

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0450

New Hampshire Department of Safety,
Division of State Police

v.

Thomas Owens

APPEAL PURSUANT TO RULE 10 FROM A JUDGMENT OF THE
PERSONNEL APPEALS BOARD

**REPLY BRIEF FOR THE
NEW HAMPSHIRE DEPARTMENT OF SAFETY,
DIVISION OF STATE POLICE**

NEW HAMPSHIRE DEPARTMENT OF SAFETY,
DIVISION OF STATE POLICE

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(Fifteen-minute Oral Argument)

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	3
STATEMENT OF THE CASE AND FACTS	4
ARGUMENT	5
I. OWENS’ ARGUMENT A, PERTAINING TO THE STATUTORY AUTHORITY GRANTED TO THE PERSONNEL APPEALS BOARD, MISCONSTRUES STATE POLICE’S ARGUMENT.....	5
II. OWENS’ ARGUMENT C, ARGUING THAT THERE IS NO DOMINANT PUBLIC POLICY AGAINST TERMINATING A DISHONEST TROOPER, RELIES UPON VAGUE ASSERTIONS, MISCONSTRUES STATE POLICE’S POSITION, AND MISAPPLIES CASE LAW.....	7
III. OWENS’ CONCLUSION ASKS THIS COURT TO MAKE A DETERMINATION AS TO HIS INTEGRITY, WHICH WAS NOT RAISED AS A CROSS-APPEAL, AND IS SEEMINGLY INCLUDED AS AN INAPPROPRIATE MECHANISM TO RELIEVE OWENS OF HIS PLACEMENT ON THE EES.....	11
CONCLUSION	13
CERTIFICATE OF COMPLIANCE	14
CERTIFICATE OF SERVICE.....	15

TABLE OF AUTHORITIES**Cases**

<i>Appeal of Amalgamated Transit Union</i> , 144 N.H. 325 (1999)	6
<i>Appeal of N.H. Div. of State Police</i> , 171 N.H. 262 (2018)	6, 9
<i>Appeal of Town of Pelham</i> , 154 N.H. 125 (2006).....	10
<i>Duchesne v. Hillsborough County Attorney</i> , 167 N.H. 774 (2015)	12
<i>State v. Laurie</i> , 139 N.H. 325 (1995)	10
<i>State v. Noucas</i> , 165 N.H. 146 (2013).....	7

STATEMENT OF THE CASE AND FACTS

State Police relies on the Statement of the Case and the Facts set forth in its opening brief.

ARGUMENT

I. OWENS' ARGUMENT A, PERTAINING TO THE STATUTORY AUTHORITY GRANTED TO THE PERSONNEL APPEALS BOARD, MISCONSTRUES STATE POLICE'S ARGUMENT.

In the opening brief, State Police expounded on the argument that the Personnel Appeals Board ("PAB") exceeded its authority by issuing an order that contravenes a dominant public policy. With particularity, State Police argues that a multitude of authorities have established a dominant public policy which supports the dismissal of dishonest law enforcement officers. By issuing an order that reinstated a Trooper with known issues of dishonesty, the PAB erred as a matter of law by defying public policy, and further, the result of the order is both unjust and unreasonable to the operational needs of State Police and to the public at large.

Owens misconstrues State Police's narrow argument – the impropriety of issuing an order in contradiction to a dominant public policy - as challenging the overall authority of the PAB. OB 16-18. Owens then attempts to resolve this appeal with a recitation of the broad authority afforded to the PAB and an explanation of how the PAB's conduct in this matter was within that authority. OB 16-18. At no point does State Police challenge the general authority of the PAB to reinstate an employee, or even the authority to reinstate an employee that has committed a terminable offense. To the contrary, State Police is well aware that current law allows considerable latitude to the PAB to reinstate an employee even if the employee has committed a terminable offense, and even if reinstatement is against the judgment of the agency. *See Appeal of N.H. Div. of State Police,*

171 N.H. 262 (2018). What current law does not allow, however, is for an administrative agency acting in a quasi-judicial capacity to circumvent dominant public policy. *Appeal of Amalgamated Transit Union*, 144 N.H. 325, 327 (1999). While, in a general sense, the PAB has the authority to disregard State Police's judgment that an employee should be terminated, and has the authority to reinstate an employee despite committing a terminable offense, the PAB does not have the authority to issue an order that runs contrary to public policy, as it has here.

