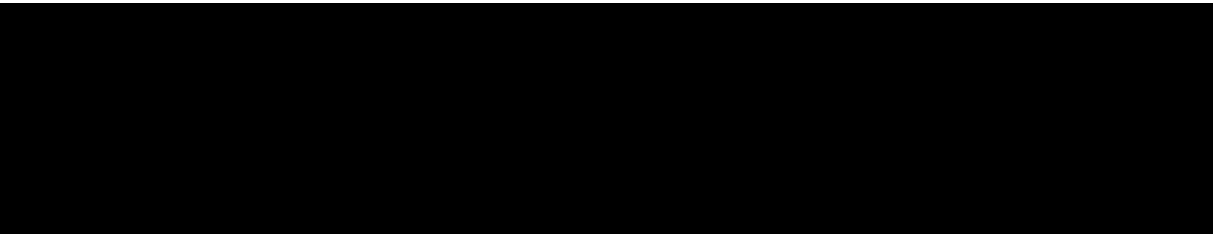
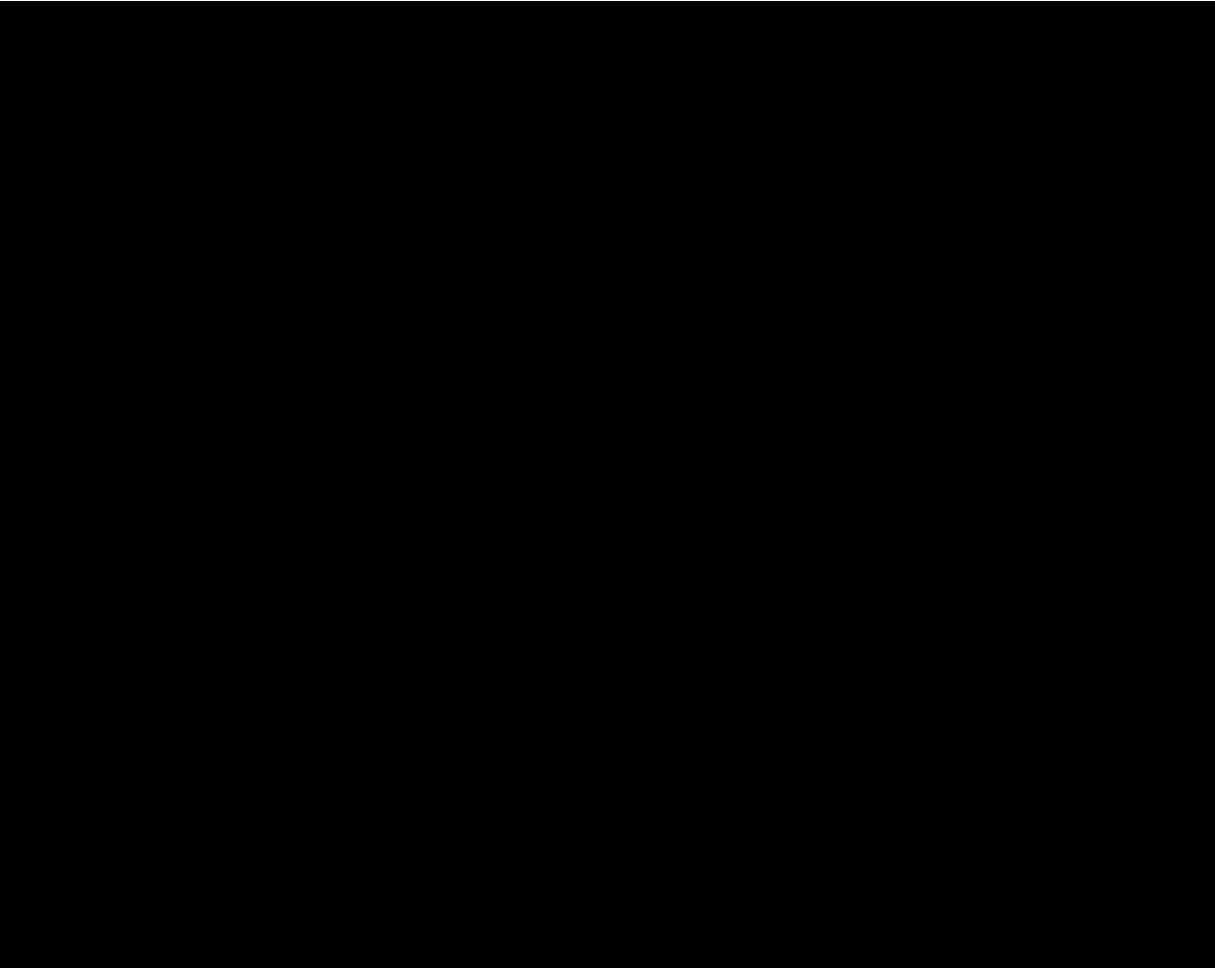
Lieutenant Patterson stated that during this investigation on the charges by the confidential informant, the Department discovered disturbing text messages made on

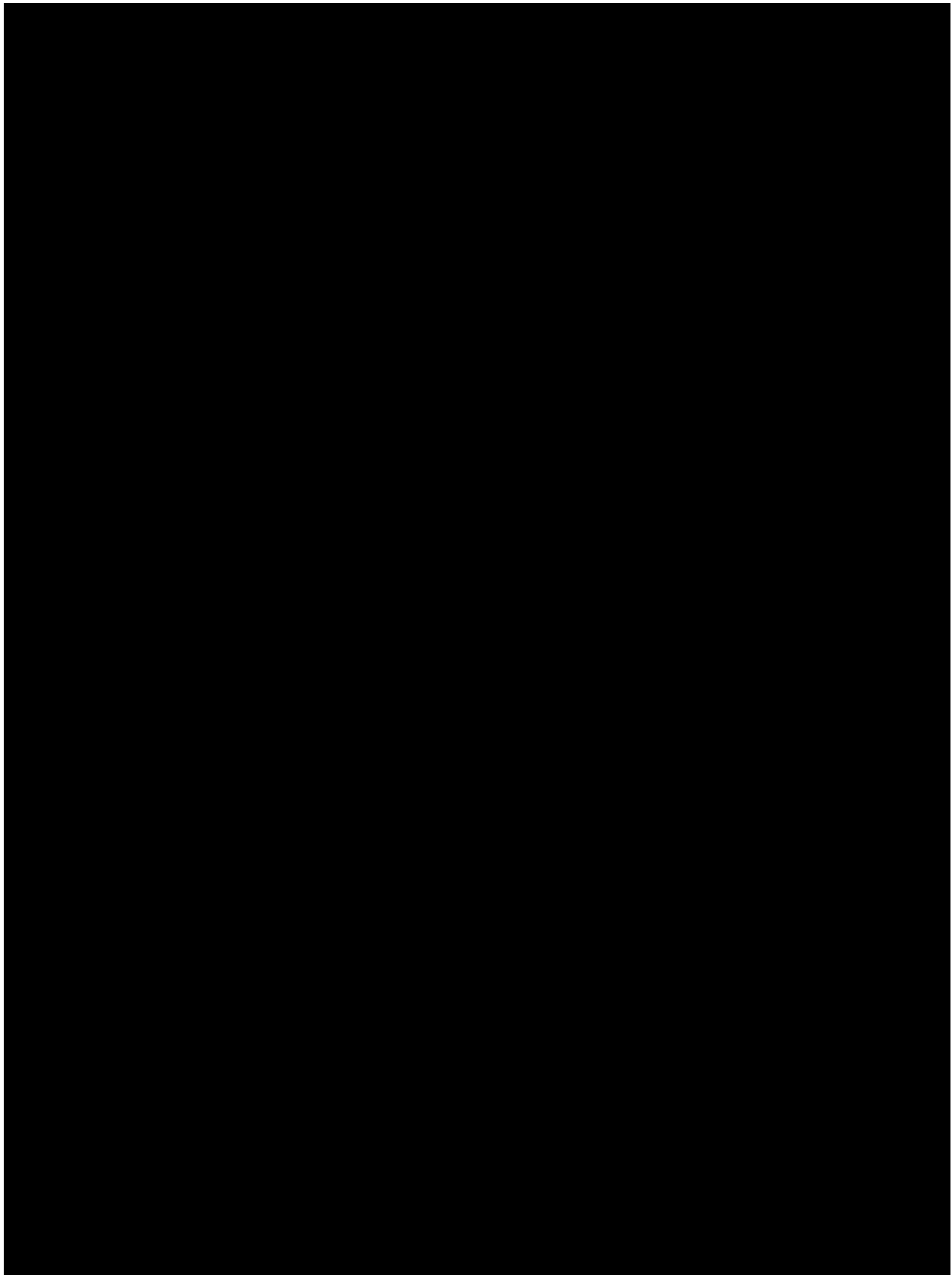
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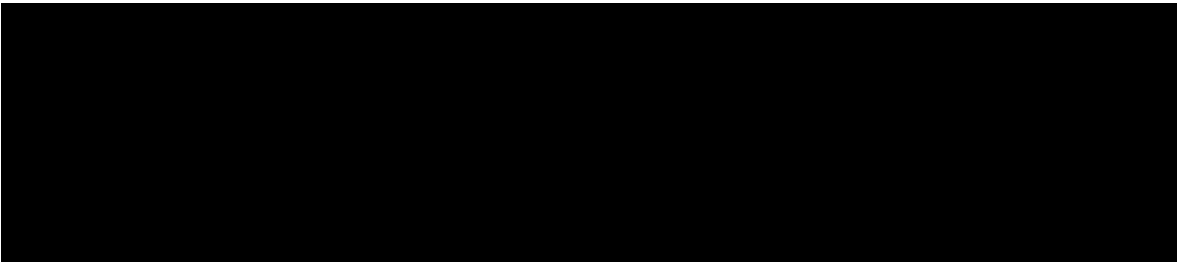
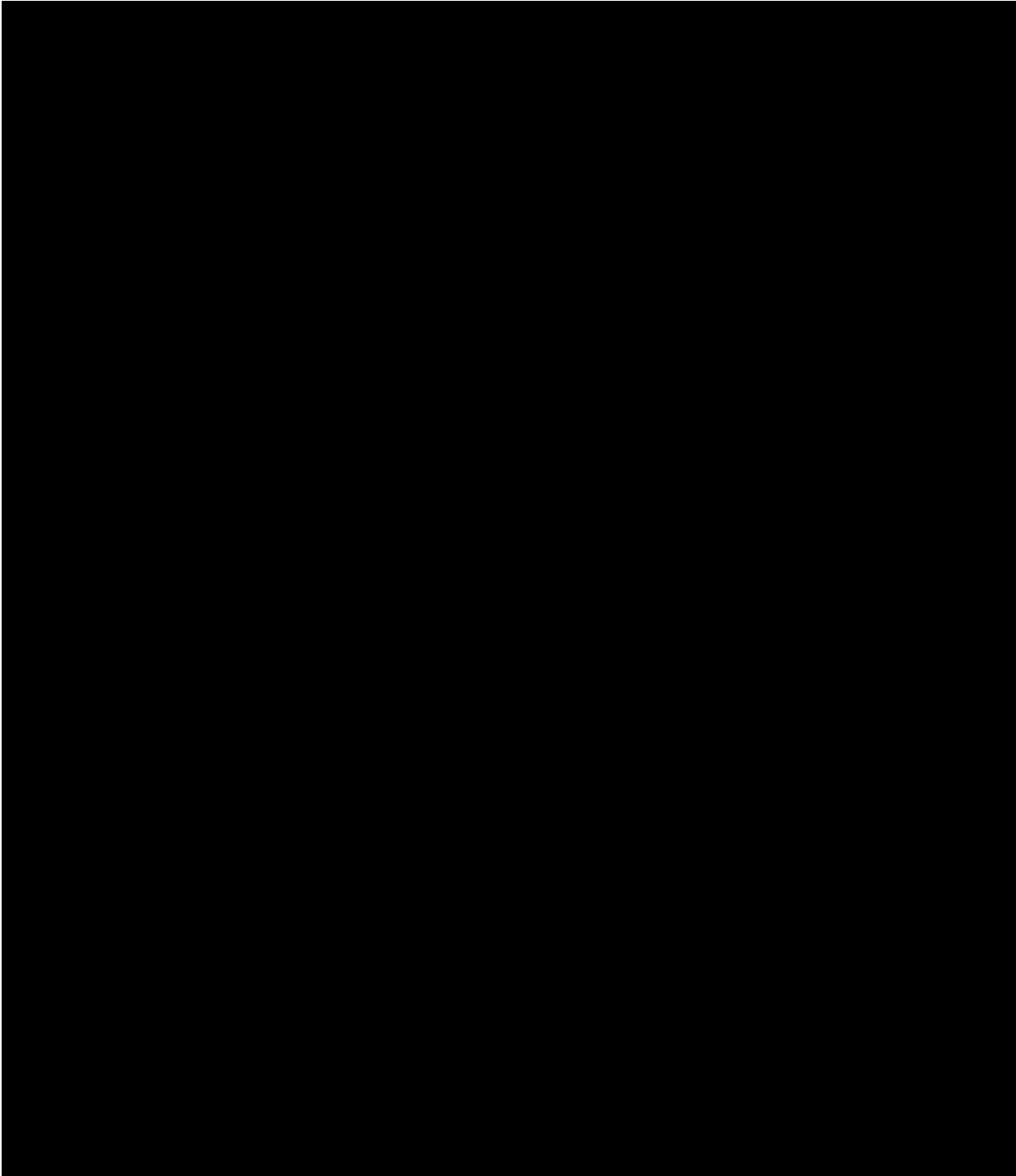
<sup>1</sup> Officer Brown testified that he was told that he could use the Department's cell phone to make personal calls.

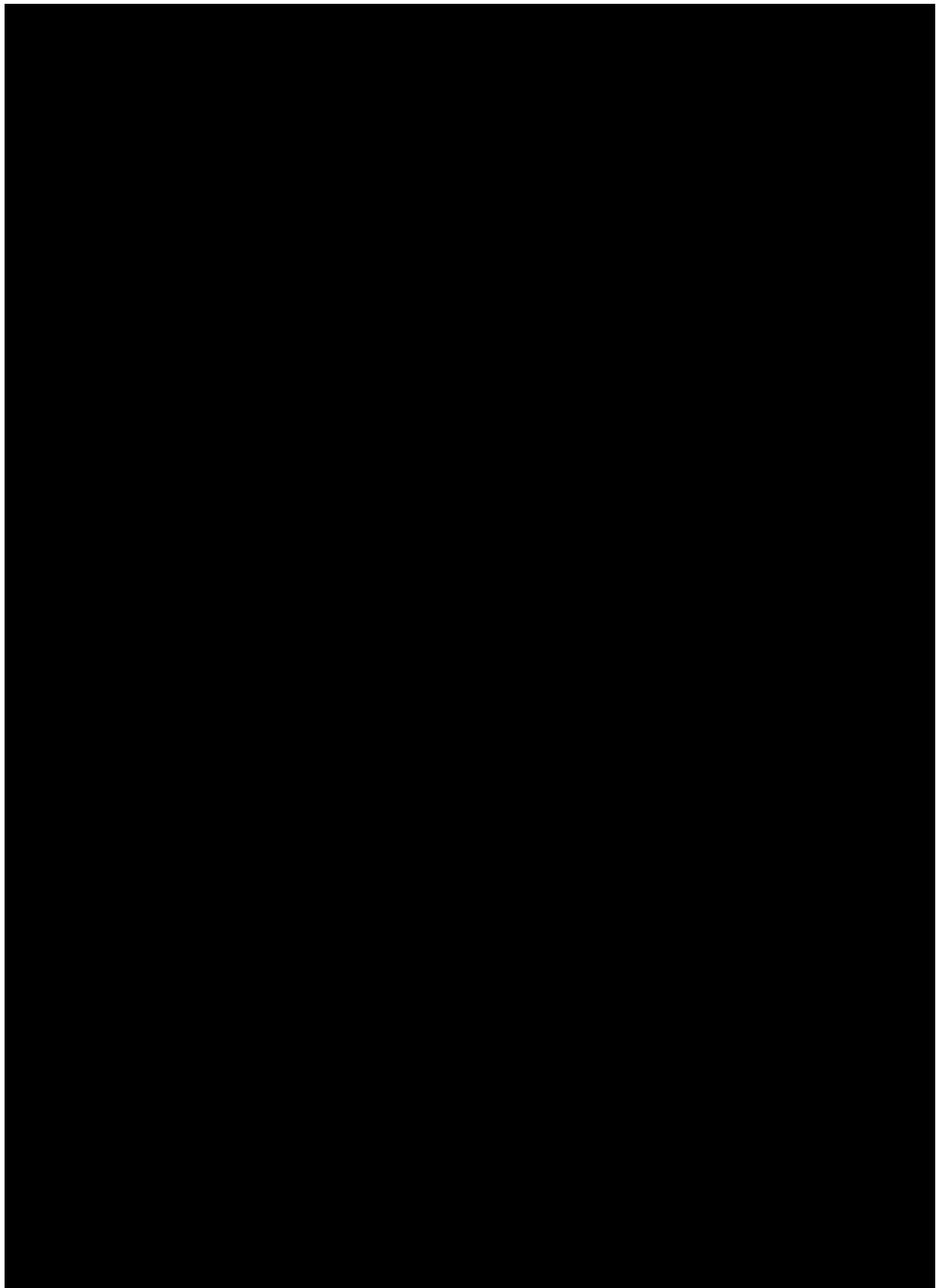


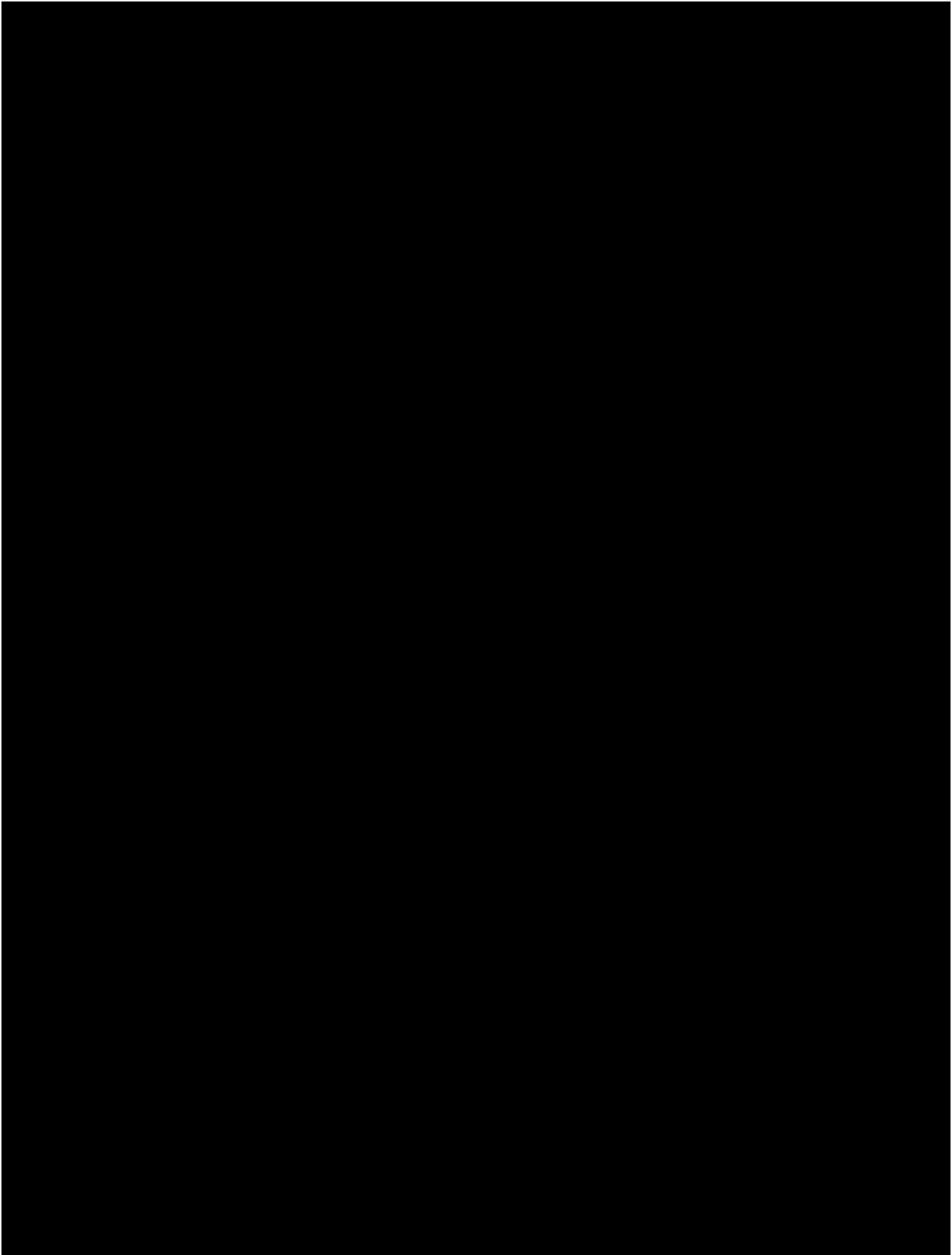
Officer Brown's Department cell phone, and it is these text messages that led to the Department issuing charges, and requesting a County Attorney from a neighboring County to further investigate whether criminal charges should be brought against Officer Brown. The events surrounding these text messages resulted in the Department discharging Officer Brown.

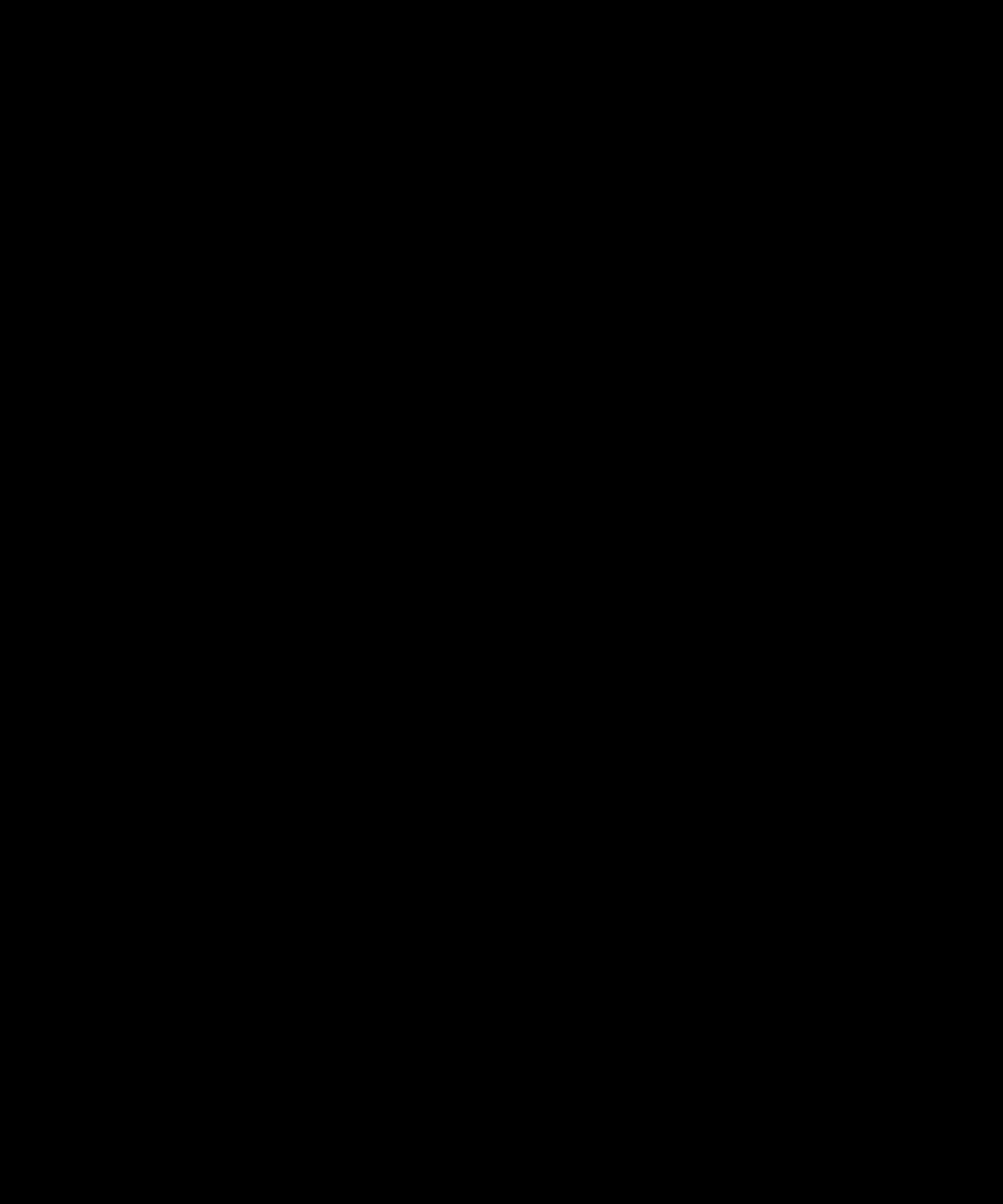












Text Message May 10, 2017

In the afternoon of May 10, 2017 Officer Brown texted to his wife that he may have to go to Dorchester, Massachusetts that evening to work on a joint case with the

FBI. The messages between Mrs. Brown and Officer Brown read as follows:

Mrs. Brown:

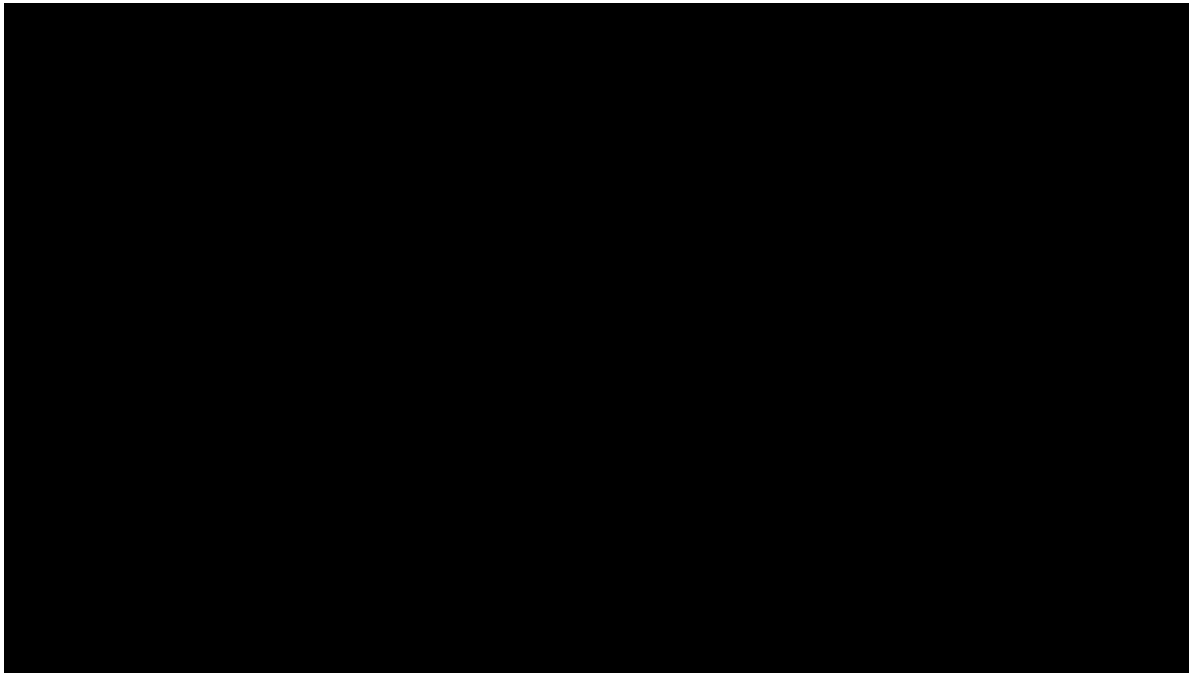
Gotcha. Let me know when you know. You know this stuff makes me all nervous nelly.

Mr. Brown:

Yes I know. Its all good, beside I got this new fancy gun. Takes out parking tickets no problem.

Mr. Brown:

FYI "parking tickets" equal black fella.



August 1, 2017 Messages between Mr. and Mrs. Brown:

Mrs. Brown:

What are you doing tonight?

Mr. Brown:

The usual. Currently putting the stall on a parking ticket ... like the big jungle cat that I am.

Mrs. Brown:

I wish I followed that but I have no idea what you mean?

Mr. Brown: Parking ticket = black feller

Mr. Brown. And I'm stalking him like a jungle cat.

Lieutenant Patterson testified at the arbitration hearing that Officer Brown stated that he had heard the words "parking ticket" in law enforcement circles as referring to black persons, and stated that he had his own biases, but did not consider himself to be a racist. Officer Brown stated that he did not profile persons of color, and that his arrest records would show that he did not target minorities in his arrests. Lieutenant Patterson stated that the Department reviewed over 18,000 text messages and that the two messages about the "parking ticket" were the only two that had any racial overtones.

Lieutenant Patterson and Sergeant McCabe completed their investigation and recommended that formal discipline be initiated against Officer Brown. Eight charges were filed against Officer Brown, six of the them dealt with Officer Brown's conduct at the two searches, and two addressed the text messages to his wife in which he made racially insensitive statements. The charges were for Unlawful Conduct, Conduct Unbecoming an Officer, and Truthfulness. The charges were then reviewed by a Review Board consisting of Assistant Chief Capano, and Captains Sanclemente and Grant. The Review Board concurred with the findings and conclusions by the Department's Investigators



and concluded that each charge warranted Officer Brown's discharge. Chief Willard accepted the Review Board's conclusions and Officer Brown was discharged from his position.

**Positions of the Parties**

Summary of the City's Arguments

The City asserts that there was just cause to discharge the grievant, Aaron Brown, from his position as a Police Officer with the Manchester Police Department. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The Department states that during this investigation it uncovered a series of text messages from Officer Brown's Department issued cell phone that demonstrated serious misconduct. The Department states that there is absolutely no merit to the Union's contention that these text messages were privileged, or should not have been reviewed by the Department. Specifically, The Department states that it was a Department issued cell phone, and that the Department only reviewed messages and emails that were transmitted during Officer Brown's working hours. The City points to a number of court decisions that have held that police officers have no expectation of privacy for emails or text messages transmitted on a department issued cell phone.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Department further argues that Officer Brown's text messages to his wife demonstrate his hostility to African Americans. Specifically, the Department states that Officer Brown's reference to African Americans as "parking tickets", and that he had a brand new gun, is an

inappropriate racial comment, that demonstrates his bias, and his inability to be fair and perform the duties of a police officer in the largest city in New Hampshire. His comment that he is stalking an African American citizen like a jungle cat demonstrates racial hostility. The Department contends that such statements are inappropriate and could be used against Officer Brown if he was ever accused of using unlawful force against African American citizens.

The Department asserts that a police department must operate on principles of trust between the Department and the public, and among the members of the Department itself.

[REDACTED]

The Department argues that discharge is the only conceivable course of action for the Department. [REDACTED]

[REDACTED]

[REDACTED] The Department states that discharge is certainly appropriate for such blatant misconduct. The Department further maintains that even if Officer Brown's claim that the text messages were made up to impress his wife, then such conduct still disqualifies him from serving as a police officer. The Department argues that it cannot continue to employ a police officer who fantasizes about committing crimes, and that his conduct will always be

measured against his tendency to make up stories to attempt to embellish his toughness. The Department concludes that the grievance must be sustained.

