

**STATE OF NEW HAMPSHIRE  
SUPREME COURT**

**Case No. 2020-0450**

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

**v.**

**Thomas Owens**

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**BRIEF FOR THE APPELLEE  
THOMAS OWENS**

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**RULE 10 APPEAL  
FROM THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD**

(Oral Argument Requested: 15 minutes)

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## RELEVANT STATUTES

### **RSA 21-I:58 Appeals –**

I. Any permanent employee who is affected by any application of the personnel rules, except for those rules enumerated in RSA 21-I:46, I and the application of rules in classification decisions appealable under RSA 21-I:57, may appeal to the personnel appeals board within 15 calendar days of the action giving rise to the appeal. The appeal shall be heard in accordance with the procedures provided for adjudicative proceedings in RSA 541-A. If the personnel appeals board finds that the action complained of was taken by the appointing authority for any reason related to politics, religion, age, sex, gender identity, race, color, ethnic background, marital status, or disabling condition, or on account of the person's sexual orientation, or was taken in violation of a statute or of rules adopted by the director, the employee shall be reinstated to the employee's former position or a position of like seniority, status, and pay. The employee shall be reinstated without loss of pay, provided that the sum shall be equal to the salary loss suffered during the period of denied compensation less any amount of compensation earned or benefits received from any other source during the period. "Any other source" shall not include compensation earned from continued casual employment during the period if the employee held the position of casual employment prior to the period, except to the extent that the number of hours worked in such casual employment increases during the period. In all cases, the personnel appeals board 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.

II. Any action or decision taken or made under this section shall be subject to rehearing and appeal as provided in RSA 541.

III. In the event of an appeal from a decision of the personnel appeals board in accordance with the provisions of RSA 541, the fee for the copy of the record and such testimony and exhibits as shall be transferred, and the fee for manifold copies shall be established by the governor and council and collected by the director of personnel from the party making the appeal. Any fees collected by the director of personnel under the provisions of this section shall be credited to the appropriation for the division of personnel. The appeals board shall not be required to certify the record upon any such appeal, nor shall the appeal be considered until the fees for the copies have been paid.

**Source.** 1986, 12:1. 1988, 269:4. 1990, 140:2, XII. 1997, 108:5, eff. Jan. 1, 1998. 2019, 332:5, eff. Oct. 15, 2019.

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### **RSA 541:13 Burden of Proof –**

Upon the hearing the burden of proof shall be upon the party seeking to set aside any order or decision of the commission to show that the same is clearly unreasonable or unlawful, and all findings of the commission upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside

or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable.

**Source.** 1913, 145:18. PL 239:11. 1937, 107:24; 133:85. RL 414:13.

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## **ISSUE PRESENTED**

A dishonest State Trooper was dismissed from employment on the basis of indisputable evidence that the Trooper lacked integrity both in the discharge of his duties and during the ensuing internal investigation. Did the Personnel Appeals Board err by overturning the Trooper's dismissal, when such dismissal was executed in furtherance of the dominant public policy that supports removing law enforcement officers from service, and when, in the discretion of State Police, the Trooper lacked the requisite integrity for the position of State Trooper?<sup>1</sup>

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<sup>1</sup> The Appellee strongly disagrees with the State's assertion that he was a dishonest Trooper, and the PAB's Order found the Appellee to be credible.

## STATEMENT OF THE CASE

On August 30, 2019, Trooper Thomas Owens (hereinafter “Trooper Owens”), filed an appeal pursuant to RSA 21-I:58 and Per-A 206.01 with the New Hampshire Personnel Appeals Board (hereinafter “PAB”) seeking to overturn his unlawful termination. CR at 1-23.<sup>2</sup> The State of New Hampshire, Department of Safety, Division of State Police (hereinafter “State”) terminated the employment of a young Trooper based primarily upon the erroneous allegation of an integrity issue. The termination was issued on August 26, 2019 and consisted of three (3) separate alleged violations of the State’s Personnel Rules and six (6) separate alleged violations of the Professional Standards of Conduct. CR at 11-12, 88. The State indicated that the primary reason for the termination was the alleged Integrity violation. CR at 452.

On May 6, 2020, the PAB issued its order (hereinafter “Order”) after it heard a full evidentiary hearing on the merits, in which it determined that termination was unjust in light of the facts and circumstances in evidence, pursuant to Per-A 207.12(b)(4). Although the PAB did not specifically state whether or not the alleged Integrity violation was sustained or not, it did infer that the PAB found that Trooper Owens’ statements were consistent, and it found him credible. CR at 88-93. As a result, the PAB reinstated Thomas Owens to the position of State Trooper, substituted the termination with a 20-day suspension without pay, and recommended that he be ineligible for detail work for a period of 60 days. CR at 88-93. The State Police subsequently filed a motion for rehearing, which was denied by the PAB. CR at 87.

On October 1, 2020, the State Police filed a Notice of Appeal with this Court pursuant to Supreme Court Rule 10. NOA 1-15. The State Police also sought to stay the Order with the PAB while the appeal was pending, but the PAB denied the motion, thus reaffirming that Trooper

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<sup>2</sup> For ease, the Appellee will use the same citations as listed in the Appellant’s brief.



Owens was not dishonest. CR at 57-64. As a result, the State Police subsequently filed a motion with this Honorable Court to stay the Order, and this Court granted that order on January 13, 2021.