II. OWENS' ARGUMENT C, ARGUING THAT THERE IS NO DOMINANT PUBLIC POLICY AGAINST TERMINATING A DISHONEST TROOPER, RELIES UPON VAGUE ASSERTIONS, MISCONSTRUES STATE POLICE'S POSITION, AND MISAPPLIES CASE LAW.

In the opening brief, State Police provides a lengthy list of authority that has established the public policy which supports termination of dishonest law enforcement officers. This dominant public policy of remedying officer dishonesty finds its roots in the New Hampshire and United States Constitutions, has been opined upon in decisional law, has been incorporated into statute, has been imported into the employment context through professional standards of conduct, has been the subject of an executive order, and is included in the recommendations from the Commission expressly tasked with reforming law enforcement accountability.

Yet, in his brief, Owens argues that there is no dominant public policy. OB 22-23. He further contends that State Police was disingenuous in raising a public policy violation, because his conduct was, at best, a minor violation of the integrity policy, and State Police has continued to employ other Troopers who are included on the Exculpatory Evidence Schedule ("EES"). OB 22. These arguments should be rejected because they offer vague and undeveloped anecdotal evidence, misconstrue State Police's argument, and rely on inapplicable case law.

As a threshold matter, arguments raised for the first time on appeal are waived and should not be considered by this Court. *State v. Noucas*, 165 N.H. 146, 152 (2013) ("We have consistently held that we will not consider issues raised on appeal that were not presented in the trial court.") There are

no facts in the record on appeal that support Owens' argument that State Police employs Troopers who have violated the integrity policy and are included on the EES. OB 22. Owens never made mention of these other Troopers at the PAB hearing and the record for this appeal is now closed.

Owens further fails to include any details to elaborate on this assertion. Even if this Court were to consider such a statement, the general mention of other Troopers with integrity violations should be given little weight, as Owens offers no details about them to suggest these Troopers are similarly situated to himself. Owens has not provided any information about the alleged integrity violations of other State Police employees, including the positions these Troopers hold and the job duties that may require them to interact with the public, the timeframe the Troopers were placed on the EES and the applicable policies at that time, the cultural expectations toward police officers at the time the Troopers were placed on the EES, the accolades or career-long reputations of those Troopers, the decision makers and investigative process at the time the Troopers were placed on the list, or any other details necessary to bolster this assertion – all of which are factors which may be considered by the State Police Colonel when exercising his discretion on whether to separate an individual from employment.

Owens asks this Court to find that there is no public policy regarding dishonest Troopers based simply on the assertion that there are other Troopers with integrity violations that have maintained employment. With over 300 Troopers employed in a variety of roles, it may well be that there are Troopers who have maintained employment in some capacity despite an integrity violation. But Owens has failed to include a single pertinent detail

to explain why those Troopers are similarly situated to his own conduct, or to allow the Court to determine why those Troopers may be wholly distinguishable from his conduct.

To be sure, State Police is not arguing that public policy necessitates removal of any officer who is on the EES for any reason. Rather, public policy confers State Police with the discretionary authority to remove a Trooper who has an integrity violation so severe that it results in State Police losing confidence in the Trooper. To refute State Police's argument that a dominant public policy requires termination of dishonest Troopers in whom the force has lost confidence, Owens makes the bold statement that "if it is such a dominant public policy as the State contends then every officer on the EES list needs to be fired immediately." OB 22. This provocative statement fails to take into consideration that an officer may be placed on the EES for a variety of reasons, including but not limited to criminal conduct, egregious dereliction of duty, excessive use of force, mental illness or instability, and for specific conduct that ranges from the relatively benign to the severely egregious.

Owens further misconstrues State Police's argument by pigeonholing the State's position into the framework set out in *Appeal of N.H. Div. of State Police*, 171 N.H. 262 (2018). OB 21. Owens' reliance on this decision, however, is misplaced, as State Police is not making the same argument today as it made in 2018. *Appeal of N.H. Div. of State Police* stands for the proposition that the PAB has authority to reinstate an employee, even if the PAB found that the employee committed a terminable offense, and even if the PAB issued discipline that differed from the discipline the agency deemed appropriate. 171 N.H. at 268. Here, State

Police does not argue that the PAB cannot sidestep the judgment of the agency, but that the PAB cannot sidestep the demands of public policy. The Court in *Appeal of N.H. Div. of State Police* was never presented with the issue of public policy, and the Court never opined on the issue of public policy. Therefore that case does not refute State Police's present argument.