Summary of the Union's Arguments

The Union maintains that there was not just cause to discharge the grievant, Aaron Brown, from his position with the Manchester Police Department. The Union states that the Department brought eight charges against Officer Brown for violating the Department's Operating Procedures. The Union argues that the Department prejudged Officer Brown's guilt before conducting a fair investigation. The Union states that the eight charges brought against Officer Brown all revolved around text messages that Officer Brown sent to his wife. The Union maintains that a review of the text messages and the totality of evidence demonstrates that Officer Brown's text messages to his wife did not amount to a dischargeable offense.

[REDACTED]

[REDACTED]

The Union states that charges 7 and 8 relate to the other two text messages that Officer Brown sent to his wife. These messages, the Union states, were again nothing more than Officer Brown's bravado and fictitious banter between a husband and wife. The Union states that Officer

Brown's texts referred to "parking tickets", which is a derogatory term for black americans, and that in another text message he was supposedly stalking a black American as part of his duties.

The Union states that the total context of these two text messages must be considered. The Union maintains that these were text messages sent from a husband to his wife, thus, it is not was if Officer Brown ever sought to make these text message public, and that it was more like a conversation between a husband and wife for which there should be a form of marital privilege, or an expectation of privacy. Moreover, the Union states that these text messages were like his other text messages, boastful and bravado about the exploits of his dangerous work.

The Union further states that in his more than ten years of service there were never any complaints by other officers, or complaints made by the public, that Officer Brown engaged in racial profiling or any other inappropriate conduct. The Union states that Officer Brown invited the Department to consider his arrest records, but the Department failed to do so, which the Union maintains demonstrates that the Department had no interest in pursuing a fair investigation into Officer Brown's conduct. The Union states that it cannot be proven that the these two private conversations amounted to conduct unbecoming, or was conduct that in any way impaired the efficiency or operations of the Department or Officer Brown's ability to perform his police duties. Moreover, the Union also states that it must be remembered that these two texts were the only two texts that could be considered as racially

insensitive, and the Department considered over 1,285 pages that included over 18,000 total text messages.

The Union contends that when considering the fact that Officer Brown has been recognized for his performance as a Manchester Police Officer during his ten years of service, and the fact that he had no prior discipline, discharge is disproportionate to the events that occurred in the present case. The Union concludes that there was not just cause for the discharge of the grievant, Aaron Brown, and that the grievance should be sustained.

**Discussion**

It is well-established arbitral precedent that the employer has the burden to prove that an employee's discipline is for just cause. This includes proof that the employee is guilty of the alleged wrong doing, and that the penalty imposed by the employer is in keeping with the severity of the offense. An employee's past work record is an important factor to be considered when determining whether the punishment is appropriate and fair. The Manchester Police Department found Officer Brown guilty of eight violations of the Department's Rules and Regulations.

[REDACTED]  
[REDACTED]  
[REDACTED] Charges 7 and 8 related to text messages that Officer Brown sent his wife, on April 22, and May 10, 2017.

I. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]



[Redacted text block]

[Redacted text block]

[Redacted text line]

[Redacted text block]

[Redacted text line]

[Redacted text line]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[REDACTED]

II. Charges 7 - 8

Charges 7 and 8 concern a series of two 2017 text messages that Officer Brown sent to his wife in which he referred to African Americans as "parking tickets"; in one he told his wife not to worry about him because he had a "fancy new gun", and in the other he stated that he was "putting a stall on a parking ticket", and "I am stalking him like a big jungle cat". The Department concluded that these two series of text messages amounted to conduct

unbecoming and each, in and of itself, was grounds for Officer Brown's discharge.

Officer Brown in his text message indicated that the term "parking ticket" referred to "black feller". Clearly any such terminology that refers to a group or race of persons in negative or pejorative terms is unacceptable. There can be no question that police officers must not express themselves in a manner that could indicate their inability to perform their duties in a fair and objective manner. The Union's claim that the texts between Officer Brown and his wife should be afforded some type of marital privilege can not be accepted. It must be remembered that Officer Brown was sending text messages during his working hours. In addition, Officer Brown was using a Department cell phone in sending these texts messages. Unquestionably, the Department has the managerial right to ensure that its cellphones are not used to transmit racially offensive language. Nor must the Department have a specific rule that prohibits an officer from using the Department's cell phones to transmit racially insensitive messages; such conduct is per-se unacceptable.

There is no dispute that Officer Brown's text messages were inappropriate and offensive. The question that remains is whether these texts should serve as grounds for Officer Brown's summary discharge. As a general matter, an arbitrator should not "second guess" the penalty imposed by management. Nevertheless, this does not mean that an arbitrator's sole purpose is only to determine whether the employee has engaged in the wrongful acts.

The Collective Bargaining Agreement requires, and the parties agreed in the stipulated issue, that just cause is

the standard that is to applied in the present case. Just cause has long been held to embrace not only a finding of whether the alleged actions have occurred but also whether the discipline imposed by the employer was appropriate for the offense.

In many cases, the reasonableness of the penalty imposed on an employee rather than the existence of proper cause for disciplining him is the question an arbitrator must decide. ... In disciplinary cases generally, therefore, most arbitrators exercise the right to change or modify a penalty if it is found to be improper or too severe, under all the circumstances of the situation. The right is deemed to be inherent in the arbitrator's power... Elkouri and Elkouri, How Arbitration Works, Vol 4. p. 668.

Zero tolerance for racially insensitive comments is clearly an appropriate response by the Manchester Police Department. Nonetheless, such conduct can not be considered to always require summary discharge. A review of arbitrable precedent shows that using a racial epithet is, in today's workplace, considered as a serious transgression, and the entirety of the events must be considered. In addition, a review of arbitrable precedent shows that when considering discipline for employees using racial epithets the employee's employment record must be considered to see whether such conduct is an isolated incident or demonstrates a pattern of inappropriate behavior. See MT Detroit, 118 LA (Allen, 2003); Albertson's, 117 LA 39 (Kaufman, 2002).

In the present case, although I have concluded that Officer Brown's texts messages were inappropriate, I do not believe that Officer Brown's actions were maliciously

motivated. These were two text messages from over 18,000 texts sent by Officer Brown that were reviewed by the Department. The text messages at issue were sent only to his wife, they were not made in public, they were not uttered to any other person, and these comments were not posted on social media. They were two text messages sent from Officer Brown to his wife. Officer Brown has never been accused, during his career, of making racially insensitive comments to members of the public or other officers of the Department. Moreover, Officer Brown during his career with the Department has had no prior discipline for any reason.


For these reasons, permanent removal of the grievant from the workforce at this point is not warranted for Officer Brown's offensive text messages. I have no hesitation in concluding that discharge is totally disproportionate to the offense. Accordingly, under the principles of just cause the grievant's discharge must be reversed. This does not mean that the grievant is blameless. The Employer is justified in taking action that will prevent a Manchester Police Officer from using their Department issued cell phone to make racially offensive comments, no matter who is the recipient of such text messages.

**Conclusion**

Based on all the factors, the discharge of the grievant shall be reduced to a thirty day disciplinary suspension. In addition the grievant shall not be awarded back pay for the period of this thirty day suspension. Under this award the grievant is to be made whole for lost compensation until he returns to work pursuant to this

Award, minus thirty days' pay for the period of the suspension. In addition, his back pay shall be offset by any compensation that the grievant received during this time period. The grievant will have no entitlement to his former position in the Special Enforcement Unit, and his reinstatement can be to a position determined to be appropriate by the Chief of the Department.

December 18, 2019  
Boston, Massachusetts

  
Gary D. Altman

**Sept. 4, 2020 Manchester Police Department  
Statement re: Aaron Brown**



*Chief of Police*  
Carlo T. Capano  
*Assistant Chief*  
Ryan A. Grant



*Commission*  
Scott R. Spradling, *Chairman*  
Steven J. Spain  
Charlie Sherman  
Manny Content  
Eva Castillo

## **CITY OF MANCHESTER**

*Police Department*

**September 4, 2020**

**Contact: Heather Hamel**  
**Public Information Officer**

**HHAMEL@manchesternh.gov**  
**(603) 792-5433**

### **Aaron Brown Ruling**

The Manchester Police Department is disappointed and disheartened by a labor arbitrator's recent ruling regarding former Manchester Police Officer, Aaron Brown.

Brown was fired from the Manchester Police Department 2 years ago after some alarming information was discovered through an internal investigation. After an evidentiary hearing, an arbitrator found that Brown had made racist comments, something that is not tolerated at this agency. Given that finding, it was to our great surprise and disappointment that the arbitrator ruled that termination was too severe a punishment. The arbitrator ruled that Brown should have only received a 30 day suspension and ordered his reinstatement as a Manchester police officer.

We are extremely saddened and sickened to see that an arbitrator could rule in this manner after hearing this egregious case.

We would like to give the community a better understanding of what took place and how we have gotten to this point. Therefore, we are providing you with the information that we are legally able to release.

On January 19, 2018, the Manchester Police Department received a complaint against Brown. An internal investigation was immediately launched and Brown was placed on leave, stripping him of his police powers. During this investigation we discovered, through Brown's department-issued cellphone, text messages in which he claimed to have intentionally damaged property while executing search warrants. We also discovered text messages that included extremely disturbing racist remarks.

Unfortunately, we are not able to go into the specifics; however the alleged intentional damage to property caused us to request a criminal investigation. The investigation was handled by the Strafford County Attorney's Office which determined that there was not enough evidence to file criminal charges.

However, our concern over the racist comments and destruction of property remained. The internal investigation was concluded on April 11, 2018 and the Manchester Police Department, under Chief Nick Willard, fired Aaron Brown the next day. Notification was immediately sent to the

Michael L. Briggs Public Safety Building  
405 Valley Street • Manchester, New Hampshire 03103 • (603) 668-8711 • FAX: (603) 668-8941  
E-mail: [ManchesterPD@manchesternh.gov](mailto:ManchesterPD@manchesternh.gov) • Website: [www.manchesterpd.com](http://www.manchesterpd.com)

A NATIONALLY ACCREDITED LAW ENFORCEMENT AGENCY

ADD 049



**Police Standards and Training Council. The Manchester Police Patrolman Association chose to file a grievance over Brown's termination. The grievance procedure in the Police union contract provides for binding arbitration. An arbitration hearing was scheduled, but for far later than the Manchester Police Department would have preferred.**

**The hearing took place on August 21, 2019. The arbitrator found that there was insufficient evidence that Brown had intentionally damaged property. However, the arbitrator ruled that Brown's racist comments were egregious and had no place in law enforcement and that the Manchester Police Department had properly applied a "zero tolerance" approach to racist conduct. Nevertheless, the arbitrator determined that Brown should not have been fired, but rather simply suspended for 30 days. The ruling called for Brown to receive his job back with back pay, minus the 30 day suspension. The Manchester Police Department vehemently disagreed with this finding.**

**Once the case goes to an arbitrator it is binding. Although the Manchester Police Department wholeheartedly disagrees with the ruling, we are forced to follow the arbitrator's decision. However, Chief Carlo Capano refused to implement the arbitrator's reinstatement order. The Police Union then filed an unfair labor practice charge with the PELRB requesting that it order the Police Department to reinstate Brown. That case is currently pending.**

**Separate from the issue of reinstatement, the Police Department and Union disputed the amount, if any, of back pay that Brown was entitled to receive. On August 24, 2020, the arbitrator issued a ruling and we again got discouraging news. Despite Brown having made no effort to find other employment since the date of his termination, the City is still required to provide Brown with substantial back pay.**

**The Manchester Police Department has asked the Police Standards and Training Council to review this matter and determine whether Brown should retain his police certification. As it has from the outset, the Manchester Police Department believes that people that hold racist beliefs should not be employed in law enforcement and will lend its full support to the Council as it considers this matter.**

**"Under no circumstances, does the Manchester Police Department tolerate racist behavior. Aaron Brown was terminated due to the findings of the internal investigation. I, personally, would have handled it the same way if a similar situation had happened, and I am confident this agency always will." says Chief Carlo Capano. "Manchester police officers take pride in the community we serve and the uniform we wear. Aaron Brown's actions cast a shadow on this agency, but those actions are not representative of this police department as a whole. We will do everything possible to make sure Brown is never in a Manchester Police Uniform again. Sometimes fighting for what is right is difficult and an uphill battle, but we take this very seriously and have no intentions of giving up."**

**3**

**City of Portsmouth/Aaron Goodwin Arbitration  
Decisions**

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IN THE MATTER OF ARBITRATION BETWEEN:

CITY OF PORTSMOUTH, NEW HAMPSHIRE  
POLICE COMMISSION/POLICE DEPARTMENT

AND

PORTSMOUTH RANKING OFFICERS ASSOCIATION,  
NEPEA, LOCAL 220

GRIEVANT: AARON GOODWIN  
REMEDY AWARD  
AAA# 01-15-0004-5476

---

**OPINION AND AWARD**

The City of Portsmouth, NH Police Commission/Police Department (Commission or Department) and the Portsmouth Ranking Officers Association, New England Police Benevolent Association, Local 220 (Union) are parties to a collective bargaining agreement (Agreement). Under Section 35 – Grievance Procedure unresolved grievances are submitted to arbitration. The parties met before Arbitrator Bonnie J. McSpillit regarding the above referenced grievance. Attorney Thomas Closson from the Law Firm of Jackson Lewis, PC represented the Department and Attorneys Peter J. Perroni and Gary Nolan from the Law Firm of Nolan Perroni, LLP represented the Union and the Grievant.

On the first day of hearing, the parties presented an evidentiary<sup>1</sup> issue regarding the admissibility of Probate Judge Gary R. Cassavechla's decision concerning the

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<sup>1</sup> Please note that I have corrected the reference from a procedural arbitrability issue to an evidentiary issue.

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and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 2 of 62

Estate of Geraldine Webber and presented arguments to that regard. On January 13, 2017, the following Award was issued on the evidentiary questions:

AWARD

Probate Judge Gary R. Cassavechia's decision concerning the Estate of Geraldine Webber is not admissible in the just cause analysis of Officer Goodwin's termination.

The Probate Decision is admissible in the remedy proceedings of arbitration, if necessary.

The Probate Decision's factual findings do not have preclusive effect.

During the time the above issue was briefed and awarded the parties moved forward on the merits of the case holding hearings in September and December 2016 and February 2017. All witnesses were sworn in and the parties had the opportunity to examine and cross examine the witnesses. The parties filed briefs and the hearing was closed upon receiving them.

On August 7, 2017, the following award was issued:

AWARD

The Department did not have just cause to terminate the Grievant, Aaron Goodwin.

The remedy is deferred. Either party may invoke jurisdiction at any time.

Hearings on the remedy phrase of the award occurred in January and April 2018. The City presented one (1) witness, Chief Robert Merner (Chief Merner or Chief) and the Union presented the Grievant, Aaron Goodwin (Officer Goodwin or Grievant). Both witnesses were sworn in and the parties had the opportunity to examine and cross

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Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 9 of 63

examine the witnesses. The parties filed briefs and reply briefs and the hearing was closed upon receiving them.

**ISSUE**

The Department did not have just cause to terminate the Grievant, Aaron Goodwin.

What shall the remedy be?

**STIPULATION**

The Union and the City stipulate that former Police Commissioners Golumb, Cavanaugh and Lehman would testify that, had he [Officer Goodwin] not be already terminated, they would have moved and voted to terminate Officer Goodwin following the issuance of the Probate Court Decision.

**PERTINENT CONTRACT LANGUAGE**

**SECTION THREE**  
**EMPLOYEE RIGHTS**

\*\*\*

B. No permanent employee shall be disciplined except for just cause ...

**RELEVANT RULES AND REGULATIONS OF THE PORTSMOUTH POLICE DEPARTMENT AND PORTSMOUTH CITY ORDINANCES**

**60.00 PROHIBITED CONDUCT**

**60.01 Acceptance or Solicitation of Gifts, Rewards, and Other Gratuities:**

**A. Gifts, loans or fees from the public:**

Employees shall not accept for either personal use or department use, either directly or indirectly, any gift, gratuity, service, object, loan, fee or any other thing of value, arising from or offered because of police employment or any activity arising from or connected with said employment. They shall not accept any gift, gratuity, loan, fee or any other thing of value, the acceptance of which might tend to influence directly or indirectly the actions of said employees or any other employee in any matter of police business; or which may tend to cast an adverse

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and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 4 of 63

reflection on the department or any other employee thereof. Persons or organizations offering anything of value for department use will be referred to the Office of the Chief of Police.

\* \* \*

I. Deposition of Unauthorized Gifts, or other Gratuities:

Any unauthorized gift, gratuity, loan, fee, reward or other thing of value coming into the possession of any employee shall be forwarded to the office of the Chief of Police together with a written report explaining the circumstances connected therewith.

\* \* \*

62.00 PUNISHABLE OFFENSES:

62.27 Conduct, whether on or off duty, tending to cast disrespect or deroga on the Department.

\* \* \*

62.30 Any other act or omission contrary to good order and discipline.

ARTICLE VIII  
CODE OF ETHICS

\* \* \*

Section 1.002: CONFLICT'S OF INTEREST

A. No Officer or employee shall engage in any business or transaction or shall have a financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his/ or her [sic] duties.

\* \* \*

F. Gifts and Favors: No officer or employee shall accept any gift, over \$100.00, whether in the form of service, loan, thing or promise, any other form from any person, firm or corporation which to his/ or her [sic] knowledge is interested directly or indirectly in any manner whatsoever, in business dealings with the City. This provision shall not apply to campaign contributions of \$100.00 or less.

\* \* \*

I. Incompatible Employment: No officer or employee shall engage in or accept private employment or render or seek services or goods for private interests when such employment or service creates a conflict with his/her duties.

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and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 5 of 63

### BACKGROUND

Pursuant to findings of the Report of the Webber-Goodwin Investigation Task Group to the Portsmouth Police Commission dated June 1, 2015, Officer Goodwin was terminated for violating Department Rules and Regulations (Rule or Rules) 50.01A, 52.27 and 52.30 as well as City Ordinance 1.802, Sections A, F and I. In my analysis of the evidence and testimony presented during the termination arbitration hearing, I found Officer Goodwin did not violate the Ordinance because the Grievant did not know the Ordinance existed therefore, Officer Goodwin did not have a reasonable basis to know what the disciplinary consequences were if he violated it. Knowledge of a rule and the consequences if violated is a vital tenet in taking disciplinary action against employees.

Considering the three (3) Department Rules, I found although the Grievant had knowledge and understood the Rules, because the Rules were not interpreted correctly or enforced by Officer Goodwin's supervisors, Command Staff, and the Police Commission, once the Commissioners were notified of the Grievant's relationship with Ms. Webber, resulted in all of Officer Goodwin's superiors supporting and/or condoning the Grievant's misconduct. Consequently, I found the City of Portsmouth's Police Commission and Police Department did not have just cause to terminate Officer Goodwin.

The parties agreed that if this was the finding that the remedy shall be deferred for hearing. In addition, pursuant to the evidentiary Award, Judge Gary Cassavechia's (Judge Cassavechia of the Court) court order regarding Ms. Webber's Revocable Living Trust (Probate Decision or Decision) would be considered in the remedial phase of the



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and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 6 of 62

award. The Probate Decision was not read until the arbitration hearings was scheduled on the deferred remedy.

Judge Cassavachia's Probate Decision

The Petition and Motion sought to set aside Ms. Webber's 2012 Estate Planning Documents and Will (Estate Planning Documents or Documents) claiming: "(1) Geraldine W. Webber . . . lacked capacity to execute the 2012 Estate Planning Documents; and/or (2) they were the product of undue influence exerted on her by then Portsmouth Police Officer Aaron Goodwin". The Court found:

. . . [T]he Court GRANTS the *Petition* having determined that the 2012 Estate Planning Documents are rendered invalid as the product of undue influence. Petitions alleging undue influence almost universally present difficult and close cases for adjudication. This application is no different. Officer Goodwin, the primary distributee of the 2012 Estate Planning Document, stood in a confidential relationship with Ms. Webber. That so, the Fiduciary [Gary W. Holmes, Esq.] and Aaron Goodwin, as proponents of the Estate Planning Documents (collectively, the "Proponents"), bear the burden of demonstrating that they were not the fruit of undue influence. The Court rules that they have not satisfied their burden. Thus, the 2012 Estate Planning Documents are declared void. . . . Finally, because it grants the relief requested regarding the invalidity of the 2012 Estate Planning Documents owing to undue influence, the Court DENIES AS MOOT, the Petitioners' request to set them aside on the basis of lack of capacity and the oral motion to admit the audio recording".<sup>2</sup>

Judge Cassavachia went through a detailed analysis of applicable law for determining capacity and undue influence, including burden and quantum of proof.<sup>3</sup> The Court noted:

[I]n New Hampshire, "the law presumes the absence of undue influence upon proof of the voluntary, formal execution of the will by competent testator and that *in the absence of circumstances arousing suspicion*, the proponent of the will is not required to offer express affirmative proof of the absence of undue influence."

<sup>2</sup> *Estate of Geraldine W. Webber*, New Hampshire Circuit Court, 7<sup>th</sup> Circuit Court-Probate Division, Case Number 818-2012-ET-01509, (Cassavachia 2015), p. 2.

<sup>3</sup> *Ibid.* p.3-15.

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Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 7 of 63

(Emphasis added by Court)<sup>4</sup> This "presumption of act, which excuses such offer of proof, however, neither extinguishes the original issues nor shifts the burden to the contestant. It simply suspends the requirement of further proof of the voluntary character of the testator's act until it is called in question, if at all, by the submission of *substantial evidence* of undue influence by the contestant."  
(Emphasis added by the Court)<sup>5</sup>

After the analysis, Judge Casavechia presented his finding of pertinent facts and analysis.

### FACTS

#### Geraldine Webber

- Ms. Webber ". . . was a rather eccentric, outspoken, "unfiltered" and funny person who sometimes expressed herself with rather colorful and often overtly sexual, language and mannerisms".<sup>6</sup>
- "Many witnesses whose testimony the Court found to be credible<sup>7</sup> and had occasion to observe Ms. Webber's behavior in her last years, testified to a noticeable cognitive decline".<sup>8</sup>
- Also listed in FN 10 were those witnesses the Court gave "little credence to" based on ". . . often evasive and contradictory statements", which included present and former non-party employees of the Portsmouth Police Department. The Court also ". . . found the testimony of Attorney James Rizzo, Officer Goodwin, and Attorney Gary Holmes to be often defensively self-serving and at most critical points implausible. As such, it has accorded weight only in those instances when independently corroborated by credible testimony of others or documentary evidence".<sup>9</sup>
- The Court found that ". . . [T]he documentary medical evidence and testimony of Ms. Webber's long-time physician, Dr. Ira Schwartz, comport with the view that her cognitive abilities had been in decline for a number of years before her death".<sup>10</sup>
- The Court concluded from ". . . trial record and testimony that because of her physical and mental decline, the naturally spirited Ms. Webber became increasingly dependent

<sup>4</sup> *Albee*, 79 N.H. at 91, *ibid.* p.7.

<sup>5</sup> *Gaffney*, 81 N.H. at 906-07, *ibid.*

<sup>6</sup> *ibid.* p. 16.

<sup>7</sup> *ibid.* FN 10.

<sup>8</sup> *ibid.* p. 17.

<sup>9</sup> *ibid.* FN 10.

<sup>10</sup> *ibid.* p.19 [Quote]. Complete analysis of Dr. Schwartz testimony from p.19-22.

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 8 of 69

upon friends, neighbors, and hired professionals in the final years of her life before meeting Officer Goodwin".<sup>11</sup>

- Between 2004 and 2010, there were eight (8) wills, several codicils and bequeathed lists executed or drafted.<sup>12</sup> The final Estate Documents were videotaped and executed on May 2, 2012 by the Fiduciary, Attorney Gary Holmes.<sup>13</sup>
- "Ms. Webber's health began to decline precipitously in the fall of 2012. No further changes were made to the 2012 Estate Planning Documents. She passed away in her home on December 11, 2012".<sup>14</sup>

#### Ms. Webber and Officer Goodwin

- Officer Goodwin met Ms. Webber in October 2010 while investigating suspicious activity in her neighborhood. "Officer Goodwin very quickly became a regular visitor at her home, and was 'stopping by' multiply times a week". Between October 25, 2010 and November 4, 2012, the Grievant's cellphone records indicated he called her 892 times with the majority of the calls placed by Officer Goodwin.<sup>15</sup>
- Ms. Webber's personal calendars/diaries for 2011 and 2012 had "references attesting to her 'love' - Aaron Goodwin".<sup>16</sup>
- The Court rejected Officer Goodwin and others claims that she loved the Grievant "like a son".<sup>17</sup>
- "Officer Goodwin very quickly became a central figure in Ms. Webber's life".<sup>18</sup>
- The Grievant "... sought out, and actively procured either personally or through his attorney, Justin Nadeau, a series of attorneys to draft her 2012 Estate Planning Documents naming him primary recipient of Ms. Webber's assets".<sup>19</sup>
- When Ms. Webber "... met with the first attorney procured for her by Officer Goodwin in February 2011, [in addition to her house] he was also going to receive the contents of her home; later that year her generosity towards him was further increase to include grants of stocks and her car."<sup>20</sup> The value of these items were figured to be approximately \$2,000,000 pursuant to Attorney Holmes notes from April 18, 2012. With regard to the amount, the Court noted "... that in all prior wills offered as evidence . . .

<sup>11</sup> Ibid. p. 29.

<sup>12</sup> Ibid. p. 24-28.

<sup>13</sup> Ibid. p. 49.

<sup>14</sup> Ibid. p. 52.

<sup>15</sup> Ibid. p. 29.

<sup>16</sup> Ibid. p. 30.

<sup>17</sup> Ibid. FN 20.

<sup>18</sup> Ibid. p. 30.

<sup>19</sup> Ibid. p. 31.

<sup>20</sup> Ibid.

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 9 of 68

no other beneficiary, including long-time friends who had themselves provided companionship and support, her grandson, and even her former husband with whom she briefly reconciled, were to receive such a generous beneficence",<sup>21</sup>

- The Court was "... mindful from December 2010 when she first offered to leave her home to Officer Goodwin until May 2012 when the 2012 Estate Planning Documents were executed, Ms. Webber consistently voiced a desire to benefit Officer Goodwin in her will".<sup>22</sup>

#### Portsmouth Police Department

- "The Court was impressed, though not in a positive fashion, by the apparent lack of concern within the department about the potential for exploitation of Ms. Webber by department employees",<sup>23</sup> i.e. Officer Goodwin and Officer Michael Schwartz, who Ms. Webber bequeathed \$25,000, which he later disclaimed.
- The Court found "remarkably" that Officer Goodwin's January 10, 2011 memorandum to Captain McDonald "... completely omits any mention that Ms. Webber... wanted to leave her house to Officer Goodwin".<sup>24</sup> The Court found that the Grievant "... testified unconvincingly that no mention was made because he was told that the subject of the memo was Attorney Rilzo and that valuable 'gifts' were being brought up [sic] a separate 'chain of command'. The Court has a very difficult time with this explanation as Officer Goodwin testified that he was given notice about the Internal Investigation concerning a complaint involving a proposed will/bequest by Ms. Webber".<sup>25</sup>
- "The Court disbelieves the claim by more than one police witness, including Goodwin, that Officer Goodwin was actively procuring counsel at the direction of the Attorney General's Office. There is no independent documentary evidence to support this explanation".<sup>26</sup> (Emphasis by the Court) The Court noted "[A]lso it appears from the same transcript (CX40) that Ms. Webber stated at least three separate times that Officer Goodwin had already begun efforts to procure a lawyer for Ms. Webber before the February 1, 2011 meeting".<sup>27</sup>
- The Court found the testimony of many of the Police Department witnesses, including the Grievant, was self-serving, dubious, contradictory and "... displayed an unusual measure of selective memory of the events at hand. As such, [the Court] finds much of the testimony unhelpful ... and indeed reflects adversely on the Court's assessment of the overall credibility of Officer Goodwin".<sup>28</sup>

<sup>21</sup> Ibid, p.32

<sup>22</sup> Ibid.

<sup>23</sup> Ibid, p. 33 Quote and FN 23.

<sup>24</sup> Ibid. P. 34.

<sup>25</sup> Ibid. p. 35.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid, p. 36.

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**Filed Under Seal**

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 10 of 69

**Ms. Webber's 2012 Estate Planning Documents**

- The Court found starting in January 2011, the Grievant "... began to seek out counsel to draft a new set of estate planning documents for Ms. Webber".<sup>29</sup>

Officer Goodwin contacted Joan Gile, an employee of Piscataqua Savings Bank, who had known Ms. Webber from 1987/1988 if she had any recommendations for an attorney. The Grievant asked Captain McDonald, who advised him to contact the Mulhern Law Firm. Officer Goodwin contacted Attorney David Mulhern about drafting an estate plan prior to Attorney Mulhern meeting with Ms. Webber on February 8, 2011. The Grievant met with Attorney Mulhern and Ms. Webber's accountant on March 1, 2011 and Attorney Mulhern discussed his concerns with Ms. Webber's mental health and drafting an enforceable estate plan. Attorney Mulhern sent a letter to Ms. Webber recommending that they file a guardian-inflated estate plan based on his opinion there were serious professional questions about her testamentary capacity and the Will could be successfully challenged. Attorney Mulhern learned that Ms. Webber was not happy with his recommendation, and she hired new counsel.

Officer Goodwin gave Ms. Webber the name of Attorney William Boesch, who she contacted on May 3, 2011. When Attorney Boesch did not work out, the Grievant asked Attorney Justin Nadeau for a recommendation. Attorney Nadeau recommended Attorney John McGee and conducted him. Attorney McGee contacted Ms. Webber about her estate plan but recused himself based on a conflict of interest. Officer Goodwin went back to Attorney Nadeau for a recommendation and on August 26, 2011 contacted, Attorney Gary Holmes regarding the estate plan. Ms. Webber hired Attorney Holmes and he executed the Estate Planning Documents nine (9) months later on May 2, 2012.<sup>30</sup>

- "The Fiduciary's notes indicate that although certain individual post-mortem gifts changed over this time, those to Officer Goodwin of her home and contents remained constant, her car and '1/3 Aaron' for the residue were added in February 2012 . . . and by March 2012, valuable stocks 'that Aaron wanted' were entered".<sup>31</sup>
- Attorney Holmes testified that he took a "slow, cautious approach" with the estate plan . . . while engaging in an on-going evaluation of Ms. Webber's cognitive abilities, "he never questioned her capacity".<sup>32</sup>
- Judge Cassavechia noted "[A]fter careful consideration and review of the documentary evidence, trial testimony and importantly a video of the execution of the Estate Planning Documents, the Court reluctantly discerns, from the totality of the evidence presented at trial, that the 'cautious approach' was as much, if not more, an endeavor to bolster sustainability of the documents under uncertain or problematic

<sup>29</sup> Ibid.

<sup>30</sup> Ibid, p 36-40.

<sup>31</sup> Ibid, p. 40.

<sup>32</sup> Ibid.

Confidential  
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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy .  
AAA# 01-16-0004-5476

Page 11 of 89

circumstances than a bona fide probe or search for confirmation pertaining to the propriety or impropriety of their execution and efficacy".<sup>39</sup> The Court reached this conclusion based on facts, which will not listed here.<sup>64</sup>

- In addition to Attorney Nadeau contacting Attorney Holmes initially about Ms. Webber's estate plan, he also sent a letter on October 18, 2011 to Attorney Holmes seeking information to update Officer Goodwin on the current status of the estate plan, and then made follow up calls in February 2012.
- The Court reviewed the video taken at the execution of the Estate Planning Documents and made several observations, which will not be listed here.<sup>36</sup>

### ANALYSIS<sup>36</sup>

#### Undue Influence

The Court, for the reasons set forth more fully below, concludes that the 2012 Estate Planning Documents must be invalidated as the product of undue influence exerted by Officer Goodwin. As stated earlier, evaluation of a claim of undue influence is by its very nature a difficult task. The Court reaches its decision only after careful consideration of: the totality of the trial testimony; extensive documentary evidence; Ms. Webber's medical history; the video of her executing the 2012 Estate Planning Documents; Officer Goodwin's standing as a police officer and the control he exercised over most details of Ms. Webber's life; the process engaged by the Fiduciary resulting in execution of the documents; and the common law governing undue influence. As well as all applicable inferences when there is a confidential relationship.