### **STATEMENT OF FACTS**

The events that gave rise to the internal investigation occurred between October 29, 2018 and November 2, 2018. On October 29, 2018, Trooper Owens received a page for an open detail from the detail desk that was seeking a Trooper for an escort on Interstate 93 in Salem at 3:00 PM on October 30, 2018. CR at 199, 274-291, 462. Trooper Owens thought that the detail was for that same day (October 29, 2018), which is why he accepted the detail. CR at 462. Trooper Owens drove to the detail that day, and that is when he realized it was for the following day on October 30, 2018. CR at 462. When he realized that the detail was for the following day, Trooper Owens noticed that he had firearms training scheduled on that same day. CR at 462. However, he knew that firearms training usually did not last for a full day, and since the detail was at 3:00 PM he thought that he would have plenty of time to make it to the detail. CR at 462.

On October 30, 2018, Trooper Owens testified that firearms training started at 8:00 or 8:30 AM, and that he lived in Hooksett with a travel time of anywhere from 45 minutes to an hour. CR at 463. He said that he would have needed to leave his residence by 7:00 am or 7:30 am at the latest. CR at 463. Trooper Owens testified that he did not note the exact time that he signed 10-1.<sup>3</sup> CR at 463-464. Trooper Owens completed his firearms training for that day in the early afternoon, somewhere between 12:00 pm and 1:00 pm. CR at 464. Trooper Owens testified that the firearms training that day was quick. CR 464. He further testified that the standard operating procedure for

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<sup>3</sup> 10-1 is the code that a Trooper calls on the radio to dispatch to let the dispatcher know that the Trooper is now on duty. The dispatcher then logs that time into the Computer Aided Dispatch ("CAD") system.

a Trooper on a firearms day is to sign 10-1, go to and complete firearms training, then go home and sign 10-2 regardless of what schedule the Trooper was working<sup>4</sup> CR at 464.

After Trooper Owens attended the firearms training, he traveled back to his residence, and he then went to the extra duty detail (police escort) in Salem at approximately 3:00 pm. CR 199, 274-291, 461-462. Trooper Owens admitted that he went to the extra duty detail that day wearing the wrong uniform. CR at 468. Later in the week, Trooper Owens was completing his timecard, and that is when he knew that he had a problem with how he was going to record his time for Tuesday, October 30, 2018. CR at 466. Trooper Owens testified that he was completing numerous extra duty details as a young Trooper, because he was trying to become established in New Hampshire. CR at 466.

Trooper Owens testified that he thought that he could rectify the timecard issue by taking a 7-hour day on October 30, 2018. CR at 469. He also testified that he entered 7:00 am on his timecard so that the hours would work for the firearms day and the detail. CR at 469-470. On the timecard there are two separate columns, one is for total hours worked and the other lists the hours worked. CR at 470. Trooper Owens entered into the timecard that he worked a total of 7 hours, but when he entered the hours worked, he typed 7:00 am and the timecard auto-populated the rest to indicate that he worked from 0700-1300 hours (7:00 am to 1:00 pm), which is only six hours. CR at 470. Trooper Owens testified that this was a clerical issue, because he meant to enter an end time of 1400 hours (2:00 pm). CR at 470. Trooper Owens did not learn that he signed 10-1 on October 30, 2018 at 7:24 until Sgt. Vincent Grieco, his direct supervisor, had confronted him about the

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<sup>4</sup> 10-2 is the code that a Trooper calls on the radio to dispatch to let the dispatcher know that the Trooper is now off duty. Uniformed patrol Troopers work either an 8.5 hour or 9-hour day depending on the rotation for that 28-day period. There is also one short day in that 28-day period called a 7-hour day. Standard operating procedure for a firearms training day is to report to the firearms range, participate in training, and then return home at the end of training. The unused work hours are meant to cover travel time and servicing of the firearms.

discrepancy in his timecard. CR at 116, 199, 470-471. Trooper Owens had previously been counseled for timekeeping discrepancies, and Lt. Commerford warned him that future timecard issues would result in a suspension from performing extra duty details. CR at 146-47.<sup>5</sup>

The discrepancy in Trooper Owens' timecard was discovered by his direct supervisor, Sgt. Grieco, when Sgt. Grieco was reviewing Trooper Owens' timecard for approval. CR at 116-18, 199-200. During this review process, Sgt. Grieco learned that Trooper Owens used a seven-hour day on October 30, 2018, but that Trooper Owens did not inform either himself or Sgt. Irwin Malilay of the usage of a short day. CR at 116-18, 200. From reviewing the timecard, Sgt. Grieco became concerned that Trooper Owens may have violated some of the Division of State Police policies, which prompted him and Sgt. Malilay to meet with Trooper Owens on November 3, 2018. CR at 117, 201, 282-83. During this initial conversation, Trooper Owens explained that a lot had happened on the day in question leading him to make the administrative mistakes. CR at 284.