Owens again misses the mark when discussing *State v. Laurie*, 139 N.H. 325 (1995) and *Appeal of Town of Pelham*, 154 N.H. 125 (2006). OB 22-23. State Police has not argued that *State v. Laurie* addresses the issue of employment for a dishonest Trooper. State Police has, however, presented *State v. Laurie* as the foundation of the public policy that dictates that officers with faulty integrity pose grievous consequences to the individuals they are tasked with protecting. *State v. Laurie* is just one link in a long chain of decisional law that identifies the concerns that arise from law enforcement dishonesty, which in turn have formed the basis for employment practices and policy reforms. *Appeal of Pelham* discusses *State v. Laurie* as it applies to the employment context, but only goes so far as applying *Laurie* through the lens of civilian employees, not sworn officers. 154 N.H. at 130-31. *Appeal of Pelham* decided that there is no dominant public policy against the reinstatement of untrustworthy civilian employees, who have only a tenuous likelihood of ever being called to testify in a criminal matter, but left unanswered whether there is a dominant public policy that applies to sworn law enforcement officers who are almost certain to testify in criminal matters. 154 N.H. at 129-31. Neither *Laurie* nor *Pelham* can be relied upon, as Owens suggests, to dismantle the dominant public policy against employing dishonest Troopers.

III. OWENS' CONCLUSION ASKS THIS COURT TO MAKE A DETERMINATION AS TO HIS INTEGRITY, WHICH WAS NOT RAISED AS A CROSS-APPEAL, AND IS SEEMINGLY INCLUDED AS AN INAPPROPRIATE MECHANISM TO RELIEVE OWENS OF HIS PLACEMENT ON THE EES.

While Owens' integrity is inescapably woven into the factual predicate to this appeal, it is not a direct subject of this appeal. This Court is not being asked to decide whether or not Owens committed an integrity violation, as no such question has been presented on appeal. The PAB order itself makes clear that Owens did commit such an integrity violation by falsifying agency records (“[Owens] consistently admitted that he paid little attention to detail and that he adjusted the hours for October 30, 2019 to avoid a policy violation.” CR 92-93). The fact that Owens remains on the EES, despite the PAB order reinstating him, underscores the fact that Owens' conduct rises to the level of an integrity violation. *See* Owens' Objection to Appellant's Motion to Stay, ¶ 4, stating “Owens' name should also be removed from Attorney General's Exculpatory Evidence Schedule (“EES”) list, because it would be consistent with this Court's previous ruling.” Neither Owens nor State Police preserved an issue asking this Court to determine whether Owens' conduct amounted to an integrity violation, and whether Owens properly remains on the EES is a subject for an entirely separate action.

First mentioned in his Objection to Appellant's Motion to Stay, and now raised in his Conclusion, Owens asks this Court to make a determination as to his integrity. OB 28. In his Objection to Appellant's Motion to Stay, Owens goes so far as to argue that Owens' name should be removed from the EES. Objection to Appellant's Motion to Stay, ¶ 4. But

this Court does not weigh evidence or make factual determinations. An inquiry into whether or not Owens lacked integrity necessarily requires this Court to weigh the evidence submitted before the PAB. Moreover, an appeal before this Court is not the appropriate mechanism or forum to seek removal from the EES. When allegations against an officer are proven to be unfounded, and there is no longer a sustained basis for an officer to be placed on the EES, then the officer may petition the Superior Court to be removed from the list. *Duchesne v. Hillsborough County Attorney*, 167 N.H. 774, 784-85 (2015). It would therefore be improper for this Court to opine on Owens' removal from the EES when he has not sought relief in Superior Court first.

CONCLUSION

For the foregoing reasons laid out in State Police's opening brief and this reply brief, State Police respectfully requests that this Honorable Court reverse the PAB's order because it violates a dominant public policy, errs as a matter of law, is unjust, and unreasonable.

State Police requests a fifteen-minute oral argument before the full Court.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE
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June 29, 2021

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CERTIFICATE OF COMPLIANCE

I, Emily C. Goering, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this reply brief contains 2,019 words, which is fewer than that which is permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

June 29, 2021

/s/ Emily C. Goering
Emily C. Goering

CERTIFICATE OF SERVICE

I, Emily C. Goering, hereby certify that a copy of State Police's brief shall be served on Marc Beaudoin, Esquire, and Jake Krupski, Esquire, counsel for Thomas Owens, through the New Hampshire Supreme Court's electronic filing system.

June 29, 2021

/s/ Emily C. Goering
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