In sum, as has been found, it is uncontroverted that Officer Goodwin stood in a confidential relationship with Ms. Webber, procured legal counsel for her for the purposes preparation and execution of the Estate Planning Documents, and was the beneficiary of the vast majority of life time assets accumulated by a ninety [sic] (93) year-old woman he had only known the final twenty-six (26) months of her life. Because of these undisputed facts, Officer Goodwin and the Fiduciary, as Proponents of the 2012 Estate Planning Documents, had the minimal burden of demonstrating by a preponderance of evidence that those documents were not the product of undue influence. The Court concludes, given Ms. Webber's age and weakened mental condition, Officer Goodwin's standing as a police officer, the nature of the extraordinary gifting to someone relatively new to her life, and her dependence upon Officer Goodwin

<sup>33</sup> *Ibid.*, p. 41.

<sup>34</sup> *Ibid.*, p. 41-43.

<sup>35</sup> *Ibid.*, p. 49-51.

<sup>36</sup> In this section, the position of the Court was verbatim therefore, quotations were omitted.

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 12 of 63

for love, attention and valuable life supports, that the Proponents have failed to rebut the inference of undue influence rendering the Estate Planning Documents invalid".<sup>37</sup>

\* \* \*

Put another way, the Petitioners offered substantial proof of "opportunity and ability" as well as "design and accomplishment [..]" (Citation omitted) and thus are seen as having sufficiently rebutted the presumption of validity. . . . Officer Goodwin, by his initial introduction as a police officer, and rapid installation as her close friend, confidante, quasi-protector, and point-person for medical care, had the ability to exert influence, even if not overt in nature of force or threats, but acting upon her fears and hopes. (Citation Omitted) Certainly, the contestants offered proof of design as Officer Goodwin, as early as January 2011, actively sought to procure legal counsel for Ms. Webber directly or through his surrogate, Attorney Justin Nadeau. Finally, the contestants offered substantial proof of accomplishment as the estate plans were drawn up, serious medical/mental health concerns were seemingly ignored, and a process was implemented to a pre-determined end by the Fiduciary.<sup>38</sup>

\* \* \*

It cannot be disputed that Officer Goodwin was beneficiary, indeed the primary distributee, of the 2012 Estate Planning Documents; and having found that he stood in a confidential relationship with Ms. Webber, and actively assisted in procuring the documents, an inference arises that they were the product of undue influence. (Citation Omitted) The documents can only be declared valid, therefore, if the proponents prove an absence of undue influence . . . by preponderance of the evidence.

After considering "all the circumstances surrounding the disposition, including the relationship between the parties, the physical and mental condition of the donor, the reasonableness and nature of the disposition, and the personalities of the parties" (Citation Omitted) the Court concludes that the Proponents have failed to rebut the inference of undue influence.<sup>39</sup>

\* \* \*

In addition to the common law inference of undue influence, several facts elicited at trial provide substantial evidence of opportunity, ability, design and accomplishment and thus independently favor a determination of undue influence. . . . Simply put, the uncharacteristic generosity to a relatively new friend to whom she became emotionally and physically dependent made the devise/grants to Officer Goodwin strikingly unnatural, in particular when compared to prior planned dispositions when Ms. Webber was in stronger mental and physical health, and less dependent or under the control of any one person. It is these special circumstances that lead the Court to conclude that the common law inference of undue influence has not been disproved.<sup>40</sup>

<sup>37</sup> Ibid, p. 52-53.

<sup>38</sup> Ibid, p. 53-54.

<sup>39</sup> Ibid, p. 55.

<sup>40</sup> Ibid, p. 56-57.

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 19 of 63

\* \* \*

Again, Officer Goodwin's participation in the choice of counsel and the oversight through his lawyer is indicative of accomplishment and casts doubt on whose will was driving execution of an estate plan with such generosity bestowed on him.

In rebuttal, the Proponents offered testimony of Officer Goodwin that he was only helping Ms. Webber accomplish what she wanted and that he only agreed to accept millions of dollars of assets to make her happy. Again, given his often evasive, sometime dubious testimony and often selective memory, the Court cannot give credit to Officer Goodwin's recounting of facts without independent verification. Similarly, the Court does not give substantial weight to the Fiduciary's testimony on this matter in light of his own clouded credibility borne of the process he effected and his own often selective and sometimes self-serving memory.

Although all agree, and the video demonstrates, that Ms. Webber possessed a vivacious, funny, irreverent, and lively personality, those traits do not logically offer sufficient support to overcome an inference of undue influence, particularly in the face of those facts indicative of undue influence discussed supra.<sup>41</sup>

#### Capacity<sup>42</sup>

Given the Court's decision that the 2012 Estate Planning Documents must be invalidated as the result of undue influence, it need not decide whether Ms. Webber lacked the requisite capacity on May 2, 2012. . . . Although the Court has deep concern about her overall mental health, even pre-dating her introduction to Officer Goodwin, through often seemingly confused, Ms. Webber does indeed appear in the video, at the time of execution, to understand that she is signing a testamentary document and trust that include post-mortem gifting. (Citation Omitted)<sup>43</sup>

The Court observes however, that it remains unconvinced that Ms. Webber, given her dementia, confusion, and lack of judgement, history of exaggerated statements about the value of her home, a claim of value of a painting, was able to recollect her property and its nature to the extent the law requires. In addition evidence presented at trial suggested that without prompting by the Fiduciary and copies of prior wills, she was largely unable to independently and accurately self-recall and rationally understand the requisite nature of her property.

<sup>41</sup> Ibid, p. 58. (Emphasis added by Court)

<sup>42</sup> The law requires for testamentary capacity: (1) understanding of the nature of the act; (2) a recollection of property and its nature; (3) recollection of the nearest relative or natural objects of her bounty; and (4) ability to make elections as to dispositions. Ibid, p. 60.

<sup>43</sup> Ibid, p. 60.



Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 14 of 63

Similarly, it is unclear to the Court, whether, or the extent to which, Ms. Webber had the contemporary capacity to bear in mind Brett Webber and the nature of her gifts, or lack thereof, for his benefit. . . .

Finally, as it concerns the fourth element requiring the ability to make an election and bestow property, the Court is particularly troubled by the actions in the video where the Fiduciary effectively ignores Ms. Webber's direction, on multiple occasions, to include a distribution to a certain helpful young man and honor her insistence that the one distribution to a charity benefit only a worthy young man or boy. Thus, although her ability to bestow property may not be a product of a delusion, her ability to prevail upon the Fiduciary to amend her distributions may well reflect some level of incapacity.

Determination of capacity presents a closer question for this Court. The Petitioners . . . raised serious doubt about Ms. Webber's mental state such that the common law presumption of capacity was rebutted.<sup>44</sup> (Citation Omitted) Had the Court been called upon to render a decision on capacity, concerns about elements three through four<sup>45</sup>, however, may have been sufficient to support a ruling that the Proponents of the 2012 Will and Trust failed to carry their burden of showing, by a preponderance of the evidence, testamentary capacity.<sup>46</sup>

#### Testimony of Chief Robert Merner

Chief Merner began working for the Portsmouth Police Department on June 28, 2017, having previously been employed with Seattle, Washington Police Department and Boston, Massachusetts Police Department. Based on his experience, the Chief believed it is imperative that in the different parts of a community that police officers work in, residents respect the police officers they come in contact with on a day-to-day basis. To gain respect, police officers must build relationships that are based on trust. Chief Merner said ". . . If there is no trust, then the Police Department is not going to be successful and the community is always going to be on edge". (Tr. 703-704)

<sup>44</sup> Ibid, p. 60-62.

<sup>45</sup> Factors listed in FN 97 above.

<sup>46</sup> Ibid, p. 62.

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 15 of 69

The Chief familiarized himself with the Portsmouth Police Department online before he applied for the Chief position. Through his research, Chief Merner learned of the situation involving Ms. Webber and Officer Goodwin, which he stated, "... this was the issue led to the demise, . . . resignation, et cetera of the existing Command Staff". (Tr. 707) Chief Merner has testified in court on thousands of occasions and he believed it is important a police officer has a reputation for being truthful and has integrity. The Chief was asked what happens to a police officer who testifies in court when they have past issues indicating a lack of truthfulness. Chief Merner explained these officers are placed on a "list", e.g. previously the "Laurie" list in NH, the "Giglio" list in MA, the "Brady" list in federal court, etc. for being untruthful and based on a set procedure their untruthfulness may get noted in the courtroom.

The Chief was asked if Judge Cassavechia made any findings regarding Ms. Webber's mental capacity. He recalled Ms. Webber's long-time physician stating that she suffered from various stages of dementia, although Ms. Webber's doctor may have used the word diminished capacity. Chief Merner remembered the Court stated that Officer Goodwin had a confidential relationship with Ms. Webber and Judge Cassavechia found the grievant exerted undue influence over her. Also, the Court found Officer Goodwin's testimony, as well as others in the Police Department, was less than credible. In addition, Judge Cassavechia ruled that Ms. Webber believed there was a romantic relationship between herself and the Grievant. (Tr. 721-722)

As a result of the above, the Chief had reservations about Officer Goodwin's ability to be a Portsmouth Police Officer. The Chief also had concerns about the

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPPA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 16 of 69

Grievant's ability to interact with the elderly community in the City given that Chief Merner had met with residents who discussed the Webber/Goodwin situation. In addition, he voiced concerns about what effect there would be if Officer Goodwin returned to the Police Department and if the Grievant could operate effectively as a police officer.

Chief Merner was asked if he reached any conclusion about Officer Goodwin's judgment that was exercised when he became involved in the process of obtaining an estate lawyer for Ms. Webber. He responded:

At some point -- and you know, I don't look at motive or anything else, but at some point Officer Goodwin, Detective Goodwin, sat down and met with various attorneys, four or five attorneys . . . and the purpose was to take over financial decisions that ultimately led to changing the Will to Officer Goodwin. . . . highly questionable as to, you know, as a police officer ethically, morally, et cetera [that] that could take place, my opinion. (Tr. 730)

The Chief talked about his concern that Captain Frank Warchol, whose testimony was also found to be less than credible by Judge Cassavechla, was still working at the Police Department stating:

I know that Captain Warchol was assigned . . . an internal investigation relative to this case. And it's my understanding that one question was asked during the internal investigation. I look at that from -- from two sides. One, that Captain Warchol was given instructions, this is what you need to go in and do; and two, I question why he would accept an internal investigation and then be told to go in and ask one question. That's not an internal investigation. . . . I have problems with that. I look at Captain Warchol's part in this as errors of omission, that he omitted doing due diligence on the investigation. (Tr. 731-732)

Chief Merner also said Captain Warchol will have to deal with the Probate Decision if he is called to testify, which concerned him and the Chief had not decided whether to put Captain Warchol on the new Exculpatory Evidence Protocol and Schedule (EES or EES List). Instead, he had raised a question to the Attorney General's office if Captain

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 17 of 63

Warchol should be placed on the EES List because Judge Cassavechla found that he was less than forth coming during the trial. The Chief agreed one, if a police officer is placed on the EES list it does not mean they are terminated from employment and two, the Attorney General wants the list to be more inclusive than and not as stigmatizing as the former Laurie list.

During Chief Merner's testimony there was a question whether he stated incorrectly that Officer Goodwin met with four (4) or five (5) attorneys regarding Ms. Webber's estate. The point made by the Union was even if the Chief was incorrect that did not mean he was a liar, an untruthful person, and that he would never be able to testify again or function as a police officer. Chief Merner responded:

I would say it depends on what the judge rules. If the judge rules that I find the officer [sic] testimony to be false or not credible, I think that makes a big difference. Doesn't mean they have to be fired or let go from the job, but it is going to be something that they're going to have to withstand forever. (Tr. 783)

The Chief agreed that police officers make mistakes and sometimes the public and/or media will exacerbate the materiality of those mistakes. Also, he believed a misstatement in the press can become a misperception in the public unless it is corrected. Chief Merner believed it is part of a Chief's job not to make a personnel decision based on a misperception and to educate people when that occurs.

The Chief thought the Grievant should not have been fired and should have received a remedy prior to the Probate Decision. After the Decision was released he would have conducted an internal investigation to determine what Rules and Regulations of the Police Department were violated. The Chief would have consider

PORTS 000017

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 18 of 63

how other people were treated in similar situation and what guidance Officer Goodwin received from his Command Staff. (Tr. 804-807.)

Referring to the Analysis Section of the Probate decision dealing with Undue Influence, Chief Merner was asked if understood what the following sentence meant:

The Court, for the reasons set forth more fully below, concludes that the 2012 Estate Planning Documents must be invalidated as the product of undue influence exerted by Officer Goodwin.<sup>47</sup>

The Chief replied:

. . . my understanding that the Judge ruled . . . that the Will and the estate was invalidated as the product of undue influence. The way I read that . . . it is the Court ruled . . . took judicial note of that [,] the Will was a product of undue influence. (Tr. 808)

Officer Aaron Goodwin

The majority of Officer Goodwin's testimony at the remedy phase of the arbitration covered the time between January 2011 and December 2012 when Ms. Webber passed away. The Grievant described Ms. Webber as a funny, quick witted woman, who had a lot of energy for her age. She had a mean streak when people crossed her and she could be crass, i.e. she told a lot of dirty jokes to get a reaction out of people. She also was lonely and had a lot of heartache with her family but she never felt bad for herself.

Officer Goodwin stated they did not have a flirtatious or sexually driven relationship or love affair. Ms. Webber was very respectful of him and she appreciated that he was a family man, which the men in her life were not. The Grievant said she

<sup>47</sup> Estate of Geraldine W. Webber, New Hampshire Circuit Court, 7th Circuit Court-Probate Division, Case Number 918-2012-ET-01509, (Cassavachia 2015), p. 52.

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 19 of 63

expressed love and affection for him as a grandmother or mother would do. Ms. Webber called him "my love" but in an affectionate manner and she did not direct any sexual innuendo towards him. Officer Goodwin admitted that he did not know what Ms. Webber said to other people when he was not around but she treated him like family.

The Grievant became Ms. Webber's medical contact because Ms. Webber's neighbor Barbara Wardell stopped taking her to doctor appointments. This occurred after Ms. Webber's Attorney, Jim Ritzo, told Ms. Wardwell, that Ms. Webber had reported to the police that she was stalking her. As a result of that conversation, Ms. Wardell stopped speaking to Ms. Webber because she thought she would be arrested. Officer Goodwin tried to contact Ms. Wardwell, as did Ms. Webber, to right the situation but Ms. Wardwell would not reestablish the friendship.

Consequently, the next time Ms. Webber had to see Dr. Schwartz she did not have a ride and Officer Goodwin took her to the appointment. While he was there, Nurse Margie Fish asked the Grievant if he would be Ms. Webber's emergency medical contact. The Grievant was surprised about the request and although he had no interest in being her medical contact, he agreed. It was upon his acceptance, Nurse Fish shared with him what Attorney Ritzo had told Ms. Wardwell about Ms. Webber telling the police she was stalking her. At that point, Officer Goodwin stated:

I realized there was a lot going on more than I knew. . . the fact that she had nobody - - I've never met anyone who . . . didn't have family, you know. . . she had some friends, but she didn't have any family. She had none. (Tr. 827)

The Grievant said once he was involved with helping Ms. Webber get to doctor's appointment, she asked him to help her in other ways. He was happy to do that and their relationship/friendship grew from there. Officer Goodwin was not sure how many

**Confidential**  
**Filed Under Seal**

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 20 of 63

times he saw her during a week because it depended on what Ms. Webber has scheduled. Although the Grievant did not check in with Ms. Webber daily, she would be offended and call him to see why he did not contact her. Officer Goodwin stated,

". . . [N]ever in my wildest dreams did I ever imagine that it was going to turn into the amount of care that I ended up providing for her . . . But it did. . . And short of just turning my back and not doing all that for her, I -- did it. And there was nobody else to do it". (Tr. 832-833.)

The Grievant, later on, did get other people to help take care Ms. Webber, i.e. Hope Dow, who was a home care provider from Living Innovations.

Officer Goodwin took Ms. Webber for drinks three (3) times at the Ninety Nine Restaurant because she continually asked him if he would. He knew that there would be ridicule for doing that but the Grievant did it because Ms. Webber wanted him to take her. They would have one (1) drink, which she would not finish, eat some popcorn and then go home. Some of the nurses told him she was isolated so in Officer Goodwin's mind going there was social interaction and a means to get her out of the house. In addition, they did go to two (2) casinos because again, Ms. Webber kept asking the Grievant to bring her. Before he brought her to the Foxwood casino, the Grievant talked to Captain Mike Schwartz, who relayed a similar situation he had been in but he did not follow through on it. Officer Goodwin said Captain Schwartz told him, it was a decision he regretted. Again, Officer Goodwin knew he would be ridiculed for taking Ms. Webber but he knew it was important to her.

The Grievant notice a decline in her physical capabilities over time as she became less mobile. In early 2012, Ms. Webber fell, breaking her wrist and spraining her ankle and then in November 2012 she fell again, breaking her hip and Officer

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance; Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 21 of 63

Goodwin said she never recovered from that fall. The Grievant also noticed she was slowly declining mentally as she got older stating:

Over time, I would say she would be a little forgetful in general . . . things that would trigger lapses in her short-term memory before would be like stressful things. . . . you would see that she would -- if she got upset about something. You know, Jim Ritzo calls and she's upset, you can see how it impacts her thinking and functioning. And then when she settled down, it sort of goes back to just being calm and normal and she's good again. As the years went on, those instances would impact her more. (Tr. 850)

With regard to Officer Goodwin involvement with getting Ms. Webber a lawyer to redo her Will he stated that she shared her concerns about Attorney Ritzo the first day they met. At first the Grievant was not overly concerned because her complaints were general so he did not see the need to open a case file. But as time went on his concern grew and he spoke to Ms. Gile at Piscataway Bank, who confirmed the incident when Attorney Ritzo tried to cash checks that Ms. Webber did not sign. It was at this point, which within four (4) weeks of meeting Ms. Webber, Attorney Ritzo reported Officer Goodwin to his superiors for visiting with her. The Grievant said, ". . . [A]nd in my mind, that also raised my level of concern, because I felt like he was trying to drive me away from her because of what she might tell me", (Tr. 852)

Officer Goodwin stated further:

. . . [I] didn't become involved in helping her find a lawyer until after Mike Schwartz met with the Attorney General's office and Gerry and came back and reported to me that she was instructed to rip up her Will and immediately find a new lawyer and I was to help her find a lawyer. That's what he said. (Tr. 853)

Accordingly, he asked Captain McDonald for a recommendation, and he recommended the Mulhern Law Office. The Grievant called Attorney David Mulhern, told him about Ms. Webber and that she was looking to have someone help rewrite/update her Will.



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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 22 of 63

Officer Goodwin told Attorney Mulhern that Ms. Webber wanted to bequeath her house to him so he would know that right up front.

The Grievant met with Attorney Mulhern and Ms. Webber's Accountant Bill McDonald and they talked about him, as a police officer, what was going on with Attorney Ritzo and if the Police Department was aware that Ms. Webber was going to give her house to him. Officer Goodwin knew that Attorney Mulhern suggested that Ms. Webber go to Probate Court and get a guardianship because she showed the letter to him. The Grievant stated Ms. Webber did not talk to him much about the letter or Attorney Mulhern's recommendation because she had fired him. Officer Goodwin said he did not know what a Probate Court guardian initiated estate plan was but it sounded like a good idea to him; however, he did not share this opinion with Ms. Webber or directed her to pursue one.

After Ms. Webber fired Attorney Mulhern, she was without an attorney again and the Grievant asked Ms. Webber's Accountant Bill McDonald for a recommendation. He recommended Attorney Bill Boesch. Officer Goodwin never met Attorney Boesch, he did not know what happened to him and he had nothing to do with Ms. Webber not using him as an attorney. Given that Attorney Boesch was not hired, Ms. Webber told the Grievant that she still needed an attorney and he contacted Attorney Justin Nadeau, an acquaintance, who recommended Attorney Jack McGee. The Grievant gave Ms. Webber Attorney McGee's contact information, he never met him and later she showed Officer Goodwin a letter where Attorney McGee wrote he could not help her because of a conflict of interest. The Grievant went back to Attorney Nadeau again for

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 23 of 69

recommendation and he recommended Gary Holmes. Officer Goodwin did not know Attorney Holmes and he did not know that Attorney Nadeau and Attorney Holmes had a personal as well as a professional relationship. He just gave Ms. Webber his contact information.

Attorney Holmes called the Grievant and they talked about Ms. Webber and himself. Officer Goodwin did not speak to Attorney Holmes again until they met by chance at Ms. Webber's home months later but before the execution of the Estate Planning Documents. The Grievant was visiting Ms. Webber when she told him that she wanted him to be her Power of Attorney; a desire she had told the Grievant several times before. Although the Grievant did not know what being her Power of Attorney entailed, he was not ready to do it and he did not want to do it; Attorney Holmes indicated this is what Ms. Webber wanted so he agreed to be her Power of Attorney.

Officer Goodwin had no knowledge why Attorney Nadeau, who was now representing him, sent a letter to Attorney Holmes on October 18, 2011 (CX44) requesting an update on the current status of Ms. Webber's Documents. He did not remember receiving a copy of the letter or an update on her estate plan from Attorney Nadeau. He also did not recall why Attorney Nadeau forwarded a letter from Chief Ferland to Officer Goodwin on April 9, 2012 or what the letter regarded. Finally, he did not speak to Attorney Holmes about Ms. Webber's competency and the Grievant did not see the Estate Planning Documents after they were executed on May 2, 2012.

Officer Goodwin acknowledged Judge Cassavechia did not believe his claim that he was actively procuring a lawyer for Ms. Webber at the direction of the Attorney

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**Filed Under Seal**

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 24 of 68

General's Office. The Grievant agreed he testified in Superior and Strafford County Courts and his credibility was important for the purposes of his testimony. He recognized that Judge Cassavechia made findings of fact that were binding on the participating parties and the Decision was not appealed, however, he did not know if the findings were the law.

Officer Goodwin admitted that when he assisted Ms. Webber to procure an attorney to change her will; he understood the new Will would give him the bulk of her estate. The Grievant believed Ms. Webber was competent, his belief was not based on a legal interpretation of competency but "... that she knew what she was doing. She knew what a Will was. She knew that she had one that she didn't like, that she wanted to get help getting another one". (Tr. 896) Officer Goodwin did not attend the whole Probate Trial; only the days he was called to testify. During the trial no one told him that Dr. Schwartz testified that Ms. Webber had dementia. He acknowledged if he knew on Christmas Eve, when Ms. Webber said she was going to give him her home, that Dr. Schwartz had diagnosed her to have dementia, he may have acted in a different way. Then the Grievant stated, "... [J]ust because somebody has dementia doesn't mean that they're not capable of doing a Will". (Tr. 890)

Officer Goodwin knew from Dr. Schwarz that Ms. Webber suffered from cognitive impairment with short term memory loss. He was then asked with that knowledge was he concerned assisting her to change her Will so that he would receive the majority of her estate. The Grievant responded:

I trusted that the professionals [Attorney Homes and Dr. Schwartz] that were involved in her life and were involved in that process were attending to that

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5475

Page 25 of 69

concern. Obviously if -- if I felt like she wasn't competent to do what she wanted to do, then I would not involve myself in it personally. But I didn't feel like it was my decision to make. If the professionals made a decision to assist her in the way she wanted to be assisted, I didn't feel like it was my place to jump in and stop it if I personally believed that she was capable of doing it. (Tr. 882)

\* \* \*

I don't specifically remember telling [Attorney Holmes] that [Ms. Webber was very competent] but -- that was my opinion of her. . . . I considered her to -- to have her faculties. And it wasn't competent in the sense of like legally competent. . . . I'm talking like just she knows who she is, what she wants to do, the people in her life that she trusts, the people . . . that she doesn't trust, the things that need to get done around her home, the stuff that's bothering her. She's consistent with it on a daily basis, it doesn't change from day-to-day. That was my assessment of her, that she knew what she was doing. She knew what a Will was. She knew that she had one that she didn't like, that she wanted to get help getting another one that's what I meant when I was talking to Gary over the phone. . . . I wasn't making some legal assessment of her, just that she knew what she was doing. (Tr. 898)

Officer Goodwin acknowledged that the Court found he did not inform Attorney Holmes of the dementia diagnosis, however, the Grievant stated emphatically that he did not know of the dementia diagnosis. In addition, he recognized the Court rejected his claim that Ms. Webber loved him "like a son" but Officer Goodwin believed it to be so.

The Grievant was directed to footnote 49, which states:

There was testimony that Ms. Webber consistently voiced a desire to benefit Officer Goodwin. Though the Court does not doubt the truth that she made such declarations, it is suspect, however, that the idea and insistence was truly autonomous and not that of Officer Goodwin.<sup>48</sup>

When asked if he would agree the finding was damaging for his reputation, credibility and ability to be a police officer, Officer Goodwin responded that it did not help. And although the Grievant acknowledged that the Court at various points in the Probate Decision found his testimony was not credible; when asked if he thought a defense

<sup>48</sup> Estate of Geraldine W. Webber, New Hampshire Circuit Court, 7th Circuit Court-Probate Division, Case Number 318-2012-ET-01509, (Cassavachia 2015), p. 58.

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 26 of 69

counsel might be able to use this fact to impeach his credibility he responded, "I don't know. Perhaps". (Tr. 916) In addition, Officer Goodwin acknowledged his credibility has been called into question by the media and the public as a result of the Decision.

The Grievant testified the first time he became aware that Dr. Schwartz had diagnosed Ms. Webber with severe dementia was when he read the Probate Decision. Officer Goodwin admitted that having known that fact he would have considered disclaiming the bequest as Captain Schwartz did. Later, the Grievant testified he read Attorney Mulhern's May 9, 2011 letter to Ms. Webber, which indicated that Dr. Schwartz could not attest to Ms. Webber's legal capacity to execute a Will. Finally, Officer Goodwin agreed the Court found that he failed to prove he did not exert undue influence over Ms. Webber.

#### POSITIONS OF THE PARTIES

##### CITY

The City contends that the remedy must take into consideration Officer Goodwin's misconduct of exerting undue influence over Ms. Webber that was detailed in Judge Casavechia's Probate Decision. Based on the Decision, the City argued that reinstatement is not an appropriate remedy and any monetary award must be mitigated by the Grievant's role "in this tragedy".<sup>49</sup> The United States Supreme Court in McKerron v. Nashville Banner Publishing Company<sup>50</sup> (Nashville Banner) caps the award at August

<sup>49</sup> City Brief, p. 2.

<sup>50</sup> 513 U.S. 352 (1995).

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 27 of 69

20, 2016 when the Decision was issued. The City presented a list of relevant facts, which have been reviewed and put forth the arguments below.

The United States Supreme Court's Decision In *McKennon v. Nashville Banner Publishing Company* is Directly Applicable to the Remedy Phrase of this Case

The US Supreme Court in the Nashville Banner Decision found that even though an employer violated federal law in terminating an employee, the employer can rely on post-termination or after-acquired evidence of misconduct to defeat claims for reinstatement and lost compensation. The NH Supreme Court followed suit in *McDill v. Environamics Corp*<sup>51</sup> as well as NH Federal District Court in *EEOC v. Freudenberg-NOK*.<sup>52</sup> Furthermore, the after-acquired doctrine is the prevailing approach for labor arbitrators in employment cases whether the arbitrator is weighing the evidence regarding the merits of a termination or remedy.<sup>53</sup>

Given the Cassavechla Decision, Reinstatement is not an Appropriate Remedy

Officer Goodwin testified a police officer must earn and maintain the trust of the community at all times and to do that a Police Officer must "... live his/her life fairly and honestly, both while on and off duty".<sup>54</sup> Although, the Grievant portrayed himself as friend and advocate to Ms. Webber to protect her from Attorney Rilzo who was exploiting her, Judge Cassavechla found instead Officer Goodwin exerted undue influence over an elderly woman, who was cognitively impaired. The City notes the Grievant reluctantly admitted Dr. Schwartz "... explicitly told him that Mr. Webber

<sup>51</sup> 144 N.H. 695 (2000).

<sup>52</sup> 2009 U.S. Dist. LEXIS 93082, \*3 (D.N.H.2009).

<sup>53</sup> Brand and Biren, Discipline and Discharge in Arbitration, 2<sup>nd</sup> Edition, 2006, Chapter 11, V11.A, p. 455 and 458.

<sup>54</sup> City Brief, p. 9.

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Reinedy  
AAA# 01-15-0004-5476

Page 2B of 63

suffered from cognitive impairment" during the arbitration hearing.<sup>65</sup> Also, Judge Cassavechla concluded that Officer Goodwin's testimony during the trial was not credible.

The Grievant did not appeal the Probate Decision thus, the finding of facts are final, binding and the law. The City's recently appointed new Chief of Police, Robert Merner, who stated "... there's now an adjudication, which is different from an accusation", he believed for Officer Goodwin "... It would be extremely difficult to function as a police officer with - - with this decision hanging over your head".<sup>66</sup> Consequently, the City maintained reinstatement is neither feasible nor appropriate.

The City also argued that the Union's position that Judge Cassavechla did not determine or find that Officer Goodwin used undue influence upon Ms. Webber is meritless. Judge Cassavechla specifically stated:

The Court, for the reasons set forth more fully below, concludes that the 2012 Estate Planning Documents must be invalidated as the product of undue influence exerted by Officer Goodwin.<sup>67</sup> (Emphasis added by City)

In addition, the Union's contention the Arbitrator should judge the Grievant's credibility independently and not consider Judge Cassavechla's findings of credibility is unfounded. Although the City believed the Arbitrator can assess Officer Goodwin's credibility also, however, they contend after the issuance of the Probate Decision, the case will be used to test the Grievant's credibility in future criminal cases.

Given the Cassavechla Decision, any Award for Lost Compensation should be Capped at August 20, 2015

<sup>65</sup> Tr. p. 892.

<sup>66</sup> Tr. p. 728-729.

<sup>67</sup> CX9, p. 52.

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 29 of 63

Since Nashville Banner and subsequent decisions allow after-acquired evidence to prevent reinstatement, the City contends the same evidence can and should be used to mitigate Officer Goodwin's claim to lost compensation. Therefore, if compensation is awarded it should be limited to the timeframe between June 24, 2015 and August 20, 2015.

#### Conclusion

The City requests the Grievant not be reinstated and his damages be limited to when he was official terminated -- June 24, 2015 to when the Probate Decision was released -- August 20, 2015. The City maintains that reinstating Officer Goodwin ". . . will reopen wounds that have begun to heal". Pursuant to the Probate Decision, the Grievant is not an innocent victim in this case. If Officer Goodwin had disclaimed Ms. Webber's bequests, as Captain Schwartz did, the Probate Decision would not exist. He did not do this, but instead took a risk in an effort to receive over \$2 million dollars from Ms. Webber's estate and lost. The City contends the Arbitrator must consider Officer Goodwin's responsibility during the entire Webber/Goodwin saga. If another compensation scenario is rendered by the Arbitrator, the City requests the matter be kept open to determine if any additional mitigation factors should be considered to offset the award.

#### Union

The Union argued that the Probate Decision does not preclude the Arbitrator from awarding a meaningful remedy to Officer Goodwin. The City's position that the



Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 80 of 68

Decision puts an end to Officer Goodwin's career is meritless given that the City did not carry their burden to prove the Grievant could not serve as a police officer or the remedy due him should be denied or diminished.

Goodwin must be Reinstated to his Position without Loss of Pay or Benefits

A. The Burden of Proof

The Union argued the Nashville Banner Decision allows for the Probate Decision to impact the remedy of reinstatement (or front pay) if the City can prove the findings of the Decision would have been the sole basis for Officer Goodwin's termination.

Specifically, the Court stated:

Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge.<sup>58</sup>

B. The Probate Court Decision does not "By Itself" Support a Finding of Just Cause

The Court's Ultimate Holding on Testamentary Capacity and Undue Influence do not Establish Just Cause for any Discipline

The City's contention that Ms. Webber did not have the capacity or competency of the contents of her estate was not proven given that the Court made no finding on this matter. Specifically the Court stated:

Given the Court's decision that the 2012 Estate Planning Documents must be invalidated as the result of undue influence, it need not decide whether Ms. Webber lacked the requisite capacity on May 2, 2012.<sup>59</sup>

<sup>58</sup> 513 U.S. 952, 962-963 (1995).

<sup>59</sup> Estate of Geraldine W. Webber, New Hampshire Circuit Court, 7th Circuit Court-Probate Division, Case Number 918-2012-ET-01509, (Cassavechia 2015), p. 60.

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 31 of 63

The Court's dicta comment the evidence "... may have been sufficient to support a ruling that the Proponents of the 2012 Will and Trust failed to carry their burden of showing, by a preponderance of the evidence, testamentary capacity"<sup>60</sup> does not mean anything and carries no weight.

The City's argument that the Court found Officer Goodwin exerted undue influence over Ms. Webber, which invalidated the Documents is meritless. Contrary to the City's position, the Court found the Grievant and Attorney Holmes failed to carry the burden to prove "the absence of undue influence". The Union contends "[T]he burden of proof was imposed on Goodwin because a legal presumption of undue influence arose (which Goodwin then needed to overcome) because he stood in a "confidential relationship" with Ms. Webber and he was named as a beneficiary under the estate plan".<sup>61</sup> Given that Officer Goodwin decided to take care of and support Ms. Webber, which was undisputed by the findings of the Task Group's Report as well as the testimony of Ms. Webber's primary care Physician, Dr. Schwartz, the legal burden fell on him.

From the Union's perspective, having the Court determine that the Grievant did not establish the absence of undue influence does not mean he exerted undue influence, which is the City's interpretation. Since the Court did not find that Officer Goodwin used undue influence upon Ms. Webber, the Probate Decision's ultimate

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<sup>60</sup> *Ibid.*, p. 61-62.

<sup>61</sup> Union Brief, p. 7.

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 92 of 63

conclusions on undue influence and testamentary capacity do not provide just cause for termination.

The Probate Court's Subsidiary Findings do not Provide Just Cause for Termination

The Union maintains the City's attempt to point out other observations Judge Cassavechia made in the Decision and offer those as providing independent proof of just cause is unfounded. The observations were:

1. The Court found the testimony of Officer Goodwin and Attorney Gary Holmes to be often defensively self-serving and at most critical points implausible;
2. The Court rejects Officer Goodwin's claims that Ms. Webber loved the Grievant "like a son";
3. The Court found the testimony of members of the Police Department and Officer Goodwin were sometimes self-serving, dubious and often contradictory. Therefore, the Court reflected adversely on the Grievant's overall credibility.
4. Officer Goodwin did not inform the Fiduciary of the dementia diagnosis;
5. The Court did not credit Officer Goodwin's testimony that Ms. Webber of her own volition initiated the dismissal of Attorney Mulhern; and
6. The Court found given the Grievant's often evasive, sometimes dubious testimony and often selective memory, the Court could not give credit to Officer Goodwin's recounting of facts without independent verification.<sup>62</sup>

None of the above observations alone can justify the termination of the Grievant.

Broad, Non-Specific Conclusions by the Court cannot Establish Just Cause

Based on the broad and non-specific conclusions made by Judge Cassavechia that are not tied to testimony, the Court's conclusions that Officer Goodwin's testimony was not credible because he was evasive, dubious, self-serving and implausible are immaterial. Consequently, they are not testable and cannot be used to prove just cause for termination.

<sup>62</sup> Ibid, p. 11-13.

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 93 of 68

To the Extent the City Relies on Specific Findings – Such Findings do not Provide Just Cause for Termination

None of the Court's findings provide just cause for termination. Also, the Arbitrator can make her own determination of credibility based on the times that the Grievant testified before her. The Officer Goodwin's relationship with Ms. Webber was a friendship, she viewed him as a "second son"; It was not flirtatious, sexually driven or a love affair. She respected the Grievant because he was a family man. Ms. Webber made raunchy jokes but they were never directed towards Officer Goodwin. The Union maintained and the record supported the Grievant cared for Ms. Webber and was committed to supporting her.

The City's argument that Officer Goodwin did not tell Attorney Holmes that Ms. Webber had dementia is meritless given that the Grievant only knew via Dr. Schwartz that she suffered from cognitive impairment and short term memory loss. Officer Goodwin testified he trusted the lawyers to effectuate Ms. Webber's wishes. There is no evidence that he tried to influence any lawyer and overcome their professional judgement in drafting Ms. Webber's Estate Planning Documents or determining her testamentary capacity. The Union also noted that it is undisputed that Ms. Webber consistently voiced her desire to benefit Officer Goodwin in her Will.

The Existence of the Probate Court Decision does not Provide Just Cause.

The City's position that the mere existence of the Decision is just cause for termination and makes reinstatement impossible is irrelevant. The City based their argument on the Grievant's ability to testify has been compromised. The Union, in

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Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 34 of 69

detail<sup>63</sup>, discussed why the City's argument is meritless based on the NH Attorney General's recent promulgation of "... a procedure whereby an Exculpatory Evidence Schedule (EES) is kept which contains a list of officers who have exculpatory evidence, [e.g. sustained complaints of lack of credibility, excessive force, etc.] in their personnel file or otherwise that may be subject to disclosure to defense counsel in cases where such officers are expected to testify".<sup>64</sup> The Union contends the Probate Decision will not impede Officer Goodwin from testifying given that based on NH rule of evidence 606(b) the Decision would be inadmissible. In addition, the Union discussed several court and arbitration decisions to support their position that even where the Probate Court found the Grievant was untruthful, the finding would not necessarily preclude him from being a police officer.

The City's Treatment of Current Employees undermines [f]s Claim that the Probate Decision Provides Just Cause

The Union argued the City failed to treat similarly situated employees in the same manner as Officer Goodwin. Although the Court found that the Grievant's testimony was evasive, dubious and self-serving, etc., Judge Casavechla also found the same for Captain Warchol, who was a Detective back in 2011 and conducted Officer Goodwin's internal investigation. However, then Detective Warchol was not disciplined and eventually was promoted to Captain, where he currently remains as second in command and responsible for the Police Department's day-to-day operations. Here again, the Union cited court and arbitration decisions to support their argument.

<sup>63</sup> Ibid, p 18-26.

<sup>64</sup> Ibid, p.19.

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-S476

Page 85 of 69

Further Investigation was Obviously Necessary if the City Intended to Attempt to Discipline Goodwin based on the Probate Decision

The Union maintains that if the City planned to discipline Officer Goodwin based on the Probate Decision then it should have performed an investigation to determine what discipline was appropriate, if any, given that the Decision in isolation does not provide just cause for the Grievant's termination. This position is supported by Chief Merner, who stated he would perform an internal investigation (IA) to determine the Rules and Regulations that may have been violated. Also, he would have taken into consideration what guidance Officer Goodwin received from the Command Staff. In addition, Commissioner Howe, who was a Police Commissioner at the time of the Grievant's discharge testified an IA would occur, the Commissioners would be briefed on the results, and if discipline was issued the Grievant would have several levels of review available to him.

The issuance of the Decision does not exempt the City of their contractual obligation to establish just cause. Without a valid investigation, without analysis and assertion of alleged rule violations and without consideration of traditional just cause factors (not to mention the procedural requirements of the CBA), without proof of actual wrongdoing, the Probate Decision in isolation simply does not establish just cause or prohibit reinstatement.<sup>68</sup> Furthermore, the City did not put forth a rule or policy that was violated to justify termination. The Union contends the Grievant was not aware that termination was the consequence after a Probate Judge found he did not carry his

<sup>68</sup> Ibid, p. 21.

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 36 of 69

burden to prove the absence of undue influence or his testimony was determined not to be credible when compared to other evidence. Based on the above, the Decision did not establish that Officer Goodwin's wrongdoing was so severe he would have been terminated solely on Judge Cassavechla's findings and order. Therefore, the actions of the Commission to quickly terminate the Grievant undermined any ability to establish just cause based upon the Probate Decision.

The Arbitrator should reject the City's invitation to quell public complaint and find Officer Goodwin at fault and responsible "... for creating the problems that the Department, and the City of Portsmouth, are still trying to overcome".<sup>66</sup> The Arbitrator's function is not to "satisfy the public's thirst for mob justice" but interpret the Agreement by determining if the Decision, on its own, established just cause to terminate the Grievant.<sup>67</sup>

The Union contends that the Probate Decision is not a basis for termination and Officer Goodwin is entitled to a make whole award. Thus, the Union requests the Arbitrator to reinstate the Grievant to his position with back pay retroactive to June 24, 2015 with any benefit, emolument or compensation (including interest) lost. If the Arbitrator does not grant the request, the Union respectfully requests that Officer Goodwin receive back pay to the date the arbitrator issues this award and front pay sufficient to compensate the Grievant for not being allowed to move forward with his

<sup>66</sup> Union Reply Brief, p.4.

<sup>67</sup> *ibid.*

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 37 of 63

career. Finally, the Union requests the Arbitrator retain jurisdiction over the remedy phrase of this grievance arbitration.

#### OPINION

After finding that the City did not have just cause to terminate Officer Goodwin, I reserved judgement on the remedy to determine if Judge Cassavochia's Probate Decision, which was not appealed by the Grievant, would impact the remedy received. I also conveyed to the Parties in the Termination Award that although I found there was no just cause for Officer Goodwin's discharge it was not because his conduct was found to be proper. The discharge was based on the Police Commission and the Command Staff incorrectly interpreted the Department's Rules and Regulations identified in the Task Group's Report and as a result condoned the Grievant's misconduct. If this fact was not present than it was likely the Officer Goodwin would have been terminated.

Specifically, I had problems with one, Officer Goodwin failed to start a file on Ms. Webber's complaints of Attorney Ritzo possibly exploiting her as well as he did not mention it to anyone at the Department. The Grievant did not raise Ms. Webber's concerns with Attorney Ritzo or begin sharing with others in the Department she was bequeathing her house and the contents within to him until Attorney Ritzo started questioning Officer Goodwin's motivations in befriending Ms. Webber. Two, I questioned the Grievant's motive to by-pass his direct supervisors and speak to Chief Ferland about Ms. Webber's intent to bequeath her home and contents within to him. Is it because he had a unique relationship with Chief Ferland or is it because Chief



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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEFBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 98 of 63

Ferland had been down this road before when Buzzy Hanscom bequeathed something to the Chief, thereby Officer Goodwin knew he would get the answer he wanted.

Three, I found the Grievant's explanation why he omitted in the January 10, 2011 memorandum to the Chief about the house and contents was not credible, suspicious and an interesting omission given that the memorandum was being sent to the Attorney General Exploitation Unit and the Bureau of Elderly and Adult Services (BEAS). Four, I found Officer Goodwin's decision not to denounce the bequest brought disrespect and disrepute to the Department by the public and the media even if his actions were condoned. Finally, I found the Department's contention the Grievant had lost the public's trust should be considered in the remedy portion of the Award. Therefore, Officer Goodwin's actions and the problems I had with them as well as the Probate Decision will be considered in the determination of what the Grievant's remedy shall be.

#### Judge Cassavechia's Probate Decision

The Petition and Motion sought by the Petitioners claimed that Ms. Webber lacked capacity to execute the Estate Planning Document and/or the Documents were the product of undue influence exerted on Ms. Webber by Officer Goodwin. Accordingly, Judge Cassavechia's role was to determine whether the Petitioners' claims of incapacity and a showing that the Grievant exerted undue influence over Ms. Webber were (1) both present; (2) either capacity or exerting undue influence was present; or (3) neither claim was present.

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 89 of 68

1. Undue Influence

Looking at the question of undue influence first, the Court did find Officer Goodwin exerted undue influence over Ms. Webber and invalidated the Estate Planning Documents. Subsequently, the City argued the same here and the Union countered that the City's contentions were meritless. The Union's position was based on Judge Cassavechia's finding the Grievant and Attorney Holmes failed to carry the burden to prove the "absence of undue influence", which is not the same as finding that Officer Goodwin exerted undue influence.

Having considered the Union's argument, I do not agree given that the Court clearly found the Grievant exerted undue influence over Ms. Webber as Judge Cassavechia referenced and supported this finding throughout the Decision:

- For the reasons set forth below, the Court GRANTS the Petition having determined that the Estate Planning Documents are rendered invalid *as the product of undue influence*. (Emphasis added)<sup>68</sup>
- The Motion to Re-Examine (Estate Case Index #29) is GRANTED IN PART. The Request to disallow the 2012 Will *on the basis of undue influence* is GRANTED, . . . (Emphasis added)<sup>69</sup>
- Finally, because it grants the relief requested regarding the invalidity of the 2012 Estate Planning Documents *owing to undue influence*, the Court DENIES AS MOOT, the Petitioners' request to set them aside on the basis of lack of capacity . . .<sup>70</sup> (Emphasis added)
- *The Court*, for the reasons set forth below, *concludes* that the 2012 Estate Planning Documents must be invalidated *as the product of undue influence exerted by Officer Goodwin*.

<sup>68</sup> Ibid, p. 2.

<sup>69</sup> Ibid, p. 3.

<sup>70</sup> Ibid.

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 40 of 63

... It is uncontroverted that Officer Goodwin stood in a confidential relationship<sup>71</sup> with Ms. Webber, *procured legal counsel for her* for the purposes preparation and execution of the Estate Planning Documents, and *was the beneficiary of the vast majority of life time assets accumulated by a ninety (93) year-old woman he had only known the final twenty-six (26) months of her life.*

Because of these undisputed facts, *Officer Goodwin and the Fiduciary, as Proponents of the 2012 Estate Planning Documents, had the minimal burden of demonstrating by a preponderance of evidence that those documents were not the product of undue influence.*

*The Court concludes, given Ms. Webber's age and weakened mental condition, Officer Goodwin's standing as a police officer, the nature of the extraordinary gifting to someone relatively new to her life, and her dependence upon Officer Goodwin for love, attention and valuable life supports, that the Proponents have failed to rebut the inference of undue influence rendering the Estate Planning Documents invalid. (Emphasis added)*<sup>72</sup>

- It cannot be disputed that Officer Goodwin was beneficiary, indeed the primary distributee, of the 2012 Estate Planning Documents; and having found that *he stood in a confidential relationship with Ms. Webber, and actively assisted in procuring the documents, an inference arises that they were the product of undue influence. (Citation Omitted)* The documents can only be declared valid, therefore, if the proponents *prove an absence of undue influence.*

After considering "all the circumstances surrounding the disposition, including the relationship between the parties, the physical and mental condition of the donor, the reasonableness and nature of the disposition, and the personalities of the parties" (Citation Omitted) *the Court concludes that the Proponents have failed to rebut the inference of undue influence. (Emphasis added)*<sup>73</sup>

- In addition to the common law inference of undue influence, several facts elicited at trial provide substantial evidence of opportunity, ability, design and accomplishment and thus independently favor a *determination of undue influence.*

... *Officer Goodwin provided security and very quickly after they met, became a critical lifeline to medical and other life supports. Although she, before meeting Officer Goodwin, had a long, and often shifting, list of intended post-mortem gifts to friends and*

<sup>71</sup> Judge Cassavechin explained "[W]hen a distributee/beneficiary in a "fiduciary capacity" or is in a "confidential relationship" with testatrix/grantor, he has the "burden of proving an absence of undue influence". This [rule is] based upon the inference of undue influence which arises in cases in which the beneficiary of a transfer holds the position of trust and confidence of the party making the transfer." *Archer v. Dow*, 126 N.H. 24, 28 (1905) (inter vivos transfer); *relying on Ederly*, 73 N.H. at 408-09 ("Whenever it appears that the donor was dependent upon or under the control of the donee, and that the latter took in active part in procuring the gift, it may be inferred that the gift was procured by undue influence." (will contest)), *ibid.* p.7.

<sup>72</sup> *Ibid.* p. 52-53.

<sup>73</sup> *Ibid.* p. 55.

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Rainey  
AAA# 01-15-0004-5476

Page 41 of 63

helpers, there is no evidence that she ever desired to benefit another in such a generous manner.

... Simply put, the uncharacteristic generosity to a relatively new friend to whom she became emotionally and physically dependent made the devise/grants to Officer Goodwin strikingly unnatural, in particular when compared to prior planned dispositions when Ms. Webber was in stronger mental and physical health, and less dependent or under the control of any one person. It is these special circumstances that lead the Court to conclude that the common law inference of undue influence has not been disproved. (Emphasis added)<sup>74</sup>

- In addition, the Court holds the Proponents of the 2012 Estate Planning Documents have not overcome the inference that Officer Goodwin, by design, carried out by the Fiduciary, accomplished execution of documents reflecting his will and not the unfettered agency of Ms. Webber. Officer Goodwin actively sought out counsel for Ms. Webber.

Although it was Attorney Nadeau who ultimately contacted the Fiduciary, the Court cannot ignore the hand of Officer Goodwin, in particular given Attorney Nadeau's letters to the fiduciary seeking updates on behalf of his client, and thus applying subtle pressure on the fiduciary to complete the "process".

Design can also be inferred by Officer Goodwin's failure to update his January 10, 2011 memo during Detective Warchol's investigation to reflect that: (1) Ms. Webber had informed him she would be leaving him her home and contents; and (2) he had begun a process to procure legal counsel to draft documents including such a generous devise. (Emphasis added)<sup>75</sup>

- Accomplishment was effected through choice of counsel ... Again, Officer Goodwin's participation in the choice of counsel and then oversight through his lawyer is indicative of accomplishment and casts doubt on whose will was driving the execution of an estate plan with such generosity bestowed on him.

In rebuttal, the Proponents offered testimony of Officer Goodwin that he was only helping Ms. Webber accomplish what she wanted and that he only agreed to accept millions of dollars of assets to make her happy. Again, given his often evasive, sometimes dubious testimony and often selective memory, the Court cannot give credit to Officer Goodwin's recounting of facts without independent verification.

Footnote 49: There was testimony that Ms. Webber consistently voiced a desire to benefit Officer Goodwin. Though, the Court does not doubt the truth that she made such declarations, it is suspect, however, that the insistence was truly autonomous and not that of Officer Goodwin. (Emphasis added)<sup>76</sup>

<sup>74</sup> ibid. p. 56-57.

<sup>75</sup> ibid. p. 57.

<sup>76</sup> ibid. p. 58.

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPPA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 42 of 68

- Although all agree, and the video demonstrates, that Ms. Webber possessed a vivacious, funny, irreverent, and lively personality, those traits do not logically offer sufficient support to overcome an inference of undue influence, particularly in the face of those facts indicative of undue influence discussed supra. (Emphasis added by Court in italics) (Emphasis added by Arbitrator underlined)<sup>77</sup>

Furthermore, Chief Merrier read the Probate Decision statement, "[T]he Court, . . . concludes that the 2012 Estate Planning Documents must be invalidated as the product of undue influence exerted by Officer Goodwin" and stated it was clear that Judge Cassavechla ruled as a result of the Grievant exerting undue influence over Ms. Webber the Estate Planning Documents were invalidated. (Tr. 808)

## 2. Capacity

With regard to capacity, the Court concluded it was not necessary to decide whether Ms. Webber lacked capacity when the Estate Planning Documents were executed on May 2, 2012 because it had found that Officer Goodwin exerted undue influence over her. Therefore, the City cannot use the Probate Decision as a means to justify the Grievant's termination from the Department because he knew Ms. Webber did not have the requisite capacity to execute the Documents. Judge Cassavechla acknowledged that determining whether Ms. Webber had the capacity or competency upon execution was a "closer question for the Court". . . .

The Court noted to make a determination of capacity, common law, in layman terms, requires four (4) elements to be present: (1) the person must understand what they are signing; (2) the person must be able to recall their property that s/he is disposing and the value of it; (3) the person must know who their nearest relative and

<sup>77</sup> ibid.

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 43 of 69

what she owned at the time of the Documents were executed; and (4) be able to elect who would receive and how they would receive the property through the Will. Although Judge Cassavechia was troubled and concerned<sup>78</sup> with what occurred when the Estate Planning Documents were executed via the video tape (CX 41), he opined "Ms. Webber does indeed appear in the video, at the time of execution, to understand that she is signing a testamentary document and the trust that include post-mortem gifting". (Citation omitted)<sup>79</sup>

The Court recognized the Petitioners "... raised serious doubt about Ms. Webber's mental state such that the common law presumption of capacity was rebutted".<sup>80</sup> Nevertheless, at the conclusion of Judge Cassavechia's analysis he found based upon the video tape, factors 1 and 2 above were present; however, "[H]ad the Court been called upon to tender a decision of capacity, concerns about elements three through [sic] four, however, *may* have been sufficient to support a ruling that the Proponents of the [Estate Planning Documents] failed to carry their burden of showing, by a preponderance of the evidence, testamentary capacity".<sup>81</sup> (Emphasis added) The operative word here is *may* and the Court did not rule on capacity.

### 3. Issues with Officer Goodwin's Credibility

Judge Cassavechia found that portions of the Grievant's testimony were not credible.

<sup>78</sup> Estate of Geraldine W. Webber, New Hampshire Circuit Court, 7th Circuit Court-Probate Division, Case Number 318-2012-ET-01509, (Cassavechia 2015), p. 42, Points 4 & 5, p. 49-50, Bullets #2 - #9.

<sup>79</sup> Ibid, p. 60.

<sup>80</sup> Ibid, p. 61.

<sup>81</sup> Ibid, p. 62.

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 44 of 68

- The Officer Goodwin stated that during a January 4, 2011 meeting with Chief Ferland, the Grievant told the Chief Ms. Webber planned to bequeath her home and contents to him.

Chief Ferland denied this conversation occurred when he met with Chief Justice Roberts on May 18, 2015 (UX28) and under oath during the Probate hearing.<sup>82</sup> Also, there was no mention of Ms. Webber bequeathing the house to Officer Goodwin in the January 20, 2011 memorandum from the Grievant to Chief Ferland. Upon review of all pertinent documents I find no evidence to corroborate Officer Goodwin told Chief Ferland about Ms. Webber was giving him the house or the contents within.

- The Grievant said he informed Captain McDonald that Ms. Webber was bequeathing the house and contents to him in early to mid-January. Captain McDonald stated that he did not know this fact when he wrote a report on January 17, 2011. (UX18)

The January 17, 2011 memorandum does not mention Ms. Webber is bequeathing the house to Officer Goodwin. In addition, although Captain McDonald notes that Ms. Webber met with Chief Ferland, Captain McDonald after talking with the Grievant did not know Officer Goodwin met with the Chief regarding Ms. Webber and Captain McDonald explained it was him, not the Chief according to the Grievant, who recommended Officer Goodwin ". . . stop seeing Ms. Webber on duty, and stop buy [sic] her house before or after work, but not during work unless there is some official business to attend to". (UX13) This memorandum in conjunction with Chief Ferland's testimony that he did not know Ms. Webber was bequeathing her home and contents to Officer Goodwin corroborated he did not inform the Chief about Ms. Webber giving him

<sup>82</sup> Estate of Geraldine W. Webber, New Hampshire Circuit Court, 7th Circuit Court-Probate Division, Case Number 91B-2012-ET-01509, (Casevechia 2015), FN 47, p. 32.

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 45 of 69

the house. Therefore, the Grievant was lying about having a conversation with Chief Ferland.<sup>63</sup>

- After Ms. Webber met with Chief Ferland and Captain Schwartz and discussed her concerns with Attorney Rilzo exploiting her, Officer Goodwin was asked by Captain Schwartz to write a memorandum regarding his knowledge of Ms. Webber accusation of Attorney Rilzo exploiting her. The Grievant submitted the memorandum to the Chief on January 10, 2011 and the majority of the memo concerns the interactions between Ms. Webber and Attorney Rilzo. In addition, he writes about a small gift Ms. Webber gave him for his children and how he informed his direct supervisor, Sergeant Kaavany, and Captain Schwartz that he had received the gift.

Officer Goodwin also writes about a meeting he had with Chief Ferland on January 4, 2011, where they discussed his "... Interactions with Ms. Webber and concerns about Attorney Rilzo". The Grievant includes in the section that Chief Ferland and he agreed "... my relationship with Ms. Webber had grown into a friendship and it would be best to visit her off-duty".

The memorandum does not mention about the Christmas Eve phone call or the after holiday voice message regarding Ms. Webber's plan to also give him the contents of her home.

When the Court reviewed the January 20, 2011 memorandum, Judge

Cassavachia noted the same omission stating:

Remarkably, this January 10<sup>th</sup> memorandum, while mentioning gifts of limited value, completely omits any mention that Ms. Webber, by the date of the memo, wanted to leave her house to Officer Goodwin. Neither Officer Goodwin nor Detective Warhol ever supplemented, or asked to supplement, the memorandum. The former [the Grievant] testified unconvincingly that no mention was made because he was told that the subject of the memo was Attorney Rilzo and that valuable gifts were brought up a separate "chain of command". The Court has a very difficult time with this explanation as Officer Goodwin testified that he was given notice about the Internal Investigation concerning a complaint involving a proposed will/bequest by Ms. Webber.<sup>64</sup>

In the Opinion Section of the Termination Award I found:

<sup>63</sup> I acknowledge the Task Group Report concluded that Officer Goodwin's testimony regarding talking the Chief about the house, etc. was the likely version of what happened but the evidence does not confirm their conclusion.

<sup>64</sup> Estate of Geraldine W. Webber, New Hampshire Circuit Court, 7th Circuit Court-Probate Division, Case Number 318-2012-ET-01509, (Cassavachia 2015), FN 47, p.35.



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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 46 of 68

I concurred with the Department that Officer Goodwin's was very circumpect about what he disclosed to his Command Staff. Specifically, I agreed that the Grievant's "... explanation why he did not include Ms. Webber's house bequest in his July [January] 10, 2011 was not credible and suspicious given that the memorandum would be sent to outside agencies to investigate Ms. Webber's claim that Attorney Ritzo was exploiting her".<sup>85</sup>

\* \* \*

Officer Goodwin's explanation why he did not mention Ms. Webber bequeathing her home in the January 10, 2011 memorandum is not credible and suspicious. The fact that the memorandum, written for the purpose of investigating Ms. Webber's complaints that Attorney Ritzo was exploiting her, leaves out the possibility of the Grievant receiving her house was an interesting omission.<sup>86</sup>

Based on the above, Judge Cassavachia believed Officer Goodwin was lying confirms my belief he was lying. The Grievant was protecting himself from also being a suspect of exploiting Ms. Webber given that he had only known her for three (3) months and she was bequeathing her home to him and the January 20, 2011 memo would be reviewed by the Attorney General's Exploitation Unit and BEAS. This lie is now more than an "interesting omission" but proof that Officer Goodwin omitted it as not to raise exploitation red flags about himself.

In addition, his testimony is implausible because earlier in the memo he mentioned the small gifts to his children, which had nothing to do with Ms. Webber's exploitation concerns with Attorney Ritzo. If one followed the Grievant's reasoning then the gifts for his children were irrelevant to the contents of the memorandum and should not have been referenced, yet they were. Furthermore, if Officer Goodwin had referenced the bequeathing of the house in the January 4, 2011 section of the

<sup>85</sup> City of Portsmouth, New Hampshire Police Commission/Police Department and Portsmouth Ranking Officers Association, NEPBA, Local 220 (August 2017), p. 31.

<sup>86</sup> Ibid. p. 35.

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Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NRPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 47 of 63

memorandum, which dealt with his meeting with Chief Ferland, then it would have corroborated he had inform the Chief, which Chief Ferland consistently denied.

- The Grievant's reasons for Ms. Webber dismissing Attorney Mulhern after he recommended a guardian-initiated estate plan.

Judge Cassavechia stated it was curious why Attorney Mulhern was dismissed after suggesting court intervention, which would have increased scrutiny on Ms. Webber's bequests to the Grievant. As such, the Court was not "... persuaded that [Attorney Mulhern] was dismissed for lack of attentiveness or diligence and [the Court] specifically does not credit Officer Goodwin's testimony that Ms. Webber of her own volition initiated his dismissal".<sup>87</sup> I concur with the Court's finding based on the Grievant admitting Ms. Webber's primary care Physician Dr. Schwartz informed him that she suffered from cognitive impairment with short term memory loss. In addition, he learned after reading Attorney David Mulhern's May 9, 2011 letter to Ms. Webber that Attorney Mulhern had reservations about her mental capacity and the Will being challenged. The letter read in pertinent part:

... It was clear to [Attorney Mulhern] that serious professional questions have arisen about your testamentary capacity. Certainly, Dr. Schwarz specifically indicated that he could not attest to your legal capacity to execute a Will. In light of that, it is my view that any Will you signed would be highly subject to legal challenge, and that such challenge might well be successful, which would undermine anything in the Will, including without limitation any bequest of the house to Aaron.

In light of these realities, I suggest that we initiate an action in the Rockingham County Probate Court to have a guardian-initiated estate plan prepared on your behalf. . .

<sup>87</sup> Estate of Geraldina W. Webber, New Hampshire Circuit Court, 7th Circuit Court-Probate Division, Case Number 918-2012-ET-01509, (Cassavechia 2015), FN 47, p.57.

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Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 48 of 63

After reading the above, Officer Goodwin, who agreed Dr. Schwartz was the best professional to determine Ms. Webber's mental capacity and in conjunction with his statement he trusted the professionals, i.e. lawyers, working with her to attend to the concern that she was giving him the majority of her estate, the Grievant should have understood that now two (2) professionals questioned her legal capacity to execute a Will.

Attorney Mulhern tried to assist Ms. Webber to obtain a legal, executable Will and his recommendation of a guardian-inflated Estate Planning Document was ignored by Officer Goodwin, even though it would have benefited him as well. Furthermore, although the Grievant allegedly did not know what a guardian inflated estate was at the Probate Court he said ". . . It sounded pretty good to me, though". (Tr. 858) If this is how Officer Goodwin felt and he was looking out for Ms. Webber's ability to change her Will then he should have discussed with her that a guardian-inflated estate plan may be the way to get her wishes accomplished. This conversation never occurred and Attorney Mulhern was fired about the same time when the recommendation was made.

- The Court found there was nothing in the Attorney General's investigation, Ms. Webber's interview transcript or any other evidence that corroborated the Grievant's explanation that he persisted at obtaining an attorney to rewrite/update Ms. Webber's Will under the direction of the Attorney General's Office.

Upon review of all the documents placed before me in this case, I agree with the Court that Officer Goodwin's explanation is not credible because it is uncorroborated and borrowing from Judge Cassavechla's findings, "self-serving and dubious". Furthermore, although the Grievant admitted, by assisting Ms. Webber to obtain an attorney to change her Will, he understood the major change would give him the bulk of her estate,

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAAF 01-15-0004-5476

Page 49 of 63

however, this did not deter him because it was something that she wanted to do and it made her happy. This explanation is also self-serving, dubious and not credible given that based on Dr. Schwartz's diagnosis Ms. Webber suffered from cognitive impairment and short term memory loss, Attorney Mulhern's May 9, 2011 letter, and the fact Officer Goodwin would ultimately benefit the most from the Will being changed.

- [The Court] found the testimony of . . . Officer Goodwin . . . to be often defensively self-serving and at most critical points implausible. As such, it has accorded weight only in those instances when independently corroborated by credible evidence testimony of others or documentary evidence.<sup>88</sup>

Again, given his often evasive, sometimes dubious testimony and often selective memory, the Court cannot give credit to Officer Goodwin's recounting of facts without independent verification.<sup>89</sup>

Having Judge Cassavechla declare that he could not credit the Grievant's testimony without independent verification damages his credibility in future court proceedings. Chief Merner, having testified in court thousands of times, believed it is important that a police officer has a reputation of being truthful and has integrity. Also, the Chief had reservations about Officer Goodwin's ability to be a Portsmouth Police Officer after Judge Cassavechla questioned his credibility. Chief Merner stated:

*. . . this is an adjudication by a judge . . . a federal judge has made an order relative to the credibility of -- of Officer Goodwin and others within the Department, and that undue influence was exerted over . . . one of the most vulnerable groups in our city. So I would have reservations as to whether or not Officer Goodwin would be able to take the stand as a police officer, or if he did, all of this would be open each and every time. (Tr. 722) (Emphasis added)*

<sup>88</sup> Estate of Geraldine W. Webber, New Hampshire Circuit Court, 7th Circuit Court-Probate Division, Case Number 318-2012-ET-01509, (Cassavechla 2015), FN 47, p. 17.

<sup>89</sup> *Ibid.*, p. 58.

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 50 of 68

The Union pointed out while examining the Chief, if he made an incorrect statement that did not mean he was a liar or an untruthful person, and that he would be able to testify again or function as a police officer. Chief Merner responded:

*I would say it depends on what the Judge rules. If the Judge rules that I find the officer [sic] testimony to be false or not credible. I think that makes a big difference. Doesn't mean they have to be fired or let go from the job, but it is going to be something that they're going to have to withstand forever. (Tr. 783)  
(Emphasis added)*

Furthermore, the Grievant acknowledged during the Arbitration hearing his credibility had been called into question by the media and the public as a result of the Decision.

Having reviewed the Decision, I returned to the Nashville Banner Decision where the Court found:

*Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge.<sup>80</sup> (Emphasis added)*

Based on the evidence and findings above, the Probate Decision established that Officer Goodwin's wrongdoing of exerting undue influence over Ms. Webber to become the beneficiary of over \$2 million dollars of her Estate Planning Documents and the Grievant's testimony was deemed not credible unless corroborated by documentation was so severe that alone, it was cause for Officer Goodwin's termination if the City had known of the wrongdoing at the time of the discharge.

<sup>80</sup> 518 U.S. 352, 362-363 (1995).

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 51 of 68

The Union put forth numerous arguments that reinstatement with full back pay and benefits is the appropriate remedy and those arguments have been considered below.

The Court's Subsidiary Findings Do Not Provide Just Cause for Termination

The Union's assertion the City's independent examples of the Grievant's misconduct<sup>91</sup> do not provide just cause for his termination. I find this assertion is meritless given that there is no need for the independent examples to be considered because the Probate Decision established Officer Goodwin's exerted undue influence over Ms. Webber and the finding that his testimony was not credible alone are justification for termination.

Broad, Non-Specific Conclusions By The Court Cannot Establish Just Cause

The Union's contention that Judge Cassavechia's presented broad, non-specific conclusions regarding the Grievant's testimony is meritless. The Court's specific examples of when Officer Goodwin's testimony was found not credible are identified and discussed above.

To the Extent The City Relies on Specific Findings – Such Findings Do Not Prove Just Cause for Termination

The Union's argument that specific Court findings do not provide just cause for termination are irrelevant because the findings of the Grievant's wrongdoings, i.e. exerting undue influence over Ms. Webber and lack of credibility, are so severe that the Officer Goodwin would have been terminated on these grounds alone if the City had

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<sup>91</sup> Union Brief, p. 11-13.

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 52 of 63

known of the information at the time he was discharged. Thus, reinstatement is not an appropriate remedy.

The Existence of the Probate Court Decision Does Not Provide Just Cause

The Union argued the Probate Decision has not compromised the Grievant's ability to testify in court. Prosecutors are required to provide criminal defendants with potential exculpatory material and New Hampshire's Attorney General recently updated the *Laurie* protocol, regarding maintaining a list of police officers who have credibility issues based on variety of reasons. (UX97) The new protocol retains the list requirement which is called the Exculpatory Evidence Schedule (EES or EES List) and "[T]he EES will include designations to distinguish between officers with credibility issues and officers with other potentially exculpatory evidence in their personnel files".<sup>62</sup>

The Union pointed out the Attorney General stated:

It is important to recognize that inclusion on the EES does not mean that an officer is necessarily untrustworthy or dishonest ---and in many cases the designation on the EES will make it clear there is no question of dishonesty. Nor does it mean that information contained in an officer's personnel file will be used at trial or otherwise become public. It simply means that there is information in the file that must be disclosed to a criminal defendant if the facts of the case warrant that disclosure. Whether that material will be used at trial to cross-examine the officer will be subject of pre-trial litigation.<sup>63</sup>

The Union contends the Probate Decision will not impede Officer Goodwin from testify given that based on New Hampshire Rule of Evidence 608(b) (Rule 608(b)), the Decision would be inadmissible.

<sup>62</sup> UX 97, p. 3.

<sup>63</sup> *Ibid*.

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 59 of 69

Having considered the Union's arguments, I find that they are unfounded. One,

Rule 608(b) states:

Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. *But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: (1) the witness; or (2) another witness whose character the witness being cross-examined has testified about.*<sup>94</sup> (Emphasis added)

Given that the rule *may* provide the Court, on cross-examination, to allow an inquiry on extrinsic evidence depending on the probative value for the untruthfulness of a witness, it cannot be confirmed that the Probate Decision would not be admissible. Two, the Decision may be admissible based on the specific factors relating to degree of probative value set forth by the NH Supreme Court, State v. Miller, 165 N.H. 246, 249 (2007), e.g. (1) whether the testimony of the witness is crucial or unimportant, (2) the extent to which the evidence is probative of truthfulness or untruthfulness, . . . (4) the extent to which the act of untruthfulness is connected to the case, etc.<sup>95</sup>

Three, although in State v. Coleman, 181 A.3d 689,687 (ME 2016), United States v. Cruz, 894 F.2d 41, 43 (2nd Cir. 1990) and United States v. Pickard, 211 F. Supp.2d 1287, 1294 (D. Kan 2002) the Courts found that prior cases, which were unrelated or not relevant, could be used to question the credibility of a witness *may* occur thus, there is no guarantee the Probate Decision will not be deemed admissible. Accordingly, requiring the City to reinstate the Grievant to see if his credibility will be called into question based on the Probate Decision is inappropriate.

<sup>94</sup> <https://www.courts.state.nh.us/rules/evid/evid-608.htm>, October 15, 2018.

<sup>95</sup> Miller, 155 N.H. at 252-53, 921 A.2d 942 (2007) (Citations omitted).



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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 54 of 68

Four, as discussed above, given that the Court found Officer Goodwin exerted undue influence over Ms. Webber, the Decision is admissible because the Grievant did not meet his burden of proof. Five, the testability of the broad findings regarding plausibility or evasiveness were proven and could be used to impeach Officer Goodwin's future credibility. Six, the Union only mentions two (2) of the Courts findings that the Grievant was not credible i.e. Ms. Webber was in love with Officer Goodwin and/or she did not treat the Grievant as second son and the dismissal of Attorney Mulhern, there are several others discussed and all of them were determined not credible.

I agree with all Judge Cassavechia credibility findings except for one. I acknowledge the Court rejected Officer Goodwin's and others claimed Ms. Webber loved him "like a son or second son" and that the "genesis of her affection was not parental in nature"; however, I do not conclude Ms. Webber was in love with the Grievant but I do believe she was infatuated with him. This determination is made because she desperately wanted to please him so he would keep coming back to visit and support her. Upon review of how intertwined Ms. Webber's and Officer Goodwin's lives were and her dependency on him and infatuation is proof that he had the opportunity to exercise undue influence.

Seven, the Union cited three (3) arbitration awards to support their position. In City of Hutchinson, 134 LA 1683 (Kossoff 2014) Arbitrator Kossoff found there was no just cause to discharge the police officer for dishonesty because he lied and his Award would not be admissible for impeachment purposes under local Kansas law. I have

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 55 of 63

review the Award and Arbitrator Kossoff based his non-admissibility/impeachment findings on submitted evidence of applicable statutory and case law in the State of Kansas and the parties' briefs. Without that information, I cannot evaluate if there are similarities in New Hampshire and Kansas law to determine I would reach the same conclusion. In addition, the officer in Arbitrator Kossoff's Award lied once in an interview and later in the same interview admitted that he lied. Here, the Grievant either lied or his testimony was deemed not credible based on him being evasive, dubious, implausible and self-serving more than once and Officer Goodwin never admitted fault.

In Appeal of Pelham, 808 A.2d 780 (N.H. 2003) the Court rejected the Town's Laurie argument that they could not be mandated to reinstate an untruthful employee who may testify in future criminal proceedings. The Court's rejection was based on the employee being a police dispatcher and found there was no "strong and dominant" public policy against reinstating civilian police employees who were untruthful and may be required to testify. It is unknown whether the Court would come down differently if the employee was a police officer and not a civilian police employee. In the Union's last Award, Union County Sheriff, 123 LA 1101 (Sellman 2007) I find the facts are case specific and dissimilar enough that they cannot be compared.

The City's Treatment of Current Employees Undermines It's Claims That The Probate Decision Provides Just Cause

The Union maintains the City failed to discipline their police officers consistently when they took no action against Detective Warchol, a similarly situated employee, after the Court also found his testimony was self-serving, dubious and often contradictory. In addition, Detective Warchol was promoted to the rank of Captain and is now second in

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 56 of 63

command as the Department's Operations Captain. The Union believed that Captain Warchol was appropriately placed in that position but his promotion emphasized the "... weakness and inconsistency of the City's contention that Officer Goodwin can no longer serve as a police officer because of the Probate Decision".<sup>66</sup> To support their position, the Union cited two court cases, Desmond v. Town of W. Bridgewater, 2016 WL 3145954, at\*5 and O'Day v. McDonnell-Douglas Helicopter Co., 79 F 3d. 753, 702 (9<sup>th</sup> Cir. 1996) and Arbitrator Sellman's Award discussed above.

Chief Merner stated that he did have a problem with the way Captain Warchol handled the Grievant's IA and he looked at Captain Warchol's part as errors of judgment given that he did not perform due diligence on the investigation. In addition, he believed that Captain Warchol would have to deal with the impact of the Probate Decision if he was called to testify. Furthermore, at the arbitration hearing, the Chief had not decided if Captain Warchol should be placed on the new EES List and he had contacted the Attorney General's office seeking clarification on placing him on the list.

In acknowledgement of the Union's position, I also question the Department's decision not to discipline Captain Warchol after the Probate Decision was issued. Nonetheless, I find the Union is incorrect in categorizing Officer Goodwin and Captain Warchol have similarly situation misconduct. Captain Warchol, who performed an unsatisfactory Internal Investigation on Attorney Ritzo's complaints to Captain McDonald regarding the Grievant (UX13), was following the directive of Chief Ferland.

<sup>66</sup> Union Brief, p. 27.

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Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 57 of 68

Please recall at the time, the Rules and Regulations were not being interpreted correctly and misconduct was being condoned from the Chief down the chain of command. This was the exact reason why I found the City did not have just cause to terminate Officer Goodwin. I am not stating incorrect interpretation or condonation of Rules and Regulations by Chief Ferland justified Captain Warchol's misconduct; however, these facts would be taken into consideration. More importantly although Captain Warchol followed the Chief's directive to ask only one question in the investigation cannot be compared to Judge Cassavechla's determination the Grievant exerting undue influence on Ms. Webber and his testimony was only found credible when it was corroborated by other evidence. Please note I considered the Court cases and Arbitrator Sellman's arbitration Award and none of the persuasive documents change my finding.

Further Investigation Was Obviously Necessary if the City Intended To Attempt To Discipline Goodwin Based On The Probate Decision

The Union's final argument stems from the City's failure to perform an investigation after the Probate Decision was issued to determine what rule or policy was violated and what discipline, if any, was appropriate. The Union contends the issuance of the Decision does not relieve the City from their contractual obligations to demonstrate just cause. The Union argued the City did not identify a rule or policy Officer Goodwin violated when the Decision was issued. Further, the Grievant did not

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 58 of 63

know he could be terminated if Judge Cassavechia "... found that he did not carry his burden of proof or did not carry his testimony ahead of other evidence in the case",<sup>97</sup>

The Union's position was supported by Chief Merner who stated after the Probate Decision was issued an IA would have occurred to determine the Rules and Regulations that were violated and charges would be developed and specified. The Chief also would have considered what was done with similar situated officers and what guidance Officer Goodwin received from the Command Staff. Furthermore, former Commissioner Gerald Howe, who was on the Police Commission at the time the Task Group released their Report, stated that if an employee was going to be suspended or terminated then an IA would be conducted and the Commissioners would be briefed on the findings. In addition, the employee would have several levels of review available to him/her if they were disciplined. (Tr. 213)

The Union also presented two (2) court cases, Moore v. University of Notre Dame, 22 F. Supp.2d 686,908 (N.D. Ind. 1998) and App of New Hampshire Department of Employment Security, 672 A.2d 687, 703 (N.H. 1996) in support of their position. Looking at the Court cases first, in Moore v. University of Notre Dame (Citations omitted), the Court found the University of Notre Dame's after-acquired evidence that the employee's alleged physical and verbal abuse of football players did not fall within the realm of after-acquire evidence under Nashville Banner because the employee's Head Coach knew of the behavior and argued it was one of the reasons why he was terminated. The Court concluded further that Notre Dame failed to establish that the

<sup>97</sup> Ibid, p. 31-32.

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 59 of 68

employee's misconduct was so severe that he would have been terminated on those grounds alone. The Court determined "[N]otre Dame's blanket assertion that if certain administrators had known of Moore's alleged abuse of players, Moore would have been immediately fired is insufficient to prove that such would have actually occurred. The Union maintains similar to the Employer in Moore v. University of Notre Dame the City's assertion "is nothing more than an excuse made after the fact".

The situation here is unlike Moore v. University of Notre Dame because the City was unaware the Grievant exerted undue influence on Ms. Webber and that he lacked credibility until the Probate Decision was issued. In addition, based on the findings above, Officer Goodwin's wrongdoing was so severe that he would have been terminated based on those actions alone therefore, the City's assertion is more than an excuse made after Officer Goodwin was discharged based on the Task Group's Report.

Regarding App of New Hampshire Department of Employment Security (Citation Omitted) the Court found the employee's misconduct was not sufficient to justify termination thus, reinstatement was an option. Here again, the Grievant's after-acquired evidence of his misconduct, as described in Judge Cassavechia's Probate Decision and analyzed above, was determined to be so severe that Officer Goodwin would have been terminated based on those actions alone.

Finally, although Chief Merner has only been with the Portsmouth Police Department since June 2017, he does have reservations about the Grievant's ability to be a Portsmouth Police Officer as a result of the Probate Decision. His concerns revolved around his lack of credibility, whether he is able to interact with the elderly

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Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 60 of 68

community and what impact Officer Goodwin's reinstatement would have on the Department. Specifically, the Chief stated in regards to the three (3) areas:

*... this is an adjudication by a judge, ... a federal judge has made an order relative to the credibility of ... of Officer Goodwin and others within the Department, and that undue influence was exerted over ... one of the most vulnerable groups in our city. So I would have reservations as to whether or not Officer Goodwin would be able to take the stand as a police officer, or if he did, all of this would be open each and every time. (Tr. 722) (Emphasis added)*

\* \* \*

*You know based on Cassavechla's decision ... I didn't walk in Aaron's shoes, but I can tell you that there's been now an adjudication, which is different from an accusation. I think in policing we all get accused of something at one point or another within our career, but there's been now an adjudication by a judge that there was undue influence over an elderly person with dementia or diminished capacity. I find it hard you know ... but our officers are in court frequently, our detectives are in court regularly, our sergeants are in court regularly, that it would be extremely difficult to function as a police officer ... with this decision hanging over your head. (Tr. 728-729)*

\* \* \*

*... many officers have worn this case, right, wrong or indifferent, fair or unfair, for a long time ... and I know just in talking to officers, ... many that worked with Aaron, many that like him, many that didn't -- some that didn't, rather, that they feel they've been all painted, that every time they walk out the door with the Portsmouth Police uniform on, that people were looking at them, and quite frankly in some cases confronting them relative to that case. ... there are people that are just never going to be satisfied with the Portsmouth Police ... And there are people that will support us pretty much unequivocally. But there is a huge group in the middle that this decision has caused them a lot of distrust. ... So there is a lot of mistrust out there. And so what effect Aaron himself would have coming back, I can't say. But I can tell you that this case has caused great mistrust with the community and caused a lot of consternation for the police officers that - that worked during this time. (Tr. 720-728) (Emphasis added)*

Returning to the Grievant's problems that I identified in the Termination Award, Judge Cassavechla's Probate Decision confirms them given that the Officer Goodwin's testimony was found to be not credible, self-serving, dubious, implausible and contradictory. In addition, his action of not disclaiming Ms. Webber's bequest of over \$2 million dollars brought disrespect and disrepute to himself and the Department.

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 61 of 69

which resulted in the loss of public trust in the entire Police Department. Based upon this, it is clear the Grievant cannot be reinstated as a police officer in the Portsmouth Police Department as he would have been immediately terminated for the severity of his wrongdoing found in the Probate Decision.

One question remains given that Officer Goodwin cannot be reinstated, is he due a financial remedy as a result of being unjustly terminated on June 24, 2015? The two (2) options available is he would receive two (2) months back pay from June 24, 2015 to the issuance of the Probate Decision on August 20, 2015, the only viable remedy argued by the City or back pay from June 24, 2015 to August 7, 2017 when the Grievant would have been disciplined or terminated if not for the mitigating circumstances of the Commission and the Command Staff incorrectly interpreting the Rules and Regulations and condoning his improper conduct. The Union argued a third option should be available – back pay to the date of this Award; however, I do not find this a viable option based on the severity of Officer Goodwin's actions determined in Judge Cassavechia's Probate Decision.

Having excluded the viability of the third option, I find the Grievant shall receive back pay from June 24, 2015 to August 7, 2017 minus compensation and benefits and/or unemployment received during the same period of time. I reached this conclusion based on the fact the City did not afford Officer Goodwin due process rights under the Agreement and pre-termination rights of notice of hearing and an opportunity to be heard required under Cleveland Board of Education v. Loudermill 470 U.S.532, 105 S. Ct. 1487, 84 L.Ed.2d 494 (1985) after the Probate Decision was issued and he

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 62 of 63

was terminated from the Department<sup>99</sup>. Specifically, the Department did not conduct an investigation, identify Rules and/or Regulations that were violated, hold a pre-termination hearing, present charges and Officer Goodwin's appeal rights to arbitration did not occur. As discussed in the Evidentiary Award issued on January 13, 2017:

*[T]he Nashville Banner<sup>99</sup> Court case dealt with an at-will employee, private employment employee with no property rights to her position and no due process rights of notice and the opportunity to be heard under a collective bargaining agreement. In addition, while McKennon's pre-termination misconduct was discovered after she was discharged . . . once the Employer learned of the misconduct they terminated McKennon a second time for the new misconduct. McKennon's termination letter also stated that had Nashville Banner known of the employee's . . . misconduct it would have terminated her at once for that reason.*

*The facts of this case differentiate it from Nashville Banner. One, Officer Goodwin was not an at-will employee and he had property rights and due process rights under Section 3-Employee Rights and Section 36-Grievance Procedure of the Agreement. The Supreme Court in Nashville Banner did not consider these rights for McKennon, an at-will employee . . . Two, when the Probate Decision was released and Judge Cassavechia ruled that Officer Goodwin failed to establish a lack of undue influence over Ms. Webber, *the City did not notify the Grievant he was now terminated based on both the Task Force Report and the Probate Decision. Nor did the City inform the Grievant he was terminated a second time based solely on the Decision. . . . The City did not inform Officer Goodwin had they known about the issues and/or factual findings contained in the Probate Decision the City would have terminated the Grievant at once for those reasons.*<sup>100</sup>*

### AWARD

The City established through the Judge Cassavechia's Probate Decision dated August 20, 2015 Officer Goodwin exerted undue influence over Ms. Webber and the Grievant's trial testimony was deemed not credible.

The Court found Officer Goodwin's misconduct was of such severity the Grievant would have been terminated on those grounds alone if the City had known of the misconduct at the time of the discharge.

<sup>99</sup> Please refer to the Parties' Stipulation above, p. 5.

<sup>99</sup> McKennon v. Nashville Banner Publishing Co. 519 U.S. 952 (1995)

<sup>100</sup> City of Portsmouth, New Hampshire Police Commission/Police Department and Portsmouth Ranking Officers Association, NEPBA, Local 220 (McSpirtt, January 2017), p. 13-15.

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Remedy  
AAA# 01-15-0004-5476

Page 63 of 63

Officer Goodwin shall not be reinstated to the Portsmouth Police Department.

The Grievant shall receive full back pay and benefits from the date of his wrongful discharge - June 24, 2015 to when the Termination Award was issued or August 7, 2017 minus any compensation, benefits and/or unemployment received during the same period of time.

The Arbitrator shall retain jurisdiction for sixty (60) days for the sole purpose of resolving any disputes that may arise from the parties determining the remedy. Either party may invoke jurisdiction within that time frame.

\_\_\_\_\_  
Bonnie J. McSpitt, Arbitrator

October 22, 2018

\_\_\_\_\_  
Date

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**IN THE MATTER OF ARBITRATION BETWEEN:**

**CITY OF PORTSMOUTH, NEW HAMPSHIRE  
POLICE COMMISSION/POLICE DEPARTMENT**

**AND**

**PORTSMOUTH RANKING OFFICERS ASSOCIATION,  
NEPBA, LOCAL 220**

**GRIEVANT: AARON GOODWIN  
TERMINATION  
AAA# 01-15-0004-5478**

---

**OPINION AND AWARD**

The City of Portsmouth, NH Police Commission/Police Department (Commission or Department) and the Portsmouth Ranking Officers Association, New England Police Benevolent Association, Local 220 (Union) are parties to a collective bargaining agreement (Agreement). Under Section 35 – Grievance Procedure unresolved grievances are submitted to arbitration. The parties met before Arbitrator Bonnie J. MoSpirtt regarding the above referenced grievance. Attorney Thomas Closson from the Law Firm of Jackson Lewis, PC represented the Department and Attorneys Peter J. Perroni and Gary Nolan from the Law Firm of Nolan Perroni, LLP represented the Union.

On the first day of hearing, the parties presented a procedural arbitrability issue regarding the admissibility of Probate Judge Gary R. Casavechla's decision concerning the Estate of Geraldine Webber and presented arguments to that regard. On January 13, 2017, the following Award was issued on the procedural question:

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Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 2 of 36

AWARD

Probate Judge Gary R. Cassavechia's decision concerning the Estate of Geraldine Webber is not admissible in the just cause analysis of Officer Goodwin's termination.

The Probate Decision is admissible in the remedy proceedings of arbitration, if necessary.

The Probate Decision's factual findings do not have preclusive effect.

During the time the above issue was briefed and awarded the parties moved forward on the merits of the case holding hearings in September, December and February. The City presented five (5) witnesses: the Honorable Judge Stephen H. Roberts (Judge Roberts), Police Commissioner Gerald Howe (Commissioner Howe); Police Commissioner Brenna Cavanaugh (Commissioner Cavanaugh), Police Commissioner Chairman John Golumb (Chairman Golumb) and Former Chief of Police Stephen DuBols (Chief DuBols). The Union presented the Grievant, Aaron Goodwin (Officer Goodwin or Grievant). All the witnesses were sworn in and the parties had the opportunity to examine and cross examine the witnesses. The parties filed briefs and the hearing was closed upon receiving them.

ISSUE

Did the Portsmouth Police Commission/Police Department have just cause to terminate the Grievant, Aaron Goodwin?

If not, what shall be the remedy?¹

¹ If the finding is that the City did not have just cause to terminate Officer Goodwin the parties agreed that the remedy shall be deferred.

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 3 of 36

**PERTINENT CONTRACT LANGUAGE**

**SECTION THREE**  
**EMPLOYEE RIGHTS**

\* \* \*

B. No permanent employee shall be disciplined except for just cause ...

**RELEVANT RULES AND REGULATIONS OF THE PORTSMOUTH POLICE  
DEPARTMENT AND PORTSMOUTH CITY ORDINANCES**

**11.00 PREAMBLE**

\* \* \*

11.03 Authority Vested – Chief of Police Through authority vested in the Chief of Police by the Board of Police Commissioners, the Chief of Police reserves the right to alter, amend, revoke or add to these rules and regulations as the necessity arises. (Footnote is exclude)

\* \* \*

11.05 Interpretation – Rules & Regulations It is understood that the rules and regulations contained herein will not cover each and every situation that may arise, and when found to be inadequate, incomplete or not adapted to a particular situation, they must be supplemented and interpreted by individual members with intelligence and discretion.

**21.00 CHIEF OF POLICE**

21.01 Authority: The Chief of Police, through authority vested in him by the Board of Police Commissioners is designated as the Chief Administrative Officer, and reserves the right to alter, amend, revoke or add to these rules and regulations at the chief's discretion as the necessity arises.

21.02 Responsibility: Through the Chief of Police, the department is responsible for the enforcement of all laws coming within its jurisdiction. The position is responsible for leading, planning, directing, coordinating, controlling, and staffing all activities of the department, for its continued and efficient operation. The office of the Chief of Police is also ultimately responsible for the enforcement of rules within the department, the completion and forwarding of reports as required by competent authority, for departmental relations with other agencies, the city government, and the protection of people and property within the city.

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Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers' Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 4 of 36

**50.00 PROHIBITED CONDUCT**

**50.01 Acceptance or Solicitation of Gifts, Rewards, and Other Gratuities:**

**A. Gifts, loans or fees from the public:**

Employees shall not accept for either personal use or department use, either directly or indirectly, any gift, gratuity, service, object, loan, fee or any other thing of value, arising from or offered because of police employment or any activity arising from or connected with said employment. They shall not accept any gift, gratuity, loan, fee or any other thing of value, the acceptance of which might tend to influence directly or indirectly the actions of said employees or any other employee in any matter of police business; or which may tend to cast an adverse reflection on the department or any other employee thereof. Persons or organizations offering anything of value for department use will be referred to the Office of the Chief of Police.

\* \* \*

**I. Disposition of Unauthorized Gifts, or other Gratuities:**

Any unauthorized gift, gratuity, loan, fee, reward or other thing of value coming into the possession of any employee shall be forwarded to the office of the Chief of Police together with a written report explaining the circumstances connected therewith.

\* \* \*

**52.00 PUNISHABLE OFFENSES:**

52.27 Conduct, whether on or off duty, tending to cast disrespect or disrepute on the Department.

\* \* \*

52.30 Any other act or omission contrary to good order and discipline.

**ARTICLE VIII**  
**CODE OF ETHICS**

\* \* \*

**Section 1.802: CONFLICTS OF INTEREST**

A. No Officer or employee shall engage in any business or transaction

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 5 of 86

or shall have a financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his/ or her [sic] duties.

\* \* \*

F. Gifts and Favors: No officer or employee shall accept any gift, over \$100.00, whether in the form of service, loan, thing or promise, any other form from any person, firm or corporation which to his/ or her [sic] knowledge is interested directly or indirectly in any manner whatsoever, in business dealings with the City. This provision shall not apply to campaign contributions of \$100.00 or less.

\* \* \*

I. Incompatible Employment: No officer or employee shall engage in or accept private employment or render or seek services or goods for private interests when such employment or service creates a conflict with his/her duties.

### BACKGROUND

In October 2010, Portsmouth Police Department's chain of command consisted of Chief David Ferland, Deputy Chief Stephen DuBols, Captain Michael Schwartz, Detective Captain Cory MacDonald, Lieutenants, Sergeants, including Sergeant Keaveny who directly supervised Officer Goodwin, Detectives, including the Grievant, and Patrol Officers. Above the Chief of Police were three (3) Police Commissioners: Gerald Howe, John Rousseau and John Golumb. The Commissioners were generally not involved in the day-to-day operations of the Police Department and their responsibilities included but were not limited to overseeing the Department's budget and approving the Chief's recommendations to hire, fire and promote officers. Officer Goodwin began working for the Department in 2005 as a Patrol Officer, he was promoted to Detective in 2007 and subsequently promoted to Sergeant in January

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Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 6 of 30

2014. The Grievant was recognized as an effective and outstanding police officer by the Command Staff and the Commissioners.

On October 20, 2010, Officer Goodwin, while on duty investigating the possibility of a planned burglary in a Portsmouth neighborhood, met Ms. Geraldine Webber (Ms. Webber), a 92 year old woman who lived in the neighborhood. Ms. Webber was nervous after learning of the planned burglary and asked the Grievant to chat for a while. During that conversation, Ms. Webber complained and raised concerns about her attorney, Jim Ritzo. After hearing Ms. Webber's complaints, Officer Goodwin was concerned about Ms. Webber's relationship with Attorney Ritzo but he did not share his concerns with anyone or initiate an investigation into her complaints. Before the Grievant left Ms. Webber, she asked if he could check on her and Officer Goodwin said that he would.

Over the next couple of months, the Grievant called or stopped by to check on her almost daily. On occasion, Ms. Webber tried to give money to the grievant but he explained that he could not receive money from her. This disappointed Ms. Webber but she understood saying "he's not allowed to take anything ... he abides by his rules and regulations ... I admire him for that".<sup>2</sup> At the end of October, Ms. Webber gave Officer Goodwin gifts for his children. The Grievant knew he could not receive the gifts but not wanting to offend Ms. Webber, he accepted them and then immediately reported what happened to his supervisor, Sergeant Keaveny. Sergeant Keaveny told the Officer

<sup>2</sup> CX40- Transcript of Ms. Webber by Attorney General Office Investigator Joseph Byron and Assistant Attorney General Tracy Culbarson, February 1, 2011, p. 112.



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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 7 of 36

Goodwin he could accept the gifts because they had little financial value and were given without an expectation of police service.

Around November 22, 2010, Ms. Webber's attorney Jim Ritzo contacted Captain MacDonald about the Grievant establishing a relationship with Ms. Webber and receiving gifts from her. Overall, Attorney Ritzo questioned Officer Goodwin's motives because he believed "... that Ms. Webber was in the beginning stages of dementia and that she is often not clear in her recollection and intent".<sup>3</sup> Attorney Ritzo insinuated to Captain MacDonald that the Grievant "... was looking to enrich himself through their relationship by getting close to Ms. Webber".<sup>4</sup> As a result of Attorney Ritzo's contact, Captain MacDonald initiated an internal affairs investigation on Officer Goodwin.  
(Goodwin/Webber IA)

On December 24, 2010, Officer Goodwin called Ms. Webber to wish her a Merry Christmas and during that conversation she became very emotional and told the Grievant she wanted to bequeath her home to him. Officer Goodwin, knowing that Ms. Webber was very emotional, did not believe she intended to give him her home. Several days later Ms. Webber left a message on the Grievant's work phone asking if he also wanted the contents of her house. Upon receipt of the call, Officer Goodwin realized that Ms. Webber did intend to bequeath her home and the contents within, so he sought advice from Chief Ferland on what to do. The Grievant said he bypassed talking to his supervisors first because he had a unique relationship with Chief Ferland

<sup>3</sup> Ux96 -- Goodwin/Webber IA, #2011-01, p. 1.

<sup>4</sup> Ibid.

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 8 of 36

and the Officer Goodwin looked upon him as a friend and mentor and he trusted his judgment and advice.

On January 4, 2011, the Grievant met with Chief Ferland to explain his friendship with Ms. Webber and that she wanted to bequeath her home to him. Chief Ferland told the Grievant he could have a friendship with Ms. Webber but it had to be off duty. Officer Goodwin said at no time did the Chief tell him his friendship with Ms. Webber and her bequeathing the house to him was unethical or would violate any Rule or City Ordinance. Years later Chief Ferland denied that Officer Goodwin told him at the meeting that Ms. Webber wanted to bequeath her house to the Grievant.

On January 5, 2011, Ms. Webber and a friend met with Chief Ferland and Captain Schwartz, who was known in the Department for working with the elderly. Captain Schwartz memorialized the meeting in an undated memorandum<sup>5</sup>, which stated Ms. Webber wanted to register a complaint that Attorney Ritzo was financially exploiting her and Portsmouth Auxiliary Police Officer John Connors (Officer Connors) was invading her privacy by reporting to Attorney Ritzo when the Grievant visited with her. During the meeting, Ms. Webber also asked if Officer Goodwin could be her friend even though Attorney Ritzo had registered a complaint against him with the Department. Captain Schwartz's memorandum indicated that Chief Ferland responded he would not "... discourage any member from the Department from pursuing friendships off duty".<sup>6</sup> Captain Schwartz informed Ms. Webber he would be her police contact for the

<sup>5</sup> UX36 - Department IA.

<sup>6</sup> UX36, p.3.

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 9 of 36

complaint of financial exploitation by Attorney Ritzo. As a follow up, Captain Schwartz filed reports with the NH Attorney General's Elder Abuse and Financial Exploitation Unit and the Department of Health and Human Services, Bureau of Elderly and Adult Services (BEAS).

Shortly after the meeting, Chief Ferland asked the Grievant to submit a memorandum outlining what Ms. Webber's concerns were regarding Attorney Ritzo and Officer Connors. In the memorandum, the Officer Goodwin reported how he met Ms. Webber, that he checked in on her everyday by visiting or calling her, how their relationship grew into a friendship, that she gave him gifts for his children, what her complaints were about Attorney Ritzo and her neighbor Officer Connors and that Attorney Ritzo had communicated with him. The Grievant did not mention in the memorandum that Ms. Webber planned to bequeath her house to him. Officer Goodwin explained the absence of the bequest in that it was a separate issue from Ms. Webber's concerns with Attorney Ritzo and Officer Connor.

On or about February 1, 2011, Attorney Ritzo refiled the initial complaint with Chief Ferland regarding Officer Goodwin exploiting Ms. Webber. The Grievant was interviewed on February 15, 2011 and his memorandum of January 10, 2011 outlining his relationship with Ms. Webber and her concerns with Attorney Ritzo was used as Officer Goodwin's statement for the IA investigation. The investigation stated the following in Section VIII – Insight and Analysis of Incident and Allegation(s), 30.29 –

Special Privileges – Violation of Trust:

The profession of law enforcement calls for a police officer to lead the life of a decent and honorable man or woman. Officers who use their

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPPA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 10 of 36

positions to gain special privileges can downgrade the profession. The public long remembers violations of trust and once observed, can create an insurmountable obstruction to the cooperation of the public when it will be most needed.

Det. Aaron Goodwin, during the course of his duties as a police officer with the Portsmouth Police Dept. took part in an investigation that he was assigned to. In the course of the investigation, Det. Aaron Goodwin became friendly with Geraldine Webber. Webber, albeit a side party of the initial investigation, took a friendly liking to Det. Goodwin. Being a compassionate, thorough and kind investigator, Det. Goodwin extended his services that went beyond the average everyday police officer which eventually turned into a personal friendship. This extension was in no way an effort to glean any type of reward, gratuity or furtherance of his personal, financial gain. Det. Aaron Goodwin operated well within the Rules and Regulations and Standard Operating Procedures of the Portsmouth Police Department.

On or around February 18, 2011, the Goodwin/Webber IA was completed and a determination was made that Attorney Ritzo's complaint was not sustained. Both the Grievant and Attorney Ritzo received a letter to that regard<sup>7</sup>.

About that same time, Chief Ferland informed the Police Commission of Attorney Ritzo's complaint and the results of the Goodwin/Webber IAs. Chief Ferland also told them he had approved of Officer Goodwin having a friendship with Ms. Webber as long as it was off duty. Chairman Golumb said that the Commission understood from Chief Ferland that the Grievant was not supposed to have any contact with Ms. Webber while on duty. By the end of February 2011, the Commission and Command Staff knew Ms. Webber was going to bequeath her home to Officer Goodwin.

Over the next year and one-half, the Grievant and Ms. Webber's friendship continued with Officer Goodwin visiting her off duty on a weekly basis, except on three

<sup>7</sup> UX36 - Department IA

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 11 of 36

occasions. The Grievant called Ms. Webber generally every day and sometimes he called her multiply times per day depending on her needs. Officer Goodwin made every attempt to call her when he was coming into work or driving home. However, if things came up during the middle of the day, e.g. doctor's appointment or coordinating her schedule, etc., he would call her and then go back to work.<sup>9</sup> The Grievant stated that all police officers were allowed to make personal phone calls while on duty and Chief Ferland did not specifically tell him he could not call Ms. Webber while working. Chief DuBois and Commission Chairperson Golumb stated that the Grievant was not supposed to contact Ms. Webber while he was on duty. (Tr. Day 3, pp.403-404 and Tr. Day 5, pp. 565-566)

Officer Goodwin took Ms. Webber gambling on two (2) occasions and he took her for drinks at the Ninety-Nine Restaurant when he was off duty. The Grievant also became Ms. Webber's primary medical emergency contact, arranged for a woman to become her companion and he communicated with her doctor's office, accountant and personal banker. During this period of time, Ms. Webber told Officer Goodwin in addition to bequeathing her home and the contents within she also planned to bequeath her car and stocks that she owned. Ms. Webber also told the Grievant she wanted to get a new attorney and change her will. Officer Goodwin said that he helped Ms. Webber find a new attorney receiving recommendations from Captain MacDonald and from Attorney Justin Nadeau, who eventually represented the Grievant for a certain time period. On December 8, 2011, Officer Goodwin was legally designated as Ms. Webber's

<sup>9</sup> CX31- Call Log from Officer Goodwin to Ms. Webber.

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Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 12 of 36

Power of Attorney and a new will was signed by Ms. Webber on May 2, 2012,  
whereupon she left the Grievant a substantial portion of her estate.

In November of 2012, the first of many newspaper articles came out reporting on Officer Goodwin's and Ms. Webber's relationship and criticizing the Department's Command Staff for not stopping the friendship. Despite the negative publicity, The Commission received a recommendation from Chief DuBois to promote the Grievant to Sergeant effective January 1, 2013. The Commissioners and Chief DuBois were concerned about the negative press but the Commissioners approved the promotion because Officer Goodwin had the best test scores and interview out of the three (3) candidates. The Grievant served a one (1) year probationary period and was permanently appointed to Sergeant on January 22, 2013. Chairman Golumb said the Commissioners were still concerned about the publicity surrounding Officer Goodwin's friendship with Ms. Webber so prior to confirming the promotion, he told the Grievant "[I]f we decide to move ahead with promoting you as Sergeant, it would be on the interview process and your test results. The Webber matter, you've been cleared as of the [this] date by BEAS and the AG's office. If we find down the road contrary to that ... we will take the appropriate disciplinary action". (Tr. Day 5, pp. 564-565) Chief DuBois also supported promoting Officer Goodwin notwithstanding the newspaper articles stating:

- I felt it was improper to let [the newspaper articles] play into my decision making, because at that point anything that was done had been done and the only other waypoint that would be hit would be when Geraldine Webber died. I thought it would be inappropriate to hold up his career because of speculation of something that might come down the line. (Tr. Day 3, p. 322)

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Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 19 of 36

Also during this time frame, the Grievant was investigated a number of times by BEAS for exploitation of Ms. Webber; all their investigations concluded there were no concerns or unfounded. Attorney Ritzo also filed a second complaint with the Department in February 2012 regarding the Grievant continuing to have a relationship with Ms. Webber to gain financially as well as improperly using Department resources while on duty. On both accounts, the Department's investigation was dismissed as unfounded stating:

VIII. Insight and Analysis of Incident and Allegation(s)

In speaking with Detective Goodwin it is clear he has fostered and continued a relationship with Mrs. Webber for reasons contrary to what Mr. Ritzo alleges. Detective Goodwin stated that after their initial contact, during routine police activities, he saw an elderly woman that enjoyed his company and companionship. Taking this into consideration and the fact that Mrs. Webber benefited from his goodwill and assistance he continued to have a friendship with her and still does. It should be noted that Detective Goodwin spends additional time and resources dedicated to assisting Mrs. Webber during his off duty hours.

Mr. Ritzo's initial (secondary complaint) was generated by the fact that he learned Mrs. Webber's vehicle had been drive [sic] to the Ampet station by Detective Goodwin on January 27, 2012. Mr. Ritzo was concerned by the fact that it appeared Detective Goodwin did this while on duty and utilized department resources to do so. This allegation was overshadowed during the follow up interview with Mr. Ritzo by the fact that Mr. Ritzo believes that Detective Goodwin is continuing to have a relationship with Mrs. Webber for illegitimate reasons.

Detective Goodwin drove Mrs. Webber's vehicle to the Ampet service station during off duty hours and was driven from the Ampet service station by another Portsmouth officer(s) during the course of routine police duties and did not result in nor caused any hardship to police activities.<sup>9</sup>

<sup>9</sup> UX36 - Goodwin/Webber IA, p.3.

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 14 of 36

On August 20, 2012, Attorney Ritzo filed a complaint against Officer Goodwin with the Department of Justice for elder exploitation. The charge was investigated by the Department of Justice<sup>10</sup> and BEAS<sup>11</sup> and determined to be unfounded. Finally, Chief Dubois supported Officer Goodwin's friendship with Ms. Webber on September 19, 2012 when he responded to Seacoast Media Group regarding Attorney Ritzo's charge referenced above. Chief Dubois stated:

The Portsmouth Police Department is aware of allegations being made by Attorney James Ritzo regarding the Department. We are also aware that these allegations have been referred to the Office of the Attorney General. In general terms, the allegations concern off-duty personal issues which do not involve the Portsmouth Police Department.

Because there was minimal on-duty contact between the officer involved and a citizen who is also subject of the allegations being made by Attorney Ritzo, the Department did conduct a thorough investigation of those contacts. The Portsmouth Police Department is convinced that there was no violation of law or Department regulations committed by the officer involved.<sup>12</sup>

On December 11, 2012, Ms. Webber died and her new Will left the majority of her estate, approximately 2 million dollars, to Officer Goodwin. In the spring of 2013, previous beneficiaries contested the new Will seeking the Grievant's bequests be voided and a Probate trial date was set for April 2015.<sup>13</sup> Given that the Probate trial date was delayed, the Commissioners decided to create an Independent Task Group in September 2014 to review how the Department handled the Goodwin/Webber matter.

<sup>10</sup> UX3

<sup>11</sup> UX9

<sup>12</sup> UX2 -- Chief DuBois letter to Seacoast Media Group, September 19, 2012; UX30 -- Second IA, p.1.

<sup>13</sup> Estate of Geraldine W. Webber, New Hampshire Circuit Court, 7<sup>th</sup> Circuit-Probate-Division-Dover, Case Number 818-2012-ET-01509. Initially, the Probate trial was scheduled for June 2014; however, in November 2013, Ms. Webber's Attorney Gary Holmes informed the challenging attorneys that he was taking a one (1) year sabbatical and the attorneys agree to a January 2015 trial date, which was pushed to April 2015.



Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 15 of 86

The Task Group was made up of three (3) volunteers: the Chair was retired Judge and practicing attorney Stephen H Roberts, Kathryn R. Lynch, D. N. So., R.N and retired Police Chief William Baker. By letter dated September 22, 2014 the Commissioners stated:

The Police Commission charges your task force to conduct a fact-finding investigative inquiry into the Webber/Goodwin matter. Items of concern include, but are not limited to:

- (1) Whether or not Aaron Goodwin violated any policies and procedures of the Portsmouth PD with regard to this matter,
- (2) An investigation into the relationship between Aaron Goodwin and Geraldine Webber on duty and off duty.
- (3) What level of supervision did Aaron Goodwin receive with regard to this matter.[sic]
- (4) Establishing a timeline of relevant facts.<sup>14</sup>

The Task Group began its investigation in late September 2014 at which point "... a total of 58 individuals were interviewed and ... well over ten thousand pages of documents were reviewed".<sup>15</sup> On January 8, 2015, Chairman Golumb sent a letter to all Department Personnel inviting employees to avail themselves to the opportunity to talk to the Task Force's investigator by stating:

... [W]e want to encourage everyone, any police employee with input, positive or negative to make an appointment to talk [the Task Group investigator] ... The commission is making this invitation as open to as possible; please know there will be absolutely no repercussions of any kind, personally or professionally, to anyone who speaks with the task force.<sup>16</sup>

The Task Force issued a report on June 1, 2015 concluding:

... [T]hat Sgt. Goodwin's conduct in fostering a relationship with Mrs. Webber and not repudiating the Webber bequest violated certain

<sup>14</sup> JX5 - Task Force Report, Attachment A.

<sup>15</sup> Ibid, p 5.

<sup>16</sup> UX1 - Letter from Police Commission Chairman Golumb to all Department Personnel, January 8, 2015.

**Confidential**  
**Filed Under Seal**

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 16 of 36

provisions of the Portsmouth Code of Ethics and the Police Department Duty Manual. The command staff at the time failed to recognize the ramifications of the bequest and the relationship between Mrs. Webber and Sgt. Goodwin and failed to take appropriate action. The Police Commission was not timely notified of the existence of the bequest or the relationship, but when it did become aware of the conduct of Sgt. Goodwin and the Webber bequest, it also did not take appropriate action.<sup>17</sup>

Based on the Task Group's Report and conclusions, the Commission voted to terminate

Officer Goodwin from the Portsmouth Police Department. On June 24, 2015, Chief

DuBols<sup>18</sup> sent a letter to the Grievant stating:

As an outcome of the investigation conducted by the Webber-Goodwin Investigative Task Group I have found that you violated the following:

1. Rules and Regulations 50.01: Acceptance or Solicitation of Gifts, Rewards, and Other Gratuities.
2. Rules and Regulations 52.27: Conduct, whether on or off duty, tending to cause disrespect or disrepute on the department
3. Rules and Regulations 52.30: Any other act or omission contrary to good order and discipline.
4. City Ordinance 1.802 Sections A, F and I by engaging in a transaction involving a financial and private interest that was in conflict with his official duties; by accepting a gift or promise of something value at more than \$100

Given the foregoing, you are terminated from the Portsmouth Police Department.<sup>19</sup>

Upon notification of Officer Goodwin's termination the Union filed a timely grievance.

<sup>17</sup> JX5, p.1.

<sup>18</sup> Chief DuBols stated that he did not support the Commission's decision to terminate Officer Goodwin because he wanted to wait for the Probate Court decision. The Commission directed him to sign the letter. (Tr. Day 3, p. 912).

<sup>19</sup> JX6

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 17 of 36

### POSITIONS OF THE PARTIES

#### DEPARTMENT

The Department argued applying Arbitrator Carroll Daugherty's seven (7) factor test in *Grief Brothers Cooperage Corp.*,<sup>20</sup> established there was just cause for Officer Goodwin's termination.

1. Officer Goodwin knew, or reasonably should have known, the possible disciplinary consequences of his misconduct.
  - The Task Group found that the Department's Code of Conduct clearly applied and Officer Goodwin either knew or should have known at a minimum that what he was doing was not right even if the friendship was approved by the Command Staff.
  - The Department requests that the following points be taken into consideration:
    - a. Officer Goodwin's relationship with Ms. Webber was not an off duty relationship.
    - b. Officer Goodwin was very circumspect about what he actually disclosed to his Command Staff.
      - I. In the January 10, 2011 Memorandum to Chief Ferland he mentioned the gifts Ms. Webber gave him for his children but he did not report that Ms. Webber planned to bequeath her home and the contents within to him.
      - II. Officer Goodwin did not inform his Command Staff about Ms. Webber's compromised mental competence and that she had a romantic and sexual interest in him.
2. Officer Goodwin violated workplace rules and regulations that are reasonably related to the orderly, efficient and safe operation of the Portsmouth Police Department.
  - The Department maintains the rules, regulations and ordinance are reasonable, clear and based on common sense. Given that Officer Goodwin violated them, he no longer had the trust of the Portsmouth community. The Task Group found

<sup>20</sup> Arbitrator Carroll Daugherty, *Grief Brothers Cooperage Corp.*, 42 LA 555, 557-59 (1964)

**Confidential  
Filed Under Seal**

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 18 of 36

that even though the Command Staff did not warn him that disciplinary action could occur, Officer Goodwin "had an independent obligation to follow the Duty Manual proscriptions, and [he] failed to do so."<sup>21</sup>

**3. Officer Goodwin's termination was based on a thorough investigation by the Task Group.**

- The Task Group had "complete and unfettered access to all witnesses and all the documents that it requested".<sup>22</sup> The investigation occurred over nine (9) months, 58 people were interviewed and over 10,000 documents were reviewed.

**4. The Task Group's investigation was unbiased, fair and objective.**

- The Union's argument that the Police Commission deferring to the Task Group as a fact finder as opposed to conducting an internal investigation is meritless. The Commissioners stated, independently from one another, due to the intense public and media scrutiny of Officer Goodwin and the Command Staff that conducting an internal investigation was not proper.

**5. The Police Commission based its decision to terminate Officer Goodwin's employment on the factual findings of the Task Group.**

- The decision to terminate Officer Goodwin was unanimous.

**6. Officer Goodwin was treated evenhandedly and without any discrimination.**

- Officer Goodwin was provided with all of the procedural due process that is required by law and/or the parties' collective bargaining agreement.
- The Union's contention that Commission Chairman Golumb's January 8, 2012 excused Officer Goodwin from being disciplined is unfounded. Chairman Golumb said the purpose of his letter was to assure other police department employees that there would be no disciplinary consequences if they cooperated with the Task Group and not to grant immunity to Officer Goodwin.

**7. Officer Goodwin's termination was reasonably related to the seriousness of his misconduct.**

- The Task Group confirmed that Officer Goodwin not only violated the Department's Rules and Regulations and a City Ordinance, he engaged in

<sup>21</sup> JX5 - Task Group Report, p. 9.

<sup>22</sup> Department Brief, p. 13.

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 19 of 86

conduct that undermined the Public's trust and confidence in his ability to function as a police officer.

Based on the above, the Department asserts that the Task Group's Report justifies the termination of Officer Goodwin. However, if the Arbitrator does not agree, the Department reserves the right to present further evidence and argument in a subsequent remedy phase of the arbitration.

#### UNION

The Union argued there was no just cause for the termination of Officer Goodwin for the following reasons stated below.

- A. **The City may only rely on the stated basis of the termination to demonstrate just cause.**
  - The Department can only rely on the Task Group Report of June 1, 2015.
- B. **The Task Group Report cannot be a basis of discipline because the Commission promised all personnel, including Officer Goodwin, that "There [would] be absolutely no repercussions of any kind, personally or professionally to anyone who speaks with the Task Group".**
  - The Union maintains that the Task Group was not contemplating discipline when they investigated and reported on the Goodwin/Webber matter.
  - The Commission's letter was sent to all police department personnel to ensure that anyone who cooperated with the Task Group investigation would not be disciplined professionally or personally. Officer Goodwin, a police department employee, cooperated fully with the Task Group investigation therefore, he cannot be terminated based on the report.
- C. **The Department cannot discipline Officer Goodwin for conduct that it was aware of, encouraged and evaluated as appropriate.**
  - The Union asserts that Officer Goodwin did not have prior knowledge that his conduct was prohibited and subject to disciplinary action.
  - The Task Group found that Officer Goodwin knew it was likely he would be included in Ms. Webber's will but he did not renounce or refuse the potential

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 20 of 36

bequest. Nevertheless, by February 2011 the Department's Command Staff and the Commission respectively knew that Ms. Webber was bequeathing her house and contents within to Officer Goodwin but did not inform him that he should renounce or refuse the bequest. Even the City's Law Department knew of the same. The Department "repeatedly considered, publically and privately approved, condoned, sanctioned, encouraged, joked about and facilitated the exact behavior for which [Officer Goodwin] was terminated".<sup>23</sup>

- The Task Group found that the Command Staff should have told Officer Goodwin that his actions violated the Department's Rules and Regulations as well as the City's Code of Ethics. The Task Group also concluded that if Officer Goodwin was informed of the potential violation then he would have renounced or refused the bequest.
- D. The Department did not establish that Officer Goodwin's conduct violated any rule of the Department.**
- The Union argued none of the cited applicable rules, regulations or ordinances were violated.
    1. Although the Task Group, in hindsight, found that the rules, regulations and ordinance were violated neither Chief Ferland nor Chief DuBols believed they were. Chief Ferland believed as long as Officer Goodwin relationship with Ms. Webber was off duty then Rule 50.01A would not be violated given that Officer Goodwin acceptance of the house, etc. would not influence his actions as a police officer. Chief DuBols, as well as Captain MacDonald, believed there was no violation based on the fact Officer Goodwin never received the house, etc. and if he did receive the house it was not for performing police work because the relationship occurred off duty.
    2. Regarding Rules 52.27 and 50.30, the Task Group found violations "without regard to Goodwin's intent, that the violations occurred with the knowledge of the Command Staff and the City's law department, and were discoverable 'with the benefit of hindsight'"<sup>24</sup>
    3. Finally, City Ordinance 1.802, Sections A, F and I were not violated,
      - a. Officer Goodwin did not have notice of the ordinance or knowledge that if he violated the ordinance discipline may occur.

<sup>23</sup> Union Brief, p. 26.

<sup>24</sup> Ibid, p. 30.

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 21 of 86

- b. Section A was not violated in that Officer Goodwin did not engage in any business or transaction that was in conflict with the proper discharge of his official duties.
- c. Section F was not violated because Officer Goodwin did not receive a gift or a promise from for any person whose knowledge was interested in business dealings with the City.
- d. Section I is not relevant given that Officer Goodwin did not engage in private employment or render services for private interest that was in conflict with his official duties.
- e. The Task Group's suggestion that Officer Goodwin should have requested an opinion from the City's Board of Ethics is irrelevant since the Board did not exist.

**E. The record does not reveal any conduct of the type mandating punishment when condoned by management.**

- The Union asserts that Officer Goodwin's conduct, even if the Command Staff did not condone or support his conduct, was not reprehensible to justify termination. The Task Group found Officer Goodwin's relationship with Ms. Webber was the "byproduct of [Officer] Goodwin's sincere belief in community policing and his upbringing and family commitment to the vulnerable elderly people ..." (Tr. Day #2, p. 172)
- The Union also noted other facts, i.e. Commissioner Cavanagh's prejudice; the Rules not being previously enforced and Officer Goodwin's exceptional employment record, which established the Department did not have just cause to terminate Officer Goodwin.

**OPINION**

Generally, in a disciplinary award my opinion begins with "In discipline cases the burden of proof lies with the Employer to sustain allegations of just cause. To accomplish this, the Employer must prove the wrongdoing occurred and then establish that the assessed punishment is reasonably related to the wrongdoing". A simple, straight forward statement that leads into the analysis of the evidence and a finding of whether there was just cause for the disciplinary action taken. I cannot begin this opinion in this same manner without acknowledging the impact this case has had on the

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 22 of 86

citizens of Portsmouth, the Portsmouth Police Department, the Portsmouth Police Union and Officer Goodwin. It is unfathomable to me that the saga surrounding the Goodwin/Webber relationship has been going on for almost (7) seven years. This is unlike any other termination award I have issued. However, based on the evidence and my rationale discussed below this saga will continue and Portsmouth's citizens, police officers, command staff, police commissioners, police union and Officer Goodwin will not move forward and this story will not be put behind them.

Officer Goodwin was terminated for violating Department Rules and Regulations (Rule or Rules) 50.01A, 52.27 and 52.30 as well as City Ordinance 1.802, Sections A, F and I. Looking at the Ordinance first, since it is not a Department Rule but a City Ordinance it cannot be assumed that the Grievant knew the Ordinance existed. Therefore, the Department, who has the burden of proof, must submit evidence to establish that fact; receiving none, I find Officer Goodwin did not violate the ordinance. Without knowledge of Ordinance 1.802, the Grievant did not have a reasonable basis to know what the disciplinary consequences were if he violated it. Knowledge of a rule and the consequences if violated is a vital tenet in taking disciplinary action against employees.

Turning to the three (3) Department Rules, as an employee of the Department it is expected that Officer Goodwin had knowledge of the Rules, unless evidence is received to the contrary. None was submitted therefore, the Grievant knew the Rules



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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 23 of 88

and there would be consequences if the Rules were violated. Rule 50.00 Prohibited

Conduct states:

50.01 Acceptance or Solicitation of Gifts, Rewards, and Other Gratulifies:

A. Gifts, loans or fees from the public:

*Employees shall not accept for either personal use or department use, either directly or indirectly, any gift, gratuity, service, object, loan, fee or any other thing of value, arising from or offered because of police employment or any activity arising from or connected with said employment. They shall not accept any gift, gratuity, loan, fee or any other thing of value, the acceptance of which might tend to influence directly or indirectly the actions of said employees or any other employee in any matter of police business; or which may tend to cast an adverse reflection on the department or any other employee thereof. Persons or organizations offering anything of value for department use will be referred to the Office of the Chief of Police. (Emphasis added)*

The purpose of the rule was to put police officers on notice they cannot accept a gift or any other thing of value for performing police duties because the acceptance of a gift or any other thing of value may influence their duties as police officers or cast disrespect on the police department.

The evidence established that Officer Goodwin understood Rule 50.01A. One, he told Ms. Webber on various occasions when she tried to give him money that he could not accept it. Two, when Ms. Webber gave him the gifts for his children, he knew to immediately report the transaction to his supervisor, Sergeant Keavney. By reporting the transaction and following the directive of his supervisor to keep the gifts and give them to his children since they had little financial value and the gifts were not given in expectation of receiving police service, the Grievant did not violate the Rule. Three,

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 24 of 86

when Ms. Webber confirmed that she was going to leave her home to Officer Goodwin, he knew he had to talk to his superiors about the bequest.

The Task Group found that Sergeant Keavney interpreted the rule correctly; however, I do not agree. First, the Rule clearly states that police officers cannot accept "any gift". It does not state any gift that has "little financial value" nor is a dollar figure tied to the gift, i.e. over \$100, as indicated in City Ordinance 1.802, Section F. Second, the gift cannot be accepted for personal use and although the gifts were not for the Grievant's personal use, they were for his children's personal use. Third, Sergeant Keavney's determination that the gift was not given in expectation of receiving a police service was incorrect. Ms. Webber gave Officer Goodwin the gifts because he would not take her money but she wanted to thank him in some manner for checking on her. Accordingly, the gifts were given in an expectation of a receiving police service, i.e. the Grievant would continue checking in on her. When Sergeant Keavney, the lowest level of the command staff, misinterpreted Rule 50.01A and allowed the Grievant to keep and give the gifts to his children, the Department's case and/or justification for the Grievant's termination starts to fall apart.

I find Sergeant Keavney did not properly enforce Rule 50.01A because his Command Staff, including the Chief of Police, were not enforcing the Rule. Chief Ferland did not enforce the Rule when he failed to inform Officer Goodwin that Ms. Webber's bequests were "other things of value" that arose from his police employment. Then Chief Ferland directed Officer Goodwin's to have an off duty relationship with Ms. Webber so that he could receive the bequeathed items. This directive violated the Rule,

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 25 of 36

whether the friendship was on or off duty, because the Goodwin/Webber relationship started when the Grievant was investigating a potential burglary and met Ms. Webber. If Officer Goodwin was not investigating the burglary it is unlikely he would have met her and started a friendship. Therefore, the Grievant's connection to Ms. Webber stemmed from his official duties and Officer Goodwin was required to comply with Rule 50.01A.

The Task Force found and the Department argued, despite the fact that the Grievant's misconduct was condoned by Chief Ferland and the Command Staff, Officer Goodwin had an individual obligation to comply with the Rule therefore, he should have refused the bequest. However, Officer Goodwin believed he was complying with the Rule by following Chief Ferland's directive and he did not know he had to refuse the bequest because Chief Ferland did not tell him to. Again, knowledge of a rule and the consequences if violated is a vital tenet in taking disciplinary action against employees.

Chief Ferland and subsequently Chief DuBois did not reconsider their misinterpretation of Rule 50.01A when it was brought to their attention the relationship was not right, i.e. Attorney Ritzo filed complaints, Chief Ferland met with BEAS personnel who alleged the Grievant was exploiting Ms. Webber and the media/public reacted negatively to Officer Goodwin's relationship with Ms. Webber. Instead, Chief Ferland and then Chief DuBois continued to support the Grievant's actions even when the relationship was violating Rule 52.27 and 52.30 by causing disrespect and/or disrepute to the Department and was contrary to good order and discipline. As a result of Chief Ferland's and Chief DuBois' failure to act, the Command Staff and Police Commission, by not challenging both Chiefs' interpretation of the Rules, supported

PORTS 000088

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 26 of 26

and/or condoned Officer Goodwin's misconduct. Based on the above, I find because the Grievant was not told by anyone he was violating the Rules and he should refuse Ms. Webber's bequests, the inaction of the Commission and the Command Staff mitigates the Grievant's misconduct of violating the Rules and just cause to terminate Officer Goodwin was not established.

The Task Group supports my finding by repeatedly stating in their Report that the failure of the Commission and the Command staff to understand and enforce the Department Rules contributed to the Grievant's misconduct:

... [W]e are concerned that it appears that neither the Duty Manual nor the City Ordinance were reviewed as part of the decision making process by any parties to this matter. The Police Commission, Police Department command staff and all Police Department employees should have a working knowledge of these documents. *Had all individuals that played a role in this matter been familiar with applicable ethical obligations of members of the police department, the controversy may have been avoided.*<sup>25</sup>

... [W]e conclude that the rapid transition of this relationship from professional to personal, culminating in her stated intent to leave her home to Sgt. Goodwin *was a reflection of poor command advice.*<sup>26</sup>

... [O]nce Mrs. Webber proposed gifting her house to Sgt. Goodwin in December, 2010, and later on other considerable assets other from her estate, *we conclude that he was improperly advised by his command staff and also made a poor individual choice. In our opinion, upon notice that he was going to be a beneficiary, Sgt. Goodwin should have immediately and affirmatively rejected any possible personal enrichment and communicated that in writing to Mrs. Webber and the Portsmouth Police Department. If the bequest was still incorporated into her will and trust, Sgt. Goodwin should have disclaimed any interest in the bequest, so there would be no question about his motivation being self-enrichment. The command staff should have required this action; they did not.*<sup>27</sup>

<sup>25</sup> JX5 - Task Group Report, p.11.

<sup>26</sup> Ibid, p. 12

<sup>27</sup> Ibid, p. 14.

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 27 of 36

... [We conclude that Goodwin was improperly supervised and advised by the former Chief and that the command staff at the time (2011-2012) failed to recognize the risk of Duty Manual or Code of Ethics violations and the community's outrage regarding the same. Further, we conclude that the original advice given to Goodwin by former Chief Ferland may have had a chilling effect on the subsequent action or inaction by other members of the command staff. It is unlikely, in a hierarchical/paramilitary organization that a subordinate would question or countermand the Chief's decision, even if there were private reservations. Once Sgt. Goodwin was permitted by the former Chief to have an off-duty relationship with Ms. Webber, any Police Department oversight of his contact and conduct with her ceased except when citizen complaints were made to the PPD and BEAS.<sup>28</sup>

Upon [Ms. Webber's] death in December, 2012 Sgt. Goodwin became the primary beneficiary of a sizable estate, all arising from his initial on-duty contact. At this point, there was another opportunity for the command staff and the Police Commission to recognize that a problem existed and action should have been taken. It appears that the existing culture at the time was responsible for the failure to act.<sup>29</sup>

Poor initial advice to Sgt Goodwin was followed by failure of the command staff to recognize real or potential policy violations... The failure of the command staff to clearly inform the Police Commission in January-February 2011 of the full nature of the Goodwin-Webber relationship stalled the Commission's ability to recognize the controversy that would eventually follow.<sup>30</sup> (Emphasis added)

Although the Task Group found Officer Goodwin made poor individual choices; his choices were based on the Command Staff's misinterpretation of the Rules and improper advice.

Chief DuBols corroborated the Grievant's rationale for following Chief Ferland directive when he described a Command Staff Operations meeting. During the meeting, Chief Ferland told the Command Staff it was his position that the Grievant

<sup>28</sup> Ibid. p. 14-15.

<sup>29</sup> Ibid. p. 16.

<sup>30</sup> Ibid. p. 23-24.

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance; Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 28 of 86

could have an off duty friendship with Ms. Webber because the Chief could not tell Officer Goodwin who he could be friends with. Chief DuBols stated that Chief Ferland was "... emphatic on [the] position that he had taken ... so from that way [sic] forward, if Aaron had contact Geraldine Webber off duty, it wasn't really in our purview to do anything about it".<sup>31</sup> Even after Chief Ferland retired, Chief DuBols had the opportunity to reconsider the situation but he chose to maintain Chief Ferland's interpretation and directive.

The Task Group also found that if Officer Goodwin had not bypassed his chain of command, i.e. Sergeant Keavney, Captain MacDonald, Captain Schwartz and Deputy Chief DuBols, he might have been told Ms. Webber's action of bequeathing her home to him violated Rule 50.01A. I do not reach the same conclusion based on the following. Sergeant Keavney did not initially enforce the Rule 50.01A correctly so it is unlikely he would have told the Grievant the bequests violated the Rule. It is doubtful that Captain MacDonald would have told Officer Goodwin to refuse the bequests because he concurred with Sergeant Keavney's incorrect interpretation of the rule. Captain MacDonald also defended that the Grievant did not violate any Department rule in a March 3, 2013 online newspaper article.<sup>32</sup> In addition, Captain MacDonald was directly involved with Attorney Rlizo's exploitation complaints, which resulted in two (2) IAs involving the Grievant that were subsequently determined "not sustained" and "unfounded". Finally, Captain MacDonald concurred with Chief Ferland's interpretation

<sup>31</sup> Testimony of Chief DuBols, Tr. Day 3, p.367.

<sup>32</sup> UX4 - Dinan, Elizabeth. "Chief defends officer named in women's will. Say his conduct does not violate code of ethics". Seacoastonline.com, March 3, 2013.

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and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5475

Page 29 of 36

of the Rule when he recommended that Officer Goodwin stop seeing Ms. Webber on duty but check on her before or after work and to only see her on duty if there were official business to attend to.

Chief DuBois would not have recognized the house was a thing of value under Rule 50.01A or that Officer Goodwin should have refused the bequest because he believed even though Officer Goodwin knew about the bequests, the Grievant had not accepted the items so the Rule was not violated. Chief DuBois also believed even if the Grievant accepted the items, a determination had to be made that receiving the bequests were in exchange for police work since the relationship was off duty. Moreover, Chief DuBois defended Officer Goodwin's friendship with Ms. Webber in the same newspaper article as Captain MacDonald as well as in a September 19, 2012 response to a reporter gathering information on Attorney Rizzo filing a complaint against the Grievant with the Attorney General Office.

The Task Group found prior incidents where Chief Ferland and Captain Schwartz assisted elderly residents on and off duty "may have influenced not only Sgt. Goodwin but also the command staff's decision making in this case"<sup>93</sup>. In the Chief's situation, he had a professional relationship with Buzzy Hanscom from Hanscom's Truck Stop in Portsmouth that began when the Chief was on duty but continued as a friendship off duty. Chief Ferland believed that since the friendship was off duty if Buzzy Hanscom wanted to leave him something in his will that was ok. Captain Schwartz became a co-signer of an elderly woman's checking account, at the request of the woman's attorney,

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<sup>93</sup> JX5 -- Task Group Report, p. 12.

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 90 of 96

When the woman died in June 2012, Captain Schwartz owned the residual money in the account, whereupon he immediately acknowledged the money and donated it so he would not gain financially from an on duty relationship with the woman or bring disrepute to the Department. I find that these incidents *unequivocally* influenced the Grievant and the Command Staff inability to recognize that Rules were violated because the conduct occur previously without repercussion.

The Department argued that the Grievant knew, or reasonable should have known, the possible disciplinary consequences of his actions. To support their argument the Department asserted that it is undisputed that Officer Goodwin met Ms. Webber while he was on duty and although he was instructed to continue the friendship off duty, he visited her three (3) times while on duty. In addition, the Grievant called her almost daily and even several times a day, both on and off duty.

I reviewed the Department's position and find it to be meritless. Commissioners Howe, Cavanaugh, and Golumb stated the only information they reviewed when they made the decision to terminate Officer Goodwin was only the Task Group's Report. Therefore, all the documents the Task Group considered during the investigation were not reviewed by the Commissioners when they made their decision. The Task Group concluded after the January 4, 2011 meeting between Chief Ferland and the Grievant "it appears that all Sgt. Goodwin's contact with Geraldine Webber took place while off duty".<sup>34</sup> Accordingly, the Commission accepted the Task Group's finding that Officer Goodwin's contact with Ms. Webber was off duty. Based on this fact, the

<sup>34</sup> JX5- Task Group Report, p. 7.



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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 31 of 36

Commissioners had no knowledge that the on duty visits occurred and did not consider the visits when they terminated the Grievant. In any event, Officer Goodwin testified without rebuttal that he informed Captain Schwartz about the three (3) visits with no repercussions. With regard to the Grievant calling Ms. Webber on duty, this fact also was not discussed or raised in the Task Group's report. Therefore, the Commission did not consider Officer Goodwin making phone calls to Ms. Webber while on duty or review CX31 – Call Log from Officer Goodwin to Ms. Webber – when they made their decision to terminate the Grievant.

The Department contends that the Grievant was very circumspect about what he disclosed to the Command Staff. I concur that Officer Goodwin's explanation why he did not include Ms. Webber's house bequest in his July 10, 2011 was not credible and suspicious given that the memorandum would be sent to outside agencies to investigate Ms. Webber's claim that Attorney Ritzo was exploiting her. With regards to Officer Goodwin not providing information on Ms. Webber's mental capacity and her romantic/sexual interest in him, again, the Task Group had all the information but they did not raise the topics in their report nor did they present findings connecting Ms. Webber's mental capacity and a romantic/sexual interest to a violation of the Rules. Instead, the Task Group specifically stated that the report would not deal with the matters pending before the Probate Court.

*The issues of testamentary capacity, undue influence, or any other factor that relate to the validity of Geraldine Webber's 2012 bequests are not within the scope of the investigation of the task group. Those issues are vigorously contested and were fully litigated by the relevant parties before the Honorable Gary Cassavechla. The task group expressly limited its*

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 32 of 96

focus and the findings ... to those issues outside the jurisdiction of the probate court.

*It was not our charge, nor do we have any information or opinion on whether or not Sgt. Goodwin unduly influenced Mrs. Webber...*<sup>35</sup> (Italic emphasis by this Arbitrator, underline emphasis made by Task Group)

Based on above, the Commission did not consider Ms. Webber's mental capacity and romantic/sexual interest in the Grievant when they decided to terminate Officer Goodwin. Accordingly, the evidence submitted by the Department was assigned no weight and did not justify the Commission's decision to terminate the Grievant.

Another argument put forth by the Department was that the rules and regulations violated by the Grievant were reasonable related to the orderly, efficient and safe operation of the Portsmouth Police. I agree the rules as written were reasonable and did relate to the proper running of the Department; however, the rules were not interpreted correctly or enforced. If Chief Ferland, Chief DuBois and the Command Staff properly enforced the Rules then the outcome of this award would be different. I acknowledge that Judge Roberts believed the Rules were not confusing or subject to legitimate dispute because they were based on common sense. Nonetheless, the Task Group noted and recommended:

[W]hile the proscriptions in 50.01A were clear to us, some individuals had a different interpretation, i.e. so long as the bequest wasn't actually paid out to Sgt. Goodwin, no violation occurred. This is far too narrow reading, but revising the Duty Manual to clarify this point and related issues should be done and would eliminate such close parsing of the language.<sup>36</sup>

<sup>35</sup> Ibid, pp. 2-3 and p. 23.

<sup>36</sup> Ibid, p. 20.

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 33 of 36

The Department contends that Officer Goodwin's termination was based on a thorough, unbiased, fair and objective investigation by the Task Group. Although the Department generally performed IA investigations in matters involving the misconduct of police officers, I find the Task Group's investigation was thorough, unbiased, fair and proper. As a result of all the public and media attention given to Officer Goodwin's relationship with Ms. Webber, the Commission's need to perform an independent investigation that could withstand scrutiny from the public was a reasonable basis to commission the Task Group.

Nevertheless, I find the Commission's decision to terminate the Grievant based solely on the Task Group's Report was unwise for two (2) reasons. First, although the Task Group was charged with identifying whether the Grievant's violated any Department policies or procedures, the Report was written as a guide to improve the Department relationship with their employees and the public and not to justify the termination of Officer Goodwin. Judge Roberts specifically stated it was not the Task Group's role or goal to contemplate discipline. In the Report's Final Thoughts section, they wrote:

... [O]ur goal is not to point fingers and place blame, but rather to recognize that individual and management lapses of judgment and oversights occurred, and to provide some initial suggestions for improvement.

It is the sincere desire of all of us that this report be viewed as constructive, designed to foster improvement to the operations and morale of the department for the benefit of not only the employees but of the entire Portsmouth community. The events of the past few years have been painful for all concerned, but we are confident that the department

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 34 of 36

will learn from this experience and put this episode behind it and move forward in a positive way.<sup>97</sup>

Second, the Goodwin/Webber relationship and the public/media fury over it had been going on for years and nothing was done to stop it. If the Commission waited five (5) years during such a tumultuous time before they terminated Officer Goodwin they should have waited two (2) more months and received the Probate Court's decision. By waiting, the unanswered questions regarding Ms. Webber's mental capacity and whether Officer Goodwin held undue influence over her would have been answered. With this information and the Task Group's report, the Commission could have made a well informed and thorough decision on what disciplinary action to take.

Before I render the award, I note that if it was not for the failure of the Command Staff and Commission to enforce the Rules cited and properly supervise the Goodwin/Webber relationship the likelihood of Officer Goodwin being discipline or terminated is very high. First, it is concerning when the Grievant met with Ms. Webber for the first time and learned that she was troubled about Attorney Ritzo exploiting her; he did not mention her complaints to anyone or opened an investigation into the matter. Per Ms. Webber's request, he continued to check on her daily by visiting and calling her over the next two months. During those times, Ms. Webber continued to raise concerns about Attorney Ritzo but Officer Goodwin still did not open an

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<sup>97</sup> Ibid, p. 26.

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Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-5476

Page 25 of 36

Investigation file. It is not until Attorney Ritzo starts questioning Officer Goodwin's motivation of having a relationship with Ms. Webber with Captain MacDonald and Ms. Webber tells the Grievant she wants to bequeath the house to him that he talks to Chief Ferland and Captain MacDonald about Ms. Webber's problems with Attorney Ritzo and he writes the July 10, 2011 memorandum. Second, I question Officer Goodwin's motivation to bypass the Command Staff and go directly to Chief Ferland about Ms. Webber bequeathing the house to him. Is it because he had a unique relationship with Chief Ferland or is it because Chief Ferland had been down this road before with Mr. Hanscom and Officer Goodwin would get the answer he wanted?

Third, Officer Goodwin's explanation why he did not mention Ms. Webber bequeathing her home in the January 10, 2011 memorandum is not credible and suspicious. The fact that the memorandum, written for the purpose of investigating Ms. Webber's complaints that Attorney Ritzo was exploiting her, leaves out the possibility of the Grievant receiving her house was an interesting omission. Four, the Grievant's decision not to denounce the bequest resulted in numerous newspaper articles, which brought disrespect and disrepute to the Department by the public and the media even if his actions were condoned. Therefore, the Department's contention the Grievant has lost the public's trust should be considered in the remedy portion of this case.

Clearly, Officer Goodwin is not blameless in this matter since his misconduct is the center of the turmoil in the Department and in the City of Portsmouth for the last seven (7) years. Although, I have determined the Department did not have just cause to terminate Officer Goodwin it is not because he did nothing wrong, it is because the

PORTS 000088

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NRPBA, Local 220  
Grievance: Termination of Aaron Goodwin  
AAA# 01-15-0004-S476

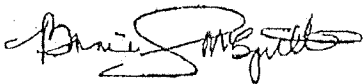
Page 36 of 36

Rule was not enforced correctly and the Grievant was improperly supervised when he was not informed his conduct was violating Department Rules and he needed to denounce Mr. Wobber's bequests. Therefore, the Commission's and Command Staff's failure to act mitigated the circumstances surrounding his termination as discussed above.

AWARD

The Department did not have just cause to terminate the Grievant, Aaron Goodwin.

The remedy is deferred. Either party may invoke jurisdiction at any time.



\_\_\_\_\_  
Bonnie J. McSpillitt, Arbitrator

August 7, 2017

\_\_\_\_\_  
Date

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IN THE MATTER OF ARBITRATION BETWEEN:

CITY OF PORTSMOUTH, NEW HAMPSHIRE  
POLICE COMMISSION/POLICE DEPARTMENT

AND

THE PORTSMOUTH RANKING OFFICERS ASSOCIATION,  
NEPBA, LOCAL 220

GRIEVANT: AARON GOODWIN  
PROCEDURAL ARBITRABILITY  
AAA# 01-15-0004-5476

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**OPINION AND AWARD**

The City of Portsmouth, NH Police Commission/Police Department (City, Commission or Department) and the Portsmouth Ranking Officers Association, New England Police Benevolent Association, Local 220 (Union) are parties to a collective bargaining agreement (Agreement). Under Section 35 – Grievance Procedure unresolved grievances are submitted to arbitration. The parties met before Arbitrator Bonnie J. McSpritt regarding the above referenced grievance. Attorney Thomas Closson from the Law Firm of Jackson Lewis, PC represented the City and Attorneys Peter J. Perroni and Gary Nolan from the Law Firm of Nolan Perroni, LLP represented the Union. On the first day of hearing, the parties presented a procedural arbitrability issue regarding the admissibility of Probate Judge Gary R. Cassavochia's decision concerning the Estate of Geraldine Webber and presented arguments to that regard. The parties submitted briefs, the City submitted a Reply brief, and the Union submitted a Sur-Reply brief.

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Procedural Arbitrability  
AAA# 01-15-0004-5476

Page 2 of 25

### ISSUE

Is Probate Judge Gary R. Cassavechla's decision concerning the Estate of Geraldine Webber admissible?

### BACKGROUND

In October 2010, the City of Portsmouth's Police Department's chain of command consisted of Chief David Ferland, Deputy Chief Stephen DuBols, Captain Michael Schwartz, Captain Cory MacDonald (who supervised the Detectives), Lieutenants, Sergeants including Sergeant Keaveny (who supervised Officer Goodwin), Detectives, including the Grievant, Detective Aaron Goodwin (Officer Goodwin or Grievant) and Patrol Officers. Above Chief Ferland there were three (3) Police Commissioners: Gerald Howe, John Rousseau and John Golumb. The Commissioners were generally not involved in the day-to-day operations of the Police Department and their responsibilities included but were not limited to overseeing the Department's budget and approving the Chief's recommendations to hire, fire and promote officers.

On October 20, 2010, Officer Goodwin, while on duty investigating the possibility of a planned burglary in a Portsmouth neighborhood, met Ms. Geraldine Webber (Ms. Webber) a 92 years old woman who lived in the neighborhood. Over the next couple of months, the Grievant and Ms. Webber formed a friendship and Officer Goodwin would call or stop by to check on her almost daily. Ms. Webber gave the Grievant gifts for his children and on December 24, 2010, Ms. Webber told Officer Goodwin that she wanted to bequeath her home to him.

PORTS 000101



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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Procedural Arbitrability  
AAA# 01-15-0004-5476

Page 3 of 25

The Grievant reported the children's gifts to his supervisor, Sergeant Keaveny, who told Officer Goodwin he could accept the gifts because they had little value and were given without an expectation of police service. On January 4, 2011, the Grievant met with Chief Ferland to explain his ongoing friendship with Ms. Webber and that she wanted to bequeath her home to him.<sup>1</sup> Chief Ferland told Officer Goodwin he could have a friendship with Ms. Webber but it had to be off-duty and that Captain Schwartz would handle Ms. Webber's police needs from that point on.

Over the next year, the Grievant and Ms. Webber's friendship continued and Ms. Webber told Officer Goodwin she wanted to bequeath the contents of her house, car and stocks that she owned to him. In addition, Officer Goodwin took Ms. Webber to gamble at the Foxwood Resort, he brought her to the Ninety-Nine Restaurant several times for drinks and arranged a woman to become Ms. Webber's companion. The Grievant also became Ms. Webber's primary medical emergency contact, he communicated with her accountant and personal banker and on December 6, 2011, Officer Goodwin was legally designated as her Power of Attorney if Ms. Webber became Incapacitated. After becoming Ms. Webber's Power of Attorney, Ms. Webber told the Grievant she wanted to change her will. Officer Goodwin assisted her in locating a new estate attorney to make the changes she wanted and a new will was signed by Ms. Webber on May 2, 2012.

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<sup>1</sup> Chief Ferland denied that Officer Goodwin discussed that Ms. Webber wanted to bequeath her house to the Grievant.

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin – Procedural Arbitrability  
AAA# 01-15-0004-5476

Page 4 of 25

On December 11, 2012, Ms. Webber died and the new will left the majority of her estate to Officer Goodwin. The previous beneficiaries contested the will and wanted the Grievant's bequeaths to be voided.<sup>2</sup> While the Probate Court case was proceeding before Judge Gary R. Cassavechia, the Portsmouth Police Commission on September 22, 2014 created a task force to conduct an independent fact finding, Investigative Inquiry into Officer Goodwin and Ms. Webber relationship. The Commission's Items of concern included but were not limited to:

- (1) Whether or not Aaron Goodwin violated any policies and procedures of the Portsmouth PD with regard to this matter.
- (2) An investigation into the relationship between Aaron Goodwin and Geraldine Webber on duty and off duty.
- (3) What level of supervision did Aaron Goodwin receive with regard to this matter.
- (4) Establishing a timeline of relevant facts.<sup>3</sup>

The Task Force was made up of three (3) volunteers: the Chair was retired Judge and practicing attorney Stephen H Roberts, Kathryn R. Lynch, D. N. Sc., R.N and retired Police Chief William Baker. The Task Force began its investigation in late September 2014 and issued a report on June 1, 2015. The Task Force concluded:

... that Sgt. Goodwin's conduct in fostering a relationship with Mrs. Webber and not repudiating the Webber bequest violated certain provisions of the Portsmouth Code of Ethics and the Police Department Duty Manual.<sup>4</sup> The command staff at the time failed to recognize the ramifications of the bequest and the relationship between Mrs. Webber and Sgt. Goodwin and failed to take appropriate action. The Police

<sup>2</sup> Estate of Geraldine W. Webber, New Hampshire Circuit Court, 7<sup>th</sup> Circuit-Probate-Division-Dover, Case Number 318-2012-ET-01509.

<sup>3</sup> Joint Exhibit 5A.

<sup>4</sup> Rules and Regulations 50:00: Acceptance or Solicitation of Gifts, Rewards, and Other Gratuities; 52:27: Conduct, whether on or off duty, tending to cause disrespect or disrepute on the department; 52:30: Any other act or omission contrary to good order and discipline; and City Ordinance 1.802 – Conflict of Interest, Sections A, F, and I by engaging in a transaction involving a financial and private interest that was in conflict with his official duties; by accepting a gift or promise of something value at more than \$100.

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin – Procedural Arbitrability  
AAA# 01-15-0004-5476

Page 5 of 25

Commission was not timely notified of the existence of the bequest or the relationship, but when it did become aware of the conduct of Sgt. Goodwin and the Webber bequest, it also did not take appropriate action.<sup>5</sup>

Based on the above, Officer Goodwin was terminated from the Portsmouth Police Department on June 24, 2015 and the Union filed a timely grievance.

On August 20, 2015, the Probate Court case concluded and Judge Cassavechia issued the following orders:

Petition to Set Aside the Geraldine W. Webber Revocable Trust Dated May 2, 2012 Is Granted;

Motion to Re-Examine Probate Will Is Granted In Part; and

Oral Motion to Admit Audio Recording Is Denied as Moot.<sup>6</sup>

The City argued that Judge Cassavechia's Decision (Probate Decision or Decision) which included factual findings that were directly related to the arbitration should be admissible and considered by the Arbitrator.

#### POSITIONS OF THE PARTIES

##### CITY

The Cassavechia Decision is relevant to, and should be admitted in, the present arbitration.

The City argued not only should the Probate Decision be admitted but Judge Cassavechia's findings of fact should be given preclusive effect. The City notified the Union on June 20, 2015, three (3) months prior to the arbitration hearing, they planned

<sup>5</sup> Joint Exhibit 5, p.1.

<sup>6</sup> Estate of Geraldine W. Webber, New Hampshire Circuit Court, 7<sup>th</sup> Circuit-Probate-Division-Dover, Case Number 318-2012-ET-01509, p.1.

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Procedural Arbitrability  
AAA# 01-15-0004-5476

Page 6 of 25

to admit the Probate Decision along with other court/arbitration decisions. The City argued the United States Supreme Court decided in McKennon v. Nashville Banner Publishing Co., 613 U.S. 352 (1995) that Employers could rely on post-termination evidence to defeat claims of reinstatement and front pay. The New Hampshire Supreme Court followed suit when they issued McDill v. Environmental Corp., 144 NH 635 (2000) and allowed after-acquired evidence to eliminate reinstatement as a remedy and/or limit damages to the time between the wrongful termination and when the Employer discovered the new misconduct.

The New Hampshire Federal Court also followed the Nashville Banner findings and relied on post-termination evidence to determine a remedy in EEOC v. Freudenberg-NOK, 2009 U.S. Dist. Lexis 33082, \*3 (D.N.H. 2009). In addition, Arbitrator Richard Allen in Hayes-Alblon Corp., 117 LA 1177 (Arb. 2002) found:

To exclude related post discharge would unduly restrict an Arbitrator in probing into all the facts. Arbitrators should be allowed to conduct the most comprehensive inquiry, including reviewing related evidence no matter *when it is discovered*. This type of inquiry is necessary in determining if there is "just cause" to terminate an employee".<sup>7</sup> (Emphasis made by Arbitrator Allen)

Finally, the City shared several cites from Brand and Biren, Discipline and Discharge in Arbitration, 2nd Edition, 2008, Elkouri & Elkouri, How Arbitration Works, 7th Edition, 2012, Chapter 8.8.D.1.; and BFI Gardena Division, 121 LA 289 (Gentile 2005) to support their argument that post discharge conduct can render an employee unfit for reinstatement and the Employer should not be required to terminate the employee again.

<sup>7</sup> Arbitrator Richard Allen, Hayes-Alblon Corp., 117 LA 1177(2002), pp. 1182-1183.

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Procedural Arbitrability  
AAA# 01-15-0004-5476

Page 7 of 25

**The factual findings included in the Cassavechia Decision should be given preclusive effect in the present arbitration.**

Here the City argued the doctrine of collateral estoppel bars a party from "... re-litigating an issue determined against that party in an earlier action, even if the second action differs significantly from the first one".<sup>9</sup> This was supported by the New Hampshire Supreme Court in Farm Family Mutual Insurance Company v. Peck, 149N.H. 603, 607 (1999) when the Court concluded the collateral estoppel doctrine promotes judicial economy and avoids unnecessary repetitive litigation. The City asserted first, Officer Goodwin had a full and fair opportunity to litigate during the Probate Court case; second, Judge Cassavechia made factual findings regarding Officer Goodwin's and Ms. Webber's relationship, Ms. Webber's mental competency and the Grievant's testimony during the case was evasive and dubious, which were two (2) critical component of the Probate Decision; and finally, because Officer Goodwin did not appeal the Decision, the factual findings are final and binding. Based on the above, the City reasoned the doctrine of collateral estoppel precludes Officer Goodwin from undoing the factual findings in the Probate Decision by arbitrating his termination.

**The limited legal authority cited by the Union actually supports the admission of the Cassavechia Decision into evidence.**

The Union's court case, Board of Regents of the University System of Wisconsin v. State Personnel Commission, 646 N.W.2d 759 (WI 2002) supports the City's position because the City notified the Union they were planning to present the Probate Decision

<sup>9</sup> Elkouri & Elkouri, How Arbitration Works, 7th Edition, 2012, Chapter 8-Evidence, Section 5, p.987.

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City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Procedural Arbitrability  
AAA# 01-15-0004-5476

Page 8 of 25

three (3) months prior to the arbitration case. Therefore, the Union and Officer Goodwin were not "ambushed by the after-acquired evidence" and the Grievant's due process rights were not violated.

**The Department should be permitted to present evidence that the Cassavechla Decision provided an independent basis for terminating Mr. Goodwin's employment.**

The Union's assertion that the City had failed to prove the Probate Decision provided an independent basis for terminating Officer Goodwin is unfounded. The Union opposed any effort made by the City to produce such evidence. The Department pursuant to Nashville Banner should be permitted to establish the findings of the Task Force and the final and binding Probate Decision independently compelled the Grievant's termination.

Based on the above, the City requests the Arbitrator to find that the Probate Decision concerning the Estate of Geraldine Webber is admissible.

**UNION**

**The Probate Decision - Issued eight weeks after the City terminated the Grievant - should not be admitted or considered for any purpose in this proceeding.**

The Union argued the Nashville Banner court case did not justify the admission of the Probate Decision. First, the Nashville Banner decision is irrelevant to this case because the employee worked at-will and had no rights to her position as Officer Goodwin had in this case. Second, during the age discrimination civil court case, the Employer discovered that the employee had removed confidential documents from her office which violated company policy. The employee was notified because of the

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Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin – Procedural Arbitrability  
AAA# 01-15-0004-5476

Page 9 of 25

misconduct she was terminated again from the Company. In this case, Officer Goodwin's termination was based solely on the Task Force Report and he was not notified that he was terminated again as a result of the Probate Decision.

Finally, the Supreme Court in Nashville Banner held if the circumstances involved at-will, private employment employees and the "... Employer sought to rely on after-acquired evidence, the Employer carries the burden . . . that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the Employer had known of it at the time of discharge".<sup>9</sup> The City failed to prove this when Police Commissioner Howe and Chief Dubois were unable to state that the Probate Decision would compel the Grievant's discharge and indicated that an investigation and discussion would occur to determine if the Decision would justify termination. Therefore, the Union maintained the City should not be given the opportunity now to one, use the Decision to bolster their justification for the Grievant's termination, two, use it solely as a basis for Officer Goodwin's termination or three, restrict remedy options.

The Union cited Board of Regents of the University System of Wisconsin v. State Personnel Commission, 648 N.W. 2<sup>nd</sup> 759 (WI 2002) (Board of Regents) to support their argument that after-acquired evidence is inadmissible for remedy purposes because the evidence would violate public sector employees' Loudermill due process rights to notice and an opportunity to be heard.<sup>10</sup> These rights stem from

<sup>9</sup> McKennon v. Nashville Banner Publishing Co., 515 U.S. 352 (1995), p. 362-363.

<sup>10</sup> Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Procedural Arbitrability  
AAA# 01-15-0004-5476

Page 10 of 25

the Agreement pursuant to the just cause and grievance procedure provisions. The Union maintained the City understood Officer Goodwin had property and due process rights to his position given that Chief Dubois notified the Grievant of his termination and offered to schedule a pre-termination "Loudemill" hearing.

The Union argued allowing the Probate Decision to be admitted would violate the Grievant's rights because he was not notified or had the opportunity to be heard on any alleged misconduct resulting from the Probate Decision. Since the City failed to do this, they should not be allowed to use the Decision to limit the remedy or discharge Officer Goodwin ". . . without ever actually terminating him and subjecting that action to the grievance and arbitration procedure".<sup>11</sup> The Union believed that a ruling in this regard was beyond the Arbitrator's authority.

Furthermore, the City's argument that the Probate Decision may collaterally estop the Union from disputing factual findings in the Decision is unfounded. Collateral estoppel cannot be used when the burden of proof in one proceeding to a subsequent proceeding shifts from one party to another. In this case, the City had the burden to prove there was just cause to terminate the Grievant. In the Probate Decision, Officer Goodwin had the burden to prove a lack of undue influence over Mrs. Webber. Since the burden shifts from the Grievant to the City collateral estoppel does not apply.

Based on the above, the Union requests that the Arbitrator find the Probate Decision is not admissible.

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<sup>11</sup> Union Brief, p. 6-7.



Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin – Procedural Arbitrability  
AAA# 01-15-0004-5476

Page 11 of 25

### OPINION

Arbitrators in discharge cases have followed the general rule that the relevant facts are limited to those in possession of the Employer at the time the discharge decision was reached. After reviewing the parties' briefs, including the various court and arbitration decisions cited and examining Elkouri and Elkouri<sup>12</sup> and Labor and Employment Arbitration<sup>13</sup> the general rule may be evolving because some arbitrators are issuing findings that support the City's position that after-acquired evidence can be used to prove just cause for a termination. Despite these awards, I find that the general rule is proper in this case and that the Probate Decision is not admissible to justify the termination of Officer Goodwin.

First, the Task Force members specifically stated in the report they did not consider the Probate Court proceedings when rendering their findings.

It must be emphasized that the WGITG is not providing any findings or opinions as to the matters pending before the probate court. The issues of testamentary capacity, undue influence, or any other facts that relate to the validity of Geraldine Webber's 2012 bequests are not within the scope of the investigation of the task group. . . The task group expressly limited its focus and the findings below to those issues outside the jurisdiction of the probate court.<sup>14</sup> (Underlined emphasis from Task Force Report)

Second, Chairman Roberts reiterated the Task Force position above when he testified:

. . . as a former judge, I was very sensitive to what the role of Judge Cassavochia was in terms of the probate issues, in terms of the challenge to the will, undue influence, coercion . . . all the probate issues. And from the beginning, I made it clear to both Bill and Kathy [other Task Force Members] and to anyone else that would ask, that we are not going to be a shadow Probate Court, we are not going to determine what Gerry Webber's state of mind is or what influence Mr.

<sup>12</sup> Elkouri and Elkouri, How Arbitration Works, Sixth Edition, Editor-in-Chief Alan Miles Rubin, Chapter 8-Evidence, Sections 5 and 6.

<sup>13</sup> Labor and Employment, Second Edition, General Editors Arbitrator Tim Bornstein, Arbitrator Ann Gosline and Arbitrator Marc Greenbaum, Chapter 9 – Contracts and Prior Proceedings, Section 9.04 – 9.07.

<sup>14</sup> JX 5, p. 2-3.

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Procedural Arbitrability  
AAA# 01-15-0004-S476

Page 12 of 25

Goodwin's conduct on Gerry would be. Our role is limited to determine the facts as to what occurred between Aaron and Ms. Webber, and then taking those occurrences, that conduct, apply that to the City rules and regs, and determine whether or not there was any violation, but not the second step, the influence that Mr. Goodwin may have had on Gerry Webber. That was not our role.

Third, former Police Commissioner Howe stated the Task Force Report and the infractions outlined in the Report were the sole basis for Officer Goodwin's termination. Commissioner Howe also testified the Commissioners did not initiate a second investigation based on the probate matters and decided they would not wait for the results of the Probate Court case to determine what discipline the Grievant would receive.

Fourth, Commissioner Brenna Cavanaugh, who was elected to replace Commissioner John Rousseau on January 1, 2014, testified she decided that Officer Goodwin should be terminated based solely on the findings of the Task Force Report. The Commissioners decided not to wait for the results of the Probate Court case and they did not direct Chief Dubois to conduct an internal investigation on the Probate Court issues to determine if there was just cause to discharge the Grievant based on those issues alone. Finally, Chief Dubois stated he did not agree with the Commissioners' decision to terminate Officer Goodwin before the conclusion of the Probate case. Chief Dubois wanted to wait until the Probate Decision was issued and then decide what disciplinary action the Grievant should receive. Chief Dubois did not believe that Officer Goodwin should be terminated based on the Task Force Report; however, the Commissioners directed him to sign Officer Goodwin's termination letter.

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin -- Procedural Arbitrability  
AAA# 01-15-0004-5476

Page 13 of 25

Based on the above and despite the fact that the Task Force members reviewed and considered volumes of documents from the Probate Court case the Task Force did not report on or consider the issues raised there. As a result, the decision to terminate Officer Goodwin was based *solely* on the Task Force Report and the identified policies and procedures that were violated. Since the Commissioners and Chief Dubois did not rely on the Probate Decision to terminate the Grievant it would be improper to allow the City to use the Decision to justify Officer Goodwin's discharge.

The City's reliance on the US Supreme Court case McKennon v. Nashville Banner Publishing Company<sup>15</sup> (Nashville Banner), the NH Supreme Court case McDill v. Environamics Corporation<sup>16</sup> and the US District Court for the District of NH case EEOC v. Freudenberg-NOK<sup>17</sup> to support their argument that the Probate Decision can also be used to justify Officer Goodwin's termination is unfounded. The Nashville Banner Court case dealt with an at-will, private employment employee (McKennon) with no property rights to her position and no due process rights of notice and the opportunity to be heard under a collective bargaining agreement. In addition, while McKennon's pre-termination misconduct was discovered after she was discharged and during the age discrimination proceedings in Nashville Banner, once the Employer learned of the misconduct they terminated McKennon a second time for the new misconduct. McKennon's termination letter also stated that had Nashville Banner known

<sup>15</sup> 513 US 352 (1995)

<sup>16</sup> 144 N.H. 695; 757 A.2d 162; 2000 N.H. LEXIS 4; 15 I.E.R. Cas. (BNA) 1868

<sup>17</sup> 2009 U.S. Dist. Lexis 39082, \*3 (D.N.H. 2009)

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin – Procedural Arbitrability  
AAA# 01-15-0004-5476

Page 14 of 25

of the employee's "... misconduct it would have terminated her at once for that reason"<sup>18</sup>.

The facts of this case differentiate it from Nashville Banner. One, Officer Goodwin was not an at-will employee and he had property and due process rights under Section 3- Employee Rights and Section 35- Grievance Procedure of the Agreement. The Supreme Court in Nashville Banner did not consider these rights for McKennon, an at-will employee, when Supreme Court Justice Anthony Kennedy wrote:

*We shall assume, as summary judgment procedures require us to assume, that the sole reason for McKennon's initial discharge was her age, a discharge violative of the ADEA. Our further premise is that the misconduct revealed by the deposition was so grave that McKennon's immediate discharge would have followed its disclosure in any event. The District Court and the Court of Appeals found no basis for contesting that proposition, and for purposes of our review we need not question it here.*<sup>19</sup> (Emphasis added)

Two, when the Probate Decision was released and Judge Cassavechia ruled that Officer Goodwin failed to establish a lack of undue influence over Ms. Webber, the City did not notify the Grievant he was now terminated based on both the Task Force Report and the Probate Decision. Nor did the City inform the Grievant he was terminated a second time based solely on the Decision. Three, the Supreme Court in Nashville Banner stated:

*Where an employer seeks to rely upon after acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge.*<sup>20</sup>

<sup>18</sup> City Brief, Exhibit 2 - McKennon v. Nashville Banner Publishing Company, 513 US 352 (1995) at p. 2.

<sup>19</sup> *Ibid.*, p. 8.

<sup>20</sup> *Ibid.*, p. 7.

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin – Procedural Arbitrability  
AAA# 01-15-0004-5476

Page 15 of 25

The City did not inform Officer Goodwin had they known about the issues and/or factual findings contained in the Probate Decision the City would have terminated the Grievant at once for those reasons. Instead, Chief Dubois sent Officer Goodwin a letter on June 11, 2015 stating:

*As you know, the report of "The Webber-Goodwin Investigation Task Group" ("the Report") has been completed. A copy is attached for your convenience. The Report concludes, among other things, that you have violated Sections 50.01A, 52.27 and 52.30 of the Portsmouth Police Duty Manual, as well as Portsmouth City Ordinance 1.802 Sections A, F and I. The Report also concludes that in the event that you prevail in the matter currently pending in the Rockingham County Probate Court and decide not to disclaim the bequest at issue, further violations of these sections of the Duty Manual and City Ordinance will occur. (Union Brief, Exhibit B) (Emphasis added by Arbitrator)*

Based on the letter, Chief Dubois informed Officer Goodwin that there shall be further violations of the Department's rules and regulations if he accepts the bequeathed items but he did not inform the Grievant he would be terminated for accepting the items or for any of the issues/factual findings raised in the Decision. Therefore, the City must prove there was just cause to terminate the Grievant based on the Task Force Report alone.

Having said this though, I find that the Probate Decision is admissible at the remedy stage of the arbitration hearing, if necessary. My finding is based on the court cases cited by the City<sup>21</sup> and the arbitration award BFI Gardena Division, 121 LA 289 (Gentile 2005). The US District Court for the District of New Hampshire stated in EEOC v. Freudenberg-NOK:

*In the McKennon v. Nashville Banner Publ'g Co. the Supreme Court held that evidence of a plaintiff's wrongdoing discovered after the termination of employment was not relevant to the employer's liability for age discrimination, but could be relevant in determining what remedy was appropriate. (Citations*

<sup>21</sup> McKennon v. Nashville Banner Publishing Company, 513 US 352 (1995); McQuill v. Environmentalics Corporation, 144 N.H. 635; 757 A.2d 162; 2000 N.H. LEXIS 4; 15 I.E.R. Cas. (BNA) 1868; and EEOC v. Freudenberg-NOK, 2009 U.S. Dist. Lexis 33082, \*5 (D.N.H. 2009).

.Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin – Procedural Arbitrability  
AAAH 01-15-0004-5476

Page 16 of 25

omitted) . . . This limit on "after-acquired evidence" addressed the concern that employers might, as a routine matter, undertake extensive discovery into an employee's background or job performance to resist claims under the ADEA. As a result, after acquired evidence is normally admissible just in relation to remedy and not as to liability. (Citations omitted)<sup>22</sup>

In McDill v. Environamics Corporation the NH Superior Court of Rockingham County found for the plaintiff when the defendant breached an employment contract. The NH Supreme Court reversed and remanded the Superior Court's decision because the after-acquired evidence doctrine was improperly applied when the Court excluded the evidence because it was ". . . speculative and not within the parameters of the litigation".<sup>23</sup> The Supreme Court found:

Specifically, [the Superior Court] ignored the fact that after-acquired evidence, by its nature, changes the parameters of the litigation because it involves evidence discovered after the initial termination that gave rise to the litigation. Thus, we reverse and remand.

Further, we find that the court's error was not harmless. "Where it appears that an error did not affect the outcome below, or where the court can see from the entire record that no injury has been done, the judgment will not be disturbed." (Citations omitted). Here, we cannot conclude that the court's treatment of the after-acquired evidence did not affect the outcome below. Because the cause of action was for breach of contract, the defendant was precluded from offering evidence of a complete defense to liability.<sup>24</sup>

In BFI Gardena Division, Arbitrator Gentile stated:

. . . [T]he events and circumstances which surfaced subsequent to the Grievant's termination, though not evaluated by either BFI or the Arbitrator in finding just cause, make reinstatement very problematic. *After acquired evidence is an appropriate reference when weighing the possibility of an employee's reinstatement.* In the Grievant's case, the inference to draw is that the pattern of conduct vis-a-vis customers was much more serious than known by BFI at the time the Grievant was terminated.<sup>25</sup> (Emphases added)

<sup>22</sup> EEOC v. Freudenberg-NOK, 2009 U.S. Dist. Lexis 33082, \*3 (D.N.H. 2009) at p. 3.

<sup>23</sup> Employer Brief, Exhibit 4, p. 6.

<sup>24</sup> McDill v. Environamics Corporation, 144 N.H. 635; 757 A.2d 162; 2000 N.H. LEXIS 4; 15 I.E.N. Cas. (BNA) 1868, p.8.

<sup>25</sup> City Brief, Exhibit 7, Footnote, p.6.

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Procedural Arbitrability  
AAA# 01-15-0004-5476

Page 17 of 25

Based on Arbitrator Gentile's finding, he stated in the Award:

Based on a careful evaluation of this evidence record as a whole, the pivotal credibility determination and the argument presented, it is the AWARD of this Arbitrator that just cause was not established and proved to support the termination; however, there was just cause to sustain a disciplinary suspension for the period of the Grievant's absence. *Reinstatement will not be directed as it is not an appropriate remedy given the pattern of the Grievant's conduct and behavior, a pattern which raises serious concerns regarding the Grievant's further contact with BFI's customers; thus, the termination will stand as administered.* (Emphasis added)

The above cases established that after-acquired evidence is relevant to remedy and can be used to mitigate damages.<sup>20</sup> In addition, there are other arbitration awards that support this conclusion.

Publishers Association of New York 36 LA 706 (Seltz 1961) dealt with a union chapel chairman (Chairman) who had over 30 years of service being terminated for insubordination and harassment. When told he was discharged, the Chairman did not leave the plant floor as instructed and informed curious fellow workers that he had just been discharged. A worker made a motion to stop working until the Chairman was reinstated. The Chairman did not try to stop the motion, a vote was taken and all worked stopped. The President of the Local Union subsequently told the workers to go back to work but a full resumption of the plant did not occur for almost 24 hours and the printing and distribution of the newspaper was impacted. Arbitrator Peter Seltz considered the Chairman's action as a single event and found:

At the threshold of this discussion it should be made absolutely clear that [Chairman] is being judged, not so much because of his actions and words which

<sup>20</sup> I disagree with Arbitrator Allen's findings in Hayes-Alblon Corp., 117 LA 1177 (Arb, 2002) that all after-acquired evidence no matter when it is discovered should be used to justify the discharge of an employee along with all the other evidence related to the grounds for the discharge of the Grievant. The evidence can be considered when determining the remedy but it should not be used if it was not part of the Employer's decision making process when the employee was terminated as found in this case.

Confidential  
Filed Under Seal

City of Portsmouth, NH, Police Commission/Police Department  
and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin - Procedural Arbitrability  
AAA# 01-15-0004-5476

Page 18 of 25

led [Supervisor] to discharge him, as by his subsequent utterly reprehensible and irresponsible behavior which caused, fomented and maintained a stoppage of work. This conduct (immediately following his discharge by [Supervisor]) flowed directly out of the events surrounding the discharge and in a very real and dramatic sense, was an integral part of those events, and was merged in it. It is abundantly clear . . . had [Chairman] walked off the floor as directed and as required by the Scale of prices, when so ordered, this dispute would *not* have come before a Board of Arbitration. . . [Chairman's] acts leading up to the discharge (loud use of epithets and obnoxious behavior) were *not* in my judgement dischargeable offenses in the light of all the circumstances . . . They were offenses for which he deserved corrective action and disciplinary action. But those offenses, coupled with his conduct immediately following the discharge give a much more serious aspects to the events . . .<sup>27</sup>

Arbitrator Sam Kates in Columbus Show Case, Co. 44 LA 507 (1965) said:

It is my view that events . . . occurring after discharge, are not relevant upon the question of the justness of the previous discharge. However, it is my further opinion that, in considering the matters of reinstatement and back pay, account may and should be taken of the employee's actions subsequent to his discharge in so far as they may relate to his fitness for employment and as they bear upon the effect of reinstatement on plant morale, discipline, efficiency and the like.<sup>28</sup>  
(Emphasis added)

In San Gamo, 44 LA 593 (1965) the Employer continued to investigate after discharging an employee for falsification of time records. The Union objected to the post-discharge evidence; however, Arbitrator John Sembower accepted the evidence finding it was permissible as long as it did not add an entirely new ground for the discharge. Arbitrator Sembower found the after-acquired evidence seemed ". . . well within the original 'theory of the case' adopted by the Company".<sup>29</sup> I find for remedy purposes that the same is true here given that the Probate Decision dealt with the items Ms. Webber bequeathed to Officer Goodwin and allegedly violated Rules and Regulations 50.01, 52.27, and 52.30. I made this finding without concluding that the

<sup>27</sup> Publishers Association of New York 86 LA 706 @ 709 (Seliz 1961).

<sup>28</sup> Columbus Show Case, Co. 44 LA 507 at 514 (Kates 1965).

<sup>29</sup> San Gamo, 44 LA 593 at 600 (Sembower 1965).



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and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance: Termination of Aaron Goodwin -- Procedural Arbitrability  
AAA# 01-15-0004-5476

Page 19 of 25

Relevant did or did not violate the Rules and Regulations but that the bequeathed items discussed in the Probate Decision are raised in the City's original theory of the case.

Arbitrator Whitley McCoy in Pullman Standard, 47 LA 753 (1966) considered after-acquired evidence that was unrelated to the discharge during the remedy portion of the award and determined that the employee would not be reinstated. In Sunshine Specialty Company, 55 LA 1001 (1970) an employee was fired for exhibiting belligerent behavior toward other employees and poor job performance. After the discharge the company discovered that before dismissing the employee, he had struck a janitor which was not listed as a reason for the employee's termination. Arbitrator William Levin did consider the after-acquired evidence when determining the remedy and found as a result of the newly discovered pre-discharge aggression, his conclusion that the original charge equated to a two-week suspension was inappropriate and he did not reinstate the employee.

Arbitrator George Young made a similar remedy analysis in American Air Filter, 64 LA 899 (1975). An employee was discharged for making off with company scrap metal that the Company had planned to sell. The employee was fired and upon further investigation the Company learned the employee had been taking and selling the scrap metal for a long time. The Union's argument in American Air Filter is the same argument the Union used in this case that the post-discharge evidence was irrelevant and should be excluded because the Company's actions had to be judged on what they knew at the time of discharge and they should not be allowed to bolster their case by information discovered later. However, Arbitrator Young although concerned that the

PORTS 000118

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Grievance: Termination of Aaron Goodwin -- Procedural Arbitrability  
AAA# 01-15-0004-5476

Page 20 of 25

Company's strongest evidence had been developed after the discharge, still relied on the evidence concluding that the discharge was appropriate. Arbitrator Young made this decision despite the fact that without the after-acquired evidence, he would have imposed a discipline short of discharge.

In St. Johnsbury Trucking, 74 LA 607 Arbitrator Thomas Knowlton held that the after-acquired evidence was admissible for remedy purposes although the post-discharge evidence was entirely unrelated to the decision to terminate an employee. Arbitrator Knowlton determined because the evidence was shared with the Union when it was discovered less than a week after the Employee was discharged and was discussed during the termination grievance hearings. In WMW District 2, 110 LA 84 (1997) Arbitrator Ruben sustained a discharge of an employee based on after-acquired evidence of similar misconduct prior to the discharge. Arbitrator Ruben admitted the evidence because it was made available to the Union during the termination grievance proceedings.

Arbitrators also consider after-acquired evidence when they make allowances for mitigating circumstances. For example, it would be inappropriate for an Arbitrator not to consider post-discharge evidence in a theft case when another employee confesses to the theft and the Arbitrator reinstates the wrongly accused employee. In addition, Arbitrators assess post discharge conduct in determining the amount of back pay awarded upon reinstatement of an employee. In these cases, Arbitrators determine whether or not the employee was diligent in finding employment and the employee's action may mitigate damages.

PORTS 000119

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and Portsmouth Police Ranking Officers Association, NEPBA, Local 220  
Grievance; Termination of Aaron Goodwin - Procedural Arbitrability  
AAA# 01-15-0004-5476

Page 21 of 25

Further, Arbitrators are asked to consider post-discharge evidence of employees' rehabilitation efforts for alcohol or drug offenses. In these cases, Unions advocate that the offense, e.g. poor performance, tardiness, etc., stemmed from the disease; the employee's action was not willful nor malicious but resulted from their addiction; and the employee's recovery makes him/her employable again. Based on the above, I find that it is well within the Arbitrator's authority to consider after-acquired evidence for remedy purposes.

The Union cited the Wisconsin's Supreme Court Board of Regents<sup>30</sup> case and argued that the Probate Decision is not admissible during the remedy phase of the arbitration hearing. The case involved the termination of a University Police Officer (Appellant) who was suspended ten (10) days and then discharged for inappropriate conduct in the workplace in February 1996. The Appellant appealed the disciplinary actions to the State Personnel Commission (Commission) who found that the University violated the Appellant's due process rights by failing to provide adequate notice and pre-disciplinary hearing for the suspension and reduced the suspension to a warning. The Commission also found the University failed to prove just cause for all the allegations of misconduct and reduced the termination to a ten (10) day suspension without pay.<sup>31</sup>

The Commission scheduled a remedy hearing and the University attempted to admit after-acquired evidence discovered during a June 1996 deposition that the

<sup>30</sup> Board of Regents v. State Personnel Commission, 546 N. W 2d. 759 (Wis. 2002).

<sup>31</sup> An issue regarding the Appellant's request for cost and fees was dealt with in this case but will not be discussed.

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Grievance: Termination of Aaron Goodwin - Procedural Arbitrability  
AAA# 01-15-0004-5476

Page 22 of 25

Appellant copied and removed confidential files. The University argued that the evidence was relevant because based on the post-discharge evidence they would have just cause to terminate the Grievant for misconduct in June 1996 and the Grievant's back pay award would be limited to the same. The Commission excluded the evidence based on a violation of the Appellant's property and due process rights and the Appellant would have to address a significant new issue which he had no prior notice.

The Commission's decision was appealed and eventually went before the Supreme Court. The Court applying a de novo standard concluded:

... [University] was required to provide notice to [Appellant] as contemplated by the civil service statutes and as required under due process before it could introduce evidence related to [Appellant] alleged misconduct in copying and removing confidential documents from the [University] Police Department. Notice and a proper hearing addressing this misconduct is required to remain faithful to the due process interests of civil service employees in Wisconsin and to remain consistent with the policies of security of tenure and impartial evaluation prior to termination.<sup>32</sup>

The Supreme Court distinguished the case from Nashville Banner because the [Appellant] was not an at-will employee. The Court considered due process issues finding that notice of hearing and an opportunity to be heard were pre-termination rights required under Cleveland Board of Education v. Loudermill 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). The Supreme Court concluded that the Commission's decision to exclude the after-acquired evidence was proper and not an erroneous exercise of discretion.

Although, the Board of Regents case clearly supports the Union's position, the case does not alter my finding that the Probate Decision is admissible at the remedy

<sup>32</sup> Ibid., p. 768.

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Grievance: Termination of Aaron Goodwin -- Procedural Arbitrability  
AAA# 01-15-0004-5476

Page 29 of 26

proceedings of the arbitration hearing. First, this sole authority does not outweigh the numerous court decisions and arbitration awards which support my finding that after-acquired evidence can be used to mitigate a remedy. Two, the admittance of the Probate Decision was not a surprise given that the City notified the Union three (3) months prior to the arbitration hearing on June 20, 2016 of their plan to present the Probate Decision at the hearing. Although the City argued the Decision was relevant to justify Officer Goodwin's termination as well as mitigating remedy, I have determined the Probate Decision can only be used for remedy purposes.

With regard to the City's assertion that the factual findings in the Probate Decision should be given preclusive effect based on the doctrine of collateral estoppel, I find that the argument is unfounded. Elkouri and Elkouri, How Arbitration Works states:

The extent to which an antecedent judgment in a civil case will be given preclusive effect depends on the arbitrator's assessment of whether the parties, issues, and the standards and burden of proof in the judicial proceeding were identical to those involved in the arbitral proceeding.<sup>83</sup>

First, the parties are not identical. The arbitration is between the City and the Union who are parties to a collective bargaining agreement and not Officer Goodwin and the previous beneficiaries of Ms. Webber's May 2009 will. Labor and Employment Arbitration states:

... arbitrators may decline to defer to judicial determination because the Union was not a party, where the right of the union seeks to protect differed from the right adjudicated by the court, or where the parties were not allowed to present evidence fully.<sup>84</sup>

<sup>83</sup> Elkouri and Elkouri, How Arbitration Works, Sixth Edition, Editor-in-Chief Alan Miles Rubin, Chapter 8-Evidence, Sections 6.B, p. 389.

<sup>84</sup> Arbitrator Jay Grenig, Labor and Employment, Second Edition, Chapter 9 - Contracts and Prior Proceedings, Section 9.07, p. 9-46.

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Grievance: Termination of Aeron Goodwin – Procedural Arbitrability  
AAA# 01-15-0004-5476

Page 24 of 25

In addition, Arbitrator Abrams in Johnston School Committee, 131 LA 872 determined a grievance was arbitrable because "... the fact that the Union had not been party to a case decided by the Rhode Island Supreme Court was a sufficient distinguishing factor".<sup>95</sup> In the Probate Court case the Union was not a party as the Grievant was represented by private counsel. The City argued that this fact is irrelevant because Officer Goodwin was present at the Court case and even though the Union is representing him in the arbitration case, the doctrine of collateral estoppel still applies. I disagree with the City's position because the Union's right to protect the Grievant's employment is different from the rights adjudicated by the Probate Court.

Second, the issues are different between the arbitration case and the Probate Decision. The arbitration issue is whether the City had just cause to terminate the Grievant and the Probate issues concerned Ms. Webber's mental capacity and if Officer Goodwin could prove a lack of undue influence on Ms. Webber. Although, the City has presented evidence regarding Ms. Webber's mental capacity, the main issue of undue influence comes from the Probate Decision and not the arbitration proceeding. Third, the burden of proof are not identical given that City has the burden to prove just cause in the arbitration case and the Grievant had the burden in the Probate Court case to prove a lack of undue influence.

Fourth, Judge Cassavechla based his decision on external probate law and not on the collective bargaining agreement. Finally, because I have determined the Decision is admissible in the remedy portion of the arbitration, it would be prejudicial to

<sup>95</sup> Ibid. Footnote 53, p. 9-46.

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AAA# 01-15-0004-5476

Page 25 of 25

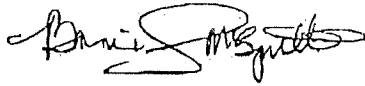
the Union and Officer Goodwin if they were not afforded the opportunity to challenge the  
Decision's factual findings if a remedy hearing becomes necessary.

**AWARD**

Probate Judge Gary R. Casavechia's decision concerning the Estate of  
Geraldine Webber is not admissible in the just cause analysis of Officer  
Goodwin's termination.

The Probate Decision is admissible in the remedy proceedings of  
arbitration, if necessary.

The Probate Decision's factual findings do not have preclusive effect.



\_\_\_\_\_  
Bonnie J. McSpritt, Arbitrator

January 13, 2017

\_\_\_\_\_  
Date

**4**

**Excerpts of New Hampshire State Police  
Professional Standards of Conduct**



3. Civilian members shall be required to comply with these rules and directives insofar as they may be applicable.
4. Division Members shall not commit any acts which constitute a violation of any of the rules, regulations, directives or orders of the Division whether stated in these Rules and Regulations or elsewhere.

### 1.3.3

**Obedience to Orders:** Division Members shall respectfully and immediately obey all orders and instructions of their superiors. It shall be the duty of each employee of the Division of State Police to obey every lawful command or order issued orally or in writing by a superior officer, which shall mean the Commissioner of Safety, Director, Commissioned Officers, Non-Commissioned Officers, or Supervisors of the Division senior in rank, grade or position to the recipient of the command or order. A lawful order shall require the same obedience whether it is communicated directly by a superior officer or originates from a superior officer and is relayed by an employee of the same or lesser rank.

1. Each Division Member will address all matters affecting them, their position, or any Division business with their Commanding Officer only, or through proper official channels.
2. All official business transacted by members of the State Police shall be processed through official channels.
3. All Division Members shall be given authority commensurate with assigned responsibilities. Each Division Member shall be accountable for the use of delegated authority.

### 1.3.4

**Willful Insubordination:** Any Division Member who deliberately and/or intentionally disobeys a lawful order shall be subject to disciplinary action, up to and including dismissal.

### 1.3.5

**Conflicting Orders:** Division Members who are given an otherwise proper order which is in conflict with a previous directive shall respectfully inform the superior officer issuing the order of the conflict. If the superior officer issuing the order does not alter or retract the conflicting order, the order shall stand. Under these circumstances, the responsibility shall be upon the superior officer. Division Members shall obey the conflicting order and shall not be responsible for disobedience of the order previously issued. Division Members shall not obey any order which would require them to commit any illegal act. If the legality of the order is in doubt, employees shall request the superior officer issuing the order to clarify the order or confer with higher authority within the Division.

### 1.3.6

**Mission Statement, Vision Statement, Collaborative Agreement and Code of Ethics:** Appendix A of these Rules and Regulations contains the Division's Mission Statement, Vision Statement, Collaborative Agreement

of interest with his employment, which conflict cannot be alleviated by said employee abstaining from actions directly affecting their employment with the Division. (RSA 21-I:52) In the event that a Division Member is considering engaging in any political activity, they are cautioned to first consult with their appointing authority to determine if the activity is permissible. With regard to political contributions and payments, refer to NH RSA 664.

**1.4.8 Integrity:** No Division Member shall, under any circumstances, make any false official statement or intentional misrepresentation of facts. Any Division Member who becomes aware that another Division Member has made a false statement or intentional misrepresentation of facts shall, without delay, inform his or her Commanding Officer. Any Division Member who becomes aware that any person has provided false information to a superior, shall inform the superior as soon as possible.

**1.4.9 Civil Affairs:** Sworn Division Members shall not involve themselves in an official capacity in any matter that is purely civil in nature.

**1.4.10 Reports and Information:** No Division Member shall, without authority, copy, alter or remove any record, report, evidence or material from any place within the care, custody and control of the Division of State Police.

1. Division Members shall take all reasonable precautions in the disposal of old case files to ensure that they are not viewed by the public. Such files include Division Members' copies of notes, criminal reports, accident reports, summonses, complaints or any other papers, recordings and photographs of police activity which contain personal identifications or police information. If secure disposal methods such as burning or shredding are not available to Division Members, materials may be submitted to Headquarters Support Services Bureau for proper disposal.

**1.4.11 Duty Requirements:** Sworn Division Members shall take appropriate action in accordance with Division policy to:

1. Protect life and property,
2. Prevent crime,
3. Detect and arrest violators of the law,
4. Enforce all Federal, State and Local Laws coming within State Police jurisdiction.

**1.4.12 Requests for Assistance:** When any person applies for assistance, advice, or makes a complaint, either by telephone or in person, all pertinent information

will be obtained in an official, courteous manner and will be properly and judiciously acted upon consistent with established Division procedures.

**1.4.13 Division Reports:** Division Members shall submit all necessary reports in proper form, on time and in accordance with established Division Procedures. Reports submitted by employees shall be accurate. No employee shall knowingly enter or cause to be entered any inaccurate, false or improper information.

**1.4.14 Use of Force:** In the exercise of their police authority, Sworn Division Members will use only the force necessary to accomplish lawful objectives.

## **1.5.0 PERFORMANCE EXPECTATION**

Division Members shall maintain sufficient competency to properly perform their duties and assume the responsibilities of their positions. Division Members shall perform their duties in a manner which will maintain the highest standards of efficiency in carrying out the functions and objectives of the Division. Unsatisfactory performance may be demonstrated by lack of knowledge of the application of laws required to be enforced; an unwillingness or inability to perform assigned tasks; the failure to conform to work standards established for the employee's rank, grade, or position; the failure to take appropriate action on the occasion of a crime, disorder or other condition deserving police attention; or absence without leave. In addition to other evidence of unsatisfactory performance, the following will be considered prima facie evidence of unsatisfactory performance: repeated poor evaluations or a written record of repeated infractions of rules, regulations, directives or orders of the Division.

## **1.6.0 USE OF WEAPONS**

**1.6.1 Handling Weapons:** Sworn Division Members shall handle weapons in accordance with Division policies.

**1.6.2 Notification of Use:** If a Sworn Division Member uses a weapon in the performance of duty he shall immediately notify his Commanding Officer and in addition within twenty-four hours shall submit a report in writing which shall be forwarded through the chain of command. When a Sworn Division Member destroys an animal in accordance with this chapter an electronic message sent will be acceptable for the purpose of administering this section. A Sworn Division Member using their weapon during training/qualification is not required to make notification.

**1.6.3 Discharge of Weapon:** Division Members shall not be disciplined for the safe and reasonable use of weapons in the following circumstances:

1. When deadly force is used in accordance with NH RSA 627:5 and Chapter 41-L (Use of Deadly Force) of the Division's Professional Standards of Conduct.

1. Each Commanding Officer shall be responsible for the proper care and maintenance of all uniforms, equipment and vehicles issued to subordinates. Every Division Member shall be personally responsible for all state property issued to them or placed in service for their use or convenience.
2. Whenever equipment or property belonging to the Division is damaged, lost, or destroyed, the employee to whom it was issued, or employee using same shall notify his Commanding Officer without delay. If it is determined that such was caused due to negligence or misuse by the employee, the employee shall be considered negligent of duty. In addition to any other disciplinary action, the Division Member may be required to repair or replace the equipment or property at their own expense.
3. No Division Member shall cause or permit any uniform, equipment, or vehicle to be modified or otherwise altered without first obtaining authorization from the Director or his designee.
5. No uniform of any nature or part thereof, nor combination of uniform and civilian clothing, other than that uniform designated by the Director, shall be worn by any member of the Division. All uniforms shall be worn in a manner prescribed by the orders of the Director.

### 1.13.0 DISCIPLINE

The Director may initiate investigations whenever he deems such action is warranted. Alleged violations of the Rules and Regulations, or any other directive of the Division, shall be investigated in accordance with the provisions set forth in the Professional Standards of Conduct Chapter 26-E, Personnel Complaint/~~Internal Affairs~~ Administrative Investigation Policy and Procedures. Any Division Member found to have violated any provision of these Rules and Regulations may be subject to disciplinary action, up to and including dismissal from the Division of State Police.

**1.13.1 Receipt of Complaint:** Whenever any Division Member receives a complaint against the State Police from any source, observes or receives information from any source that another employee has allegedly violated any state law, rule, regulation or order of the Division of State Police, they shall immediately notify their Commanding Officer or supervisor.

**1.13.2 Compelled Statements:** Division Members will respond to any questions narrowly and directly related to the matter under investigation unless a criminal prosecution is contemplated. If such criminal prosecution is indicated, the Division Member will be afforded their constitutional rights before any questioning.