THE STATE OF NEW HAMPSHIRE

THE SUPREME COURT

DANIEL J. BARUFALDI

v.

CITY OF DOVER

CASE NO. 2021-0244

BRIEF OF APPELLEE CITY OF DOVER

ON APPEAL FROM FINAL ORDERS OF
THE STRAFFORD COUNTY SUPERIOR COURT

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STATEMENT OF CASE AND FACTS

The following facts are drawn from (1) the Complaint, the well-pleaded allegations of which are assumed true for the purposes of the City of Dover's motion to dismiss filed with the trial court, and (2) supplementary affidavits filed by the City of Dover with undisputed facts concerning Mr. Barufaldi's unsuccessful petition filed with the New Hampshire Retirement System. In addition, certain statutes and administrative rules are discussed below to provide context.

A. Plaintiff's Employment & NHRS Waivers from 2009 to Present

Mr. Barufaldi is the current Director of Economic Development for the City of Dover. *See* Appendix to Appellant's Brief ("App."). at 004 (Complaint ¶ 10). In March 2009, Mr. Barufaldi was originally hired as the Director of Economic Development for the Dover Business and Industrial Development Authority ("DBIDA"). *See* App. at 003, 010 (Complaint ¶ 5 & Ex. A § 1). DBIDA is an authority formed to promote business and industry, *see* Dover Code § 9-16[1]; RSA 162-G:2; RSA 162-G:15-a.

Participation in the NHRS can be optional on various grounds, including certain employees hired before July 1, 2011 as well as "officials

[1] *available at* https://www.ecode360.com/33403501

appointed for fixed terms." *See* RSA 100-A:3, I(a). The 2009 employment agreement identified Mr. Barufaldi's 2009 position as one with a three-year term, with "subsequent automatic one-year re-appointments unless employment is otherwise terminated." *See* App. at 010 (Complaint, Ex. A § 2). Accordingly, in Section 9 of the 2009 agreement, Mr. Barufaldi "acknowledge[d] and waive[d] participation in the NH Retirement System per the requirements and exemptions allowed by State of New Hampshire Retirement System." *See* App. at 012 (Complaint, Ex. A § 9).

Mr. Barufaldi served continuously in this role until 2017. *See* App. at 004 (Complaint ¶ 9). In 2017, the City created a new position for Mr. Barufaldi and appointed him to that new position (his current position). *See id*. (Complaint ¶ 10). Unlike the earlier agreement, the 2017 employment agreement was between the City of Dover and Mr. Barufaldi (*i.e.*, not DBIDA and Mr. Barufaldi). However, similar to the earlier employment agreement, the 2017 agreement contained a fixed term of employment as well as a waiver of participation in the New Hampshire Retirement System ("NHRS"). *See* App. at 015, 017 (Complaint, Ex. B §§ 2, 9).

Consistent with his contractual waivers, Mr. Barufaldi was not enrolled in the NHRS in 2009 or in 2017. *See generally* App. at 005.

B. The NHRS's Administrative Determination

There came a point when Mr. Barufaldi questioned his lack of enrollment in NHRS, ultimately leading to the filing of this action, in which Mr. Barufaldi alleges he was entitled to be enrolled in the NHRS and that the City should bear the funding obligation for the cost of the failure to enroll. Analytically, then, the issues in this appeal center upon RSA 100-A:3, VI(d) as the basis for the relief Mr. Barufaldi seeks in this matter.

By way of brief overview, RSA 100-A:3, VI(d)(1) addresses situations where "an employer which through its own fault, and not the fault of the employee, failed to enroll an eligible employee at the time such employee became eligible for membership in this retirement system." In such a situation of sole employer fault, the employer "shall pay the cost of the actuary's statement" that, per a statutory formula, essentially determines the amount due for the oversight period. *See* RSA 100-A:3, VI(d)(1).

To seek employer payment for failure to enroll, the statute calls for a "petition" be filed with the NHRS Board of Trustees. *See* RSA 100-A:3, VI(e); *see also* RSA 100-A:3, VI(a). In turn, the NHRS's administrative rules provide for the filing of a "Request for Cost Calculation to Purchase Service Credit Employer Enrollment Oversight." *See N.H. Code of Admin.*

Rules, Ret. 308.03(a). In July 2020, Mr. Barufaldi submitted such a request for the period of March 1, 2009 to July 11, 2020. *See* App. at 041 (Affidavit of Makenzie Moore at Ex. A to same). That request sought to hold the City at fault for the asserted oversight. *See id*.

Mr. Barufaldi's request contained a section completed by the City of Dover disagreeing with Mr. Barufaldi's request, along with an attachment from the City's Director of Human Resources explaining that (1) Mr. Barufaldi was originally "hired to work for DBIDA", (2) Mr. Barufaldi twice waived participation in the retirement system (in writing), and (3) in 2017 "[t]he City of Dover did not realize at the time that a 'fixed term' was no longer acceptable for exemption from participation" but "regardless [Mr. Barufaldi] signed the employment contract knowing he was waiving participation." *See id*. at 043. Lastly, the City acknowledged it had complied with the NHRS's instruction to enroll Mr. Barufaldi prospectively. *See id*.