On November 29, 2018, Sgt. Grieco met with Trooper Owens a second time in order to conduct a formal recorded interview regarding the timekeeping discrepancies. CR 201. Prior to this interview, Trooper Owens completed a "Yellow Letter<sup>6</sup>," which explained what had occurred on October 30, 2018. CR at 144-145. In his Yellow Letter, Trooper Owens acknowledges that he technically signed on duty on or about 7:24 am, so his timecard should have reflected that time instead of 7:00 am. CR at 144. Throughout, all the interviews, Trooper Owens consistently stated that the errors on his timecard were the result of poor planning, time management, and sloppy record keeping. CR at 145. (Audio Exhibit J @ 21:24 and 28:33). At the conclusion of the

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<sup>5</sup> A suspension from working extra duty details is not a formal form of discipline as the State's brief on page 10 would suggest, because being suspended from working extra duty details is the proscribed discipline for violating the State Police detail policy, and it is also a form of financial punishment. It is not official discipline for the purposes of the State's personnel rules. See CR at 148-56

<sup>6</sup> A Yellow Letter is an inter-departmental memorandum that is usually printed and distributed on yellow paper.

interview, Sgt. Grieco completed his investigation and sent the written finding to State Police Headquarters. CR at 115-119.

Colonel Christopher Wager, then-director of State Police, reviewed Sgt. Grieco's report, and ultimately requested additional information. CR 424, 426-427. Lt. Mullen was assigned to conduct the follow up investigation. CR 307, 426-427. On March 15, 2019, over four months later, Lt. Mullen conducted a follow up interview with Trooper Owens. CR 202, 338, Audio Exhibit K. In this interview, Lt. Mullen focused on why Trooper Owens wrote 7:00 am on his timecard when in fact it appeared that he went on-duty at 7:24 am, and he also questioned Trooper Owens about the use of the 7-hour day. Trooper Owens admitted that he wrote 7:00 am on his timecard, because he was trying to make the hours work so that he did not travel to the extra duty detail on duty time. (Audio Exhibit K @ 12:11). Again, he reiterated that he entered the times that he did on the timecard so that he would not be in violation of the detail policy. (Audio Exhibit K at 13:43). Trooper Owens further stated that he was trying to make the numbers work. (Audio Exhibit K at 20:02). Trooper Owens also admitted that he did not request permission to take a 7-hour day on October 30, 2018.<sup>7</sup> (Audio Exhibit K at 20:49).

On April 24, 2019, over 5-months later, Lt. Mullen interviewed Trooper Owens for the fourth time in reference to the same incident on October 30, 2018. CR at 204, 359 and Audio Exhibit L. The State characterized this interview as the focus was to determine why Trooper Owens led Sgt. Grieco to believe the inaccuracies in the timecard were an error when he told Lt. Mullen that the inaccuracies were entered on purpose. Lt. Mullen ultimately concluded that Trooper Owens' statements to Sgt. Grieco that the inconsistencies were clerical or administrative errors, and his

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<sup>7</sup> There is no State Police policy that dictates that a Trooper has to ask permission to take a 7-hour day or when a 7-hour day can be taken. See testimony of Sgt. Irwin Mallay. CR at 290-291.

Yellow Letter that reflected the same, were in fact inaccurate statements intended to deceive because Trooper Owens had intentionally entered the false information. CR at 194.

On August 26, 2019, Colonel Wagner dismissed Trooper Owens from his employment with the Division of State Police, and per the State's brief, "Chief amongst the violations, and pertinent to this appeal, was Owens' violation of the New Hampshire State Police Professional Standards of Conduct, Section 1.4.8, Integrity." State's Brief at 20.

On March 18, 2020, the PAB held a full evidentiary hearing on the merits. NOA 18. Testimony for the State was provided by Sgt. Irwin Malilay, Lt. John Mullen, and Col. Christopher Wagner, and Trooper Owens testified in support of his appeal. NOA 18. The PAB received numerous exhibits and heard evidence throughout the day in the form of testimony and audio recordings. CR at 95-254.

On May 6, 2020, the PAB issued its order overturning Trooper Owens' disciplinary dismissal. CR at 88-93. In its order, the PAB noted that Trooper Owens was consistent in what he told investigators and that the Board found him to be credible. CR at 91-93. The Board concluded with, "The errors and omissions including failing to communicate his problem to his superiors in a timely manner, poor record keeping and traveling 16 minutes on state time on the way to a detail wearing the wrong uniform constitute policy violations and warrant a suspension of 20 days without pay." CR at 93. Although the PAB did not specifically state that the integrity violation was not sustained, it definitely appears to be inferred when looking at the order as a whole and especially when taking the above listed quote into consideration, which lacks any mention of integrity.

The State filed a Motion for Rehearing claiming that it could not reinstate a Trooper that had integrity issues due to public policy, which was subsequently denied by the PAB on June 24,

2020. Based on the PAB's findings that Trooper Owens consistently recalled the same series of events, that the Board found him credible, and that the Board did not list integrity as one of the reasons it issued a 20-day suspension to Trooper Owens, the Board found that Trooper Owens did not commit the alleged integrity violation.

### **STANDARD OF REVIEW**

The review of this case is governed by RSA 541:13 (2007). As the appealing party, the Appellant has the burden of proof to show that the PAB decision is clearly unreasonable and unlawful. See RSA 541:13. The PAB decision should not be set aside or vacated except for errors of law, unless the Court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust and unreasonable. The PAB's findings of fact are deemed to be prima facie lawful and reasonable. Appeal of N.H. Div. of State Police N.H. Pers. Appeals Bd., 171 N.H. 262, 266 (2018).

“We review the PAB's interpretation of statutes and administrative rules *de novo*.” N.H. Dep't of Env'tl. Servs. V. Marino, 155 N.H. 709, 713, 928 A.2d 818 (2007); State v. Elementis Chem., 152 N.H. 794, 803, 887 A.2d 1133 (2005). “In both instances, we ascribe the plain and ordinary meanings to the words used,” Appeal of Flynn, 145 N.H. 422, 423, 764 A.2d 881 (2000), “...looking at the rule or statutory scheme as a whole, and not piecemeal.” See Appeal of Alley, 137 N.H. 40, 42, 623 A.2d 223 (1993). “Although we accord deference to the PAB's interpretation, that deference is not absolute. We still examine its interpretation to determine if it is consistent with the language of the regulation and with the purpose the regulation is intended to serve.” Appeal of Vicki Morton, 150 N.H. 76 (2008).

## SUMMARY OF THE ARGUMENT

The authority of the PAB is codified in RSA 21-I:58, and it allows the PAB to, “reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just.” The PAB, after a thorough evidentiary hearing on the merits, found that the termination of Trooper Owens was unjust in light of the facts in evidence under Per-A 207.12(b)(4), and had the statutory authority to reinstate and modify the discipline of the appointing authority.

The State mischaracterizes Troopers Owens as a dishonest police officer, because the PAB found him to be credible and does not cite a violation of the State Police integrity policy as part of the 20-day suspension that was issued to him in lieu of termination. The PAB found that Trooper Owens made consistent statements in all the interviews, and that he did not harbor any intention of hiding any information from anyone. The PAB also found Trooper Owens to be credible. Therefore, the PAB did not sustain the alleged integrity violation even though the Order is not as concrete as the State would find acceptable.

Assuming arguendo, that the alleged integrity violation was sustained, the State’s argument that Trooper Owens cannot be reinstated due to a dominant public policy fails, because the State Police continues to employ Troopers who have previously violated the integrity policy. The Exculpatory Evidence Schedule (hereinafter “EES”) contains over 200 names of police officers, most of which have an integrity issue, many of whom are still employed at both the State Police and other local law enforcement agencies throughout the state.

Finally, the PAB’s reinstatement of Trooper Owens was just, reasonable, and supported by the evidence. The PAB heard from four separate witness and had the chance to assess the

credibility of each of them. Testimonial evidence along with numerous exhibits were examined, and the PAB took the whole matter into consideration when it issued its Order.

### ARGUMENT

**A. The PAB is authorized by statute to reinstate an employee, change, or modify an order of the appointing authority or make such other order as it may deem just.**

The enabling statute for the authority of the PAB is codified in RSA 21-I:58. This statute provides,

...If the personnel appeals board finds that the action complained of was taken by the appointing authority for any reason related to politics, religion, age, sex, gender identity, race, color, ethnic background, marital status, or disabling condition, or on account of the person's sexual orientation, or was taken in violation of a statute or of rules adopted by the director, the employee shall be reinstated to the employee's former position or a position of like seniority, status, and pay. The employee shall be reinstated without loss of pay, provided that the sum shall be equal to the salary loss suffered during the period of denied compensation less any amount of compensation earned or benefits received from any other source during the period. "Any other source" shall not include compensation earned from continued casual employment during the period if the employee held the position of casual employment prior to the period, except to the extent that the number of hours worked in such casual employment increases during the period. In all cases, the personnel appeals board **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.** (emphasis added)

II. Any action or decision taken or made under this section shall be subject to rehearing and appeal as provided in RSA 541.

III. In the event of an appeal from a decision of the personnel appeals board in accordance with the provisions of RSA 541, the fee for the copy of the record and such testimony and exhibits as shall be transferred, and the fee for manifold copies shall be established by the governor and council and collected by the director of personnel from the party making the appeal. Any fees collected by the director of personnel under the provisions of this section shall be credited to the appropriation for the division of personnel. The appeals board shall not be required to certify the record upon any such appeal, nor shall the appeal be considered until the fees for the copies have been paid.

Resolution of this petition requires statutory interpretation, which is a question of law that the Court reviews *de novo*. Hudson v. Director, N.H. Div. of Motor Vehicles, 155 N.H. 197, 198



(2007) “We are the final arbitrator of the intent of the legislature as expressed in the words of a statute considered as a whole.” McDonald v. Town of Effingham Zoning Bd. Of Adjustment, 152 N.H. 171, 174 (2005) (quotation omitted). “When examining the language of a statute, we ascribe the plain and ordinary meaning to the words used.” Bennett v. Town of Hampstead, 157 N.H. 477, 483 (2008) “We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. We interpret a statute in the context of the overall statutory scheme and not in isolation.” Id. (citation omitted) “When a statute’s language is plain and unambiguous, we need not look beyond it for further indications of legislative intent.” Appeal of Garrison Place Real Estate Inv. Trust, 159 N.H. 539, 542 (2009).

The PAB is statutorily authorized to “...reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just.” See, RSA 21-I:58(I). “It is axiomatic that the remedial authority of an administrative authority is governed by statute.” Appeal of Campaign for Repair Rights, et al, 162 N.H. 245, 255 (2011) citing Appeal of Land Acquisitions, 145 N.H. 492, 498 (2000). The legislature chose to empower the PAB to allow the PAB broad discretion in adjusting a decision of the appointing authority. Further, in this case, the PAB properly applied their standard and found that the PAB voted unanimously to GRANT the appeal, and in its decision stated, “The Board concludes that the Appellant carried his burden of proof and established by a preponderance of the evidence that his dismissal was unwarranted by the alleged conduct and unjust in light of the facts in evidence.” CR at 91. The PAB properly applied the standards set forth in their rules and regulations, codified in Per-A 207.12(b).

However, assuming arguendo, that the PAB's order is read to have found a violation of the State Police policy, Chapter 1, Rules & Regulations, subsection 1.4.8, Integrity, the clear and unambiguous language of RSA 21-I:58 authorizes the PAB to reinstate Trooper Owens, change or modify the order, or make such other order as it deems just. The PAB found that the termination was unjust in light of the facts in evidence (Per-A 207:12(b)(4)) and had a statutory right to reinstate and modify the discipline of the appointing authority. The PAB in conformance with the rule, could modify the State's discipline to a suspension without pay (see, Per 1002.06(a)(3)(h)). Furthermore, this Honorable Court has stated, "The Petitioner counters that RSA 21-I:58, I, gives the PAB the authority to reinstate an employee even if it concludes that the employee committed a terminable offense. We agree with the petitioner that the PAB acted within its authority." Appeal of the N.H. Div. of State Police N.H. Pers. Appeals Bd., 171 N.H. 262, 268 (2018).

Therefore, the PAB did not abuse its discretion or err as a matter of law when it reinstated Trooper Owens to his former position as a Trooper I with the State Police. They received numerous exhibits and heard a days' worth of testimony from several witnesses to include Trooper Owens, and they properly concluded that his termination was unjust in light of the facts and circumstances in evidence.

**B. The State mischaracterizes Trooper Owens as a dishonest police officer, because the PAB found him to be credible and does not cite a violation of integrity as part of the 20-Day suspension that was issued to him in lieu of termination.**

The State attempts to argue, in its brief, that the actions of the PAB "contravenes a dominant public policy." The State alleges that the PAB did not have the authority to reinstate Trooper Owens, because the State believes that he is a dishonest police officer. As such, the State continues to argue that a "dishonest police officer" cannot be employed as a Trooper as a matter of law. The State's argument fails on two levels.

First, the State is assuming that the PAB did not overturn the alleged integrity violation, and that the Board reinstated what it believed to be a dishonest police officer to the ranks of the State Police. The Appellee will concede that the PAB's decision does not directly state that the alleged integrity violation was overturned; however, there is a strong inference from reading the PAB's decision that the Board did in essence overturn it. The following is the excerpt from the PAB's decision in this case:

The adjustments to the Appellant's timecard caught the attention of his superiors. He admitted that he entered 07:00 as his starting time for October 30, 2018 and acknowledged that it was challenging for him to balance regular duty, court appearances, details and home activities and that time management was a problem for him. **He recited the same consistent story during the four interviews held over a 5-month period** and should have heeded the advice of the interviewers to complete the timecard daily instead of weekly to avoid the situation the he got himself into.

During all the questioning by the interviewers the **Appellant consistently admitted** that he paid little attention to detail and that he adjusted the hours for October 30, 2018 to avoid a policy violation. **He also consistently denied that he ever harbored any intention of hiding any information from anyone.** He accepted full responsibility for his actions.

**The Board found the Appellant to be credible** and concluded that he exercised poor judgment in an attempt to juggle regular duty shifts and details and to keep the combined hours within the payroll guidelines. This case serves as an example of inattention to detail and poor time management, but these deficiencies do not rise to the level of termination. **The errors and omissions including failing to communicate this problem to his superiors in a timely manner, poor record keeping and traveling 16 minutes on state time on the way to a detail wearing the wrong uniform constitute policy violations and warrant a suspension of 20 days without pay.** In addition, the Board recommends to the State that it not offer him any details for 60 days. (emphasis added) (CR at 92 & 93).

The PAB noted in its decision that Trooper Owens recited the same series of events during the four interviews held over a 5-month period. CR at 92. Therefore, the Board found his statements to be consistent, and disagreed with the State's assertion that in the fourth interview Trooper Owens confessed to lying by stating that he purposely entered the information into his timecard in order to deceive his supervisors and avoid discipline. The Board also found that Trooper Owens consistently admitted to his mistakes throughout all four interviews, and that he consistently denied

harboring any intention of deceiving his superiors. Furthermore, the Board also states in plain language, “The Board found the Appellant to be credible.” CR at 93.

Finally, and most importantly, the Board stated, “The errors and omissions including failing to communicate this problem to his superiors in a timely manner, poor record keeping and traveling 16 minutes on state time on the way to a detail wearing the wrong uniform constitute policy violations and warrant a suspension of 20 days without pay.” CR at 93. Here, the Board listed all the actions/policies that it believed that Trooper Owens violated, and issued the severe punishment of a 20-day suspension without pay. Noticeably missing from this sentence is the word “integrity” or any indication of deception. Therefore, one can conclude from this statement alone that the Board did not sustain the alleged integrity violation. See State Police Policy – Chapter 1, Rules and Regulations, subsection 1.4.8, Integrity, which can be located at CR at 163.

Furthermore, the State argued in its Motion for Rehearing that “...the Board did not address and make specific findings as to any of the Division’s grounds for terminating the Appellant.” CR at 32. The State further argued, “In the absence of specific findings regarding each of the Division’s grounds for terminating the Appellant, the Appellee infers that the Board essentially sustained the Division’s disciplinary action, but not the sanction, on the basis of the violation of a posted or published agency policy or procedure,...” CR at 33. Colonel Wagner testified at the hearing that the only violation, which was grounds for termination, was the alleged integrity violation. CR at 452. Trooper Owens argued in his Objection to the State’s Motion for Rehearing that the Board found him to be credible and that he did not violate the Integrity section of the State Police policy. CR at 53-56. The PAB denied the State’s Motion for Rehearing without any further commentary, which would conclude that the PAB in essence affirmed its decision that Trooper Owens did not violate the integrity policy. Otherwise, the PAB would have written a clarifying order. CR at 87.

Therefore, the State's whole first argument that it spends an exorbitant amount of time citing various public policy and case law is simply misplaced and wrong, because the PAB found Trooper Owens to be credible and it appears that it also found that he did not violate Chapter 1, Rules & Regulations, subsection 1.4.8, Integrity of the State Police policy. The only error that the PAB may have committed was that the order could have been written more clearly so that the State could understand it.

**C. The State's argument that the PAB cannot reinstate Trooper Owens because of public policy fails on a second level, because the State Police continues to employ Troopers who have previously violated the integrity policy and are currently on the Exculpatory Evidence Schedule.**

Assuming arguendo, that the PAB's order is read to have found that Trooper Owens did violate the State Police integrity policy, the State is disingenuous to argue that Trooper Owens cannot perform the essential duty functions of a Trooper. This Court has already rejected the State's argument in the case of Appeal of N.H. Div. of State Police N.H. Pers. Appeals Bd. where it stated, "The Division argues that the PAB's reinstatement of the petitioner was unreasonable and unjust because RSA 21-I:58, I, and the applicable administrative rules do not allow the PAB to "substitute its own judgment for that of the [Division], particularly when the [Division] has properly followed the personnel rules, and the [PAB] found that the employee committed a terminable offense." Specifically, it argues that, because the PAB agreed with the Division that the petitioner committed the terminable offense of endangering the life, health, or safety of another, it was unjust and unreasonable for the PAB to reinstate the petitioner. The petitioner counters that RSA 21-I:58, I, gives the PAB the authority to reinstate an employee even if it concludes that the employee committed a terminable offense. We agree with the petitioner that the PAB acted within its authority." Appeal of N.H. Div. of State Police N.H. Pers. Appeals Bd., 171 N.H. 262, 268, (2018).

Furthermore, Lieutenant Mullen testified at the PAB hearing that the actions of Trooper Owens on that Tuesday in question were an accident and that he did not intend to violate State Police policy that day. CR at 378-79. Colonel Wagner testified that the dishonesty/integrity violation occurred in the fourth interview when Trooper Owens admitted to adjusting his timecard on purpose in an attempt to hide the policy violation. CR 446-48. Even if this were true, and even if the PAB found this to be an integrity violation, it would amount to a minor violation of that policy. The manipulation of the timecard was not done for the purposes of any type of theft, at best the hours were modified slightly so that the system would accept the submission. Trooper Owens did not receive any extra pay or benefits as a result of his entry into the timecard system, and his sole purpose in making any entries was simply to make the “numbers work” for the purposes of the Garcia period so that the system would accept the entry.

Even if that is considered dishonest and an integrity violation, the State Police has several Troopers, some of whom are in elevated positions, that have violated the integrity policy in the past and are now included on the Attorney General’s EES.<sup>8</sup> There are over 200 officers whose names are included on the EES, and many of those officers are still working at their agencies. If it is such a dominant public policy as the State contends then every officer on the EES list needs to be fired immediately. Therefore, to state that Trooper Owens cannot perform the essential functions of a Trooper because of his alleged integrity violation is disingenuous and simply false.

An integrity violation would not preclude a Trooper from performing the essential functions of the job, nor would it preclude the Trooper from testifying in court. This whole issue boils down to an evidentiary issue, and how much weight would be given to a Trooper’s testimony

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<sup>8</sup> This firm has represented numerous officers from both the State Police and local police departments that are on the EES, and is aware that many of them are still employed by their agencies. However, due to the confidential nature of the EES, those names and situations will not be included in this brief. See N.H. Ctr. for Pub. Interest Journalism v. N.H. DOJ, 173 N.H. 648 (2020).

in court. The case of State v. Laurie and the EES deal with exculpatory evidence that is required to be turned over the defendant, and not with the employment status of the police officer. State v. Laurie, 139 N.H. 325 (1995). This Honorable Court dealt with this issue in the Appeal of Town of Pelham where it stated, “More importantly, we disagree with the town’s assertion that *Laurie* expresses a strong and dominant public policy against the reinstatement of a civilian police department employees who are found to be untruthful and who might possibly be required to testify in future criminal matters. In *Laurie*, we addressed only a defendant’s right under the State Constitution to receive exculpatory evidence from the State. Laurie, 139 N.H. at 327. The fact that the potentially impeachable witness in *Laurie* was a police officer was not dispositive of our decision, and we did not address the issue of terminating the employment of police officers who are known to be untrustworthy. While *Laurie*, as a practical matter, may influence a police department’s internal hiring and disciplinary policies, it does not express a strong and dominant public policy to the extent posited by the town.” Appeal of Town of Pelham, 154 N.H. 125, 130-131 (2006).

This Honorable Court further stated, “Thus, the PELRB is limited to applying only ‘strong and dominant public policy as expressed in controlling statutes, regulations, common law, and other applicable authority, to address matters necessary to resolve questions arising within the scope of their jurisdiction.’” Appeal of Town of Pelham, 154 at 130. The PAB is a similar board with limited jurisdiction, so the State’s argument fails on this level as well.

**D. The PAB did consider the appointing authority’s evidence and correctly interpreted the evidence to support Trooper Owens’ reinstatement, and its decision was just, reasonable, and supported by the facts in evidence.**

This Court has granted much deference to an administrative agency in making factual determinations and assessing witness credibility. The PAB’s role is similar to a trial court in which

this Honorable Court has previously recognized. “It is not our role to calculate how much weight the trial court should afford specific evidence, second guess its decision on matters of witness credibility or substitute our judgment for the trial court in discretionary rulings.” In the Matter of Kurowski and Kurowski, 161 N.H. 578, 600 (2011). Although, this appeal is governed by RSA 541, the adjudicative role of the PAB is analogous to a trial court, especially in light of the broad, almost equitable powers, bestowed by the legislature in RSA 21-I:58(I). The PAB correctly found that the termination of Trooper Owens was unjust in light of the facts in evidence. In reaching this conclusion, the PAB considered all of the information considered by the appointing authority and certain information not available to the appointing authority.

In reinstating Trooper Owens, with a twenty (20) day suspension, the PAB reviewed the record as a whole and took into consideration all the facts in evidence when it modified the termination to a twenty (20) day suspension. See Per-A 207.12(b)(4). Trooper Owens never argued that he did not violate the detail policy or that his record keeping was not sloppy, but he was adamant that he did not lie to the investigators and/or violate the integrity policy. What the State did not do, but the PAB did was place this whole matter into perspective. The PAB adjudicated this matter as an objective factfinder who reviewed the contents of hundreds of pages of exhibits, the examination and cross examination of witnesses, and heard argument from two parties in an adversarial process in order to divine the truth in this matter.

The PAB considered facts, such as:

- Trooper Owens being interviewed four (4) separate times over the course of a five-month period about the same incident. CR at 92.
- Trooper Owens first learned that he signed on-duty at 7:24 after the first interview with Sgt. Grieco. Prior to the interview, he was not sure exactly what time he had signed on at, but that he knew it was around 7:00 am. Trooper Owens said that he chose 7:00 am not to deceive anyone, but to make the hours work for the Garcia period. CR at 470-71.



- Trooper Owens during live testimony stated that he did not try to deceive Sgt. Grieco. CR at 471.
- Trooper Owens stated that he did not receive any extra pay or benefits as a result of completing his timecard the way he did at the end of the week. (Week of October 29, 2018). CR at 471.
- Trooper Owens stated that he tried to take full responsibility for his actions, “fall on the sword,” when he was interviewed by Sgt. Grieco. CR at 473.
- When asked why 8.5 hours was crossed out on his detail voucher and 7 hours was written in its place, Trooper Owens said that he realized at the end of the week that he needed to make the numbers work for the Garcia period, and that is why he changed it. He also was forthright with Sgt. Grieco about what he did and why he did it. CR at 475-76.
- During the testimony, Trooper Owens made the comment, “I told everyone the truth and that wasn’t good enough for them.” CR at 474.
- Trooper Owens was adamant during his testimony that he did not try to deceive anyone or lie during the investigation. CR at 476-477.
- The Board concluded that Trooper Owens, “During all the questioning by the interviewers the Appellant **consistently** admitted that he paid little attention to detail and that he adjusted the hours for October 30, 2018 to avoid a policy violation. He also **consistently** denied that he ever harbored any intention of hiding any information from anyone.” (Emphasis added). CR at 93.
- The PAB also considered the testimony of Sgt. Irwin Malilay, who “...acknowledged that balancing work, details, and court appearances can be challenging and that **there existed no formal policy for requesting leave** as it was left to each trooper’s discretion. He also confirmed that firearms training normally lasts only half a day.” (Emphasis added). CR at 90.
- All of the State’s witnesses described Trooper Owens as a hard-working Trooper. CR at 290,
- Sgt. Malilay also testified that prior to the Lawson electronic timecard, Troopers would complete a “weekly duty report” in order to report their time to the Division of State Police for the purposes of payroll. He also noted that this document was often referred to as a “week lie” by members of the Division of State Police. It was referred to as that, because Troopers would often have to “fudge” the numbers in order to make the hours work for the Garcia period. CR 293-294.
- Sgt. Malilay also testified that it was possible that Trooper Owens got confused when he asked Sgt. Malilay to take a second 7-hour day in the course of the same 28-day period. CR at 295.

- Sgt. Malilay also testified that it was possible that Trooper Owens used a 7-hour day on October 30, 2018 so that he would not be traveling to the extra duty detail on duty and not because he was concerned about working over 16 hours in one duty day. CR at 296-297.
- Lt. Mullen testified that the punishment for violating the State Police detail policy is just a suspension from doing extra duty details, and that the punishment is more of a financial punishment. CR at 373. See State Police Extra Duty Detail Policy, Chapter 22-E CR at 148-56.
- Lt. Mullen testified that he had some questions about the discrepancies on Trooper Owens' timecard after reviewing the internal investigation that Sgt. Grieco conducted, so he contacted the Troop Commander<sup>9</sup>. Lt. Commerford told him that this was a common issue for Tom (Trooper Owens), and that they were working with him on it. CR at 374-75.
- Lt. Mullen testified that he believed that the entry of 0700-1300 hours on the timecard was simply a typo, and that the box auto-populated. CR at 377-78.
- Lt. Mullen testified that he believed that Trooper Owens had no intention of deceiving anyone or violating any policy on October 30, 2018. CR at 378-79.
- Lt. Mullen testified that a lot of times, you have to make the numbers work [in Lawson].<sup>10</sup> CR at 380.
- Lt. Mullen testified that when working a firearms training day the travel time to and from the range is included in the day as portal to portal, so if you live close to the range you make out and work a shorter day. If you live further away, you may actually work a full 8-hour day. Also, it does not matter if a Trooper's normal duty day is an 8, 8.5, or 9 hour day, they are all physically working the same amount of time. However, in order to make "the numbers work" in Lawson, the Trooper will put their normal duty time in for that day. CR 381-82.
- Lt. Mullen testified that there can be discrepancies in the Lawson timecard system, the Computer Aided Dispatch ("CAD") system, and the detail vouchers. CR at 384-386.
- Trooper Owens repeatedly answered, "I don't know" to questions posed by Lt. Commerford in the fourth interview, to which Lt. Commerford responded, "I don't remember won't cut it, I don't remember is not going to work here, we need an answer." CR at 296-398. (Audio Exhibit L).

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<sup>9</sup> Lieutenant Michael Commerford was the Troop Commander for Troop D, which is the Troop that Trooper Owens was assigned to at the time of the incident. Lt. Commerford is also the direct supervisor of Sgt. Grieco.

<sup>10</sup> Lawson is the name of the program that keeps track of a Troopers time (timecard). The system has certain requirements that often necessitate inputting certain codes or hours in order to get the program to accept the timecard at the end of the Garcia period (160 hours in a 28-day period).

- Furthermore, as for the State’s allegation that Trooper Owens intentionally provided inaccurate information on his timecard related to the time he started his duty shift, the PAB noted that, “[T]he Appellant explained that he hit the wrong button and that the timecard essentially self-populated itself based upon historical information. When he entered 07:00 the timecard provided a list of previous times for which he entered 07:00 and he mistakenly selected 13:00 as the ending time. The Appellant was not aware of the fact that the timecard machine had this populating function, but Lt. Comerford confirmed that it did.”<sup>11</sup> CR at 90.
- Colonel Wagner did not listen to the audio recorded interviews of Trooper Owens, so he did not hear the exact questions that were asked or the amount of times that Trooper Owens answered “I don’t know” or “I don’t remember” to the same question. Nor, did he hear the tone of the interviews/interrogations that they were conducted on Trooper Owens. CR at 445-448.
- Colonel Wagner admitted under testimony, “The terminable offense here is integrity.” CR at 452.
- When asked about adjusting the hours on the timecard to make the situation work so that Trooper Owens would not get into trouble, Colonel Wagner admitted that his supervisor might have had him do the same thing that Trooper Owens did on his own to correct the situation. CR at 453.

The PAB took all the above into consideration and more, as well as assessed the credibility of the witnesses, and examined the exhibits that were provided, which led them to believe that Troopers Owens met his burden of proof by preponderance of the evidence that the punishment of termination was unjust in light of the facts and circumstances in evidence pursuant to Per-A 207.01(a) and 207.12(b)(4). They also placed the whole matter into context and determined that Trooper Owens should receive a 20-day suspension for, “The errors and omissions including failing to communicate this problem to his superiors in a timely manner, poor record keeping and traveling 16 minutes on state time on the way to a detail wearing the wrong uniform....”

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<sup>11</sup> Lt. Michael Comerford was the Troop Commander of Troop D and was the former lieutenant in command of the Professional Standards Unit (“PSU”). Lt. John Mullen, the other interviewer, was the current commander of PSU. Lt. Mullen was unaware of the auto-populating feature of the timecard.

Again, no where in the Order does the PAB mention that it found Trooper Owens not to be credible, nor did it include “integrity” and/or dishonesty in its explanation for why it issued a 20-day suspension to Trooper Owens. Therefore, the PAB’s reinstatement of Trooper Owens was just, reasonable, and supported by the evidence.

**CONCLUSION**

For the reasons set forth above, the Appellee respectfully requests that this Honorable Court affirm the PAB’s Order and find that the PAB did not sustain the alleged integrity violation of the State Police policy (Chapter 1, Rules and Regulations, Section 1.4.8, Integrity).

**REQUEST FOR ORAL ARGUMENT**

The Appellee requests a 15-minute oral argument to be presented by Marc G. Beaudoin, Esq.

Respectfully submitted,

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By and through counsel,  
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Date: June 9, 2021

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**CERTIFICATE OF COMPLIANCE**

In accordance with New Hampshire Supreme Court Rule 16(7), the undersigned hereby certifies that an original Brief of the Appellee has been uploaded to the Supreme Court electronic filing system on this 9<sup>th</sup> day of June 2021.

In accordance with New Hampshire Supreme Court Rule 16(10), the undersigned hereby certifies that opposing counsel, Emily C. Goering, Esq. and Matthew T. Broadhead, Esq. of the New Hampshire Attorney General's Office, have been copied on the Supreme Court filing system.

In accordance with New Hampshire Supreme Court Rule 16(10), the undersigned hereby requests that this matter be heard on oral argument and, further, that Marc G. Beaudoin, Esq. be designated as the attorney to argue its merits on behalf of the Appellee. Counsel respectfully requests fifteen (15) minutes for argument.

In accordance with New Hampshire Supreme Court Rule 16(11), the undersigned hereby certifies that the brief does not exceed 9,500 words, exclusive of pages containing the table of contents, table of citations, and any other addendums.

Date: June 9, 2021

/s/ Marc G. Beaudoin  
Marc G. Beaudoin, Esq.