Consistent with the NHRS rules providing for an administrative determination in the first instance, *see N.H. Code of Admin. Rules*, Ret 308.03(b), the NHRS issued an administrative determination dated August

4, 2020 finding Mr. Barufaldi had "been found ineligible for the prior service credit and [his] request has been denied" for the following reasons:

> **Employer disagrees** – Upon review of your request, the City of Dover (City) disagrees with your claim for prior service credit under the employer enrollment oversight provision in RSA 100-A:3, VI(d)(1), which only permits prior service credit *"[i]n the case of an employer which through its own fault, and not the fault of the employee, failed to enroll in an eligible employee at the time such employee became eligible for membership."* With respect to your employment by the City commencing on 7/13/2017, based on your voluntary waiver of participation in Section 9.A of your employment contract dated 7/13/2017, NHRS has made an administrative determination that you are partially at fault for the failure to be enrolled at the time of your initial eligibility. With respect to your employment by the Dover Business and Development Authority (DBIDA) prior to 7/13/2017, it is our understanding that DBIDA was a separate entity from the City and is not a NHRS participating employer. Moreover, in Section 9.A of your employment contract dated 3/1/2009 you acknowledged that you were waiving right to participate in NHRS. Therefore, for these reasons, NHRS has made an administrative determination you are not eligible for service credit for that period of time either.

See App. at 045 (Affidavit of Makenzie Moore at Ex. B).

The August 4, 2020 determination letter also stated: "If you wish to appeal this administrative determination, you may request a hearing within 45 days pursuant to NH Code of Administrative Rules Ret 200, copy enclosed." *See id*..

Mr. Barufaldi did not appeal the NHRS determination. *See* App. at 047 (Affidavit of Diana Crichton). Instead, by Complaint dated November 10, 2020 and filed 98 days after the August 4th letter, Mr. Barufaldi initiated this action asserting one count for declaratory judgment asking the Court to adjudicate the very same issues determined by the NHRS (adversely to Mr.

Barufaldi). *See* App. at 003 (Complaint). Mr. Barufaldi did not name the NHRS as a party and his complaint omitted mention of the NHRS's administrative determination. *See id*.

The City moved to dismiss the Superior Court complaint, *see* App. at 51, which the trial court granted (Howard, J.). *See* Addendum to Appellant's Brief ("Add.") at 23-32. Mr. Barufaldi moved for reconsideration, which the trial court denied. *See id*. at 035. This appeal followed.

SUMMARY OF ARGUMENT

As the trial court held, at least two independent reasons support dismissal of the Complaint below, namely: (1) Mr. Barufaldi's sole option for judicial review of the NHRS's determination was a writ of certiorari, which he did not and now cannot pursue; (2) Mr. Barufaldi failed to exhaust administrative remedies.

Writ of Certiorari: RSA 100-A:3, VI(d) governs petitions seeking past credit and employer payment of related costs. The text of that statute makes clear that such petitions are to be filed with the NHRS board. The NHRS has created a process for appealing and formally adjudicating administrative dispositions of those petitions. Well-established cases from this Court confirm that a writ of certiorari is the sole avenue for obtaining judicial review and relief from the NHRS's determinations. Mr. Barufaldi cannot bypass and circumvent this process by filing a purported RSA 491:22 declaratory judgment action months after receiving the NHRS's administrative determination, as confirmed by prior decisions of this Court,

including a recent (non-precedential) Order of this case affirming dismissal of an analytically identical claim.

Exhaustion: Exhaustion of administrative remedies was required in this case. Mr. Barufaldi's unexhausted claims were correctly dismissed. RSA chapter 100-A and the NHRS administrative rules provide significant process to benefits claimants such as Mr. Barufaldi. Mr. Barufaldi's attempt to portray his claims as pure issues of law lacks merit. The statutory right and remedy Mr. Barufaldi asserts turns on fact-sensitive administration determinations such as (i) ability to waive participation in the NHRS, and (ii) the parties' respective fault for a failure to enroll. And, to countenance an exception to exhaustion in this case would swallow the rule of exhaustion and harm important public policies, including the importance of administrative expertise, the value of administrative consistency, and the conservation of judicial resources.

Alternative Grounds: Beyond these two bases for dismissal, the preclusive doctrines of res judicata and collateral estoppel independently warrant dismissal of the Complaint, though the trial court did not reach that issue below. Mr. Barufaldi petitioned NHRS for an administrative ruling, which NHRS issued in a judicial or quasi-judicial capacity after receiving input from both the employee and the employer. Mr. Barufaldi cannot re-litigate the determination in this action. Well-established decisions of this Court make plain that administrative agency determinations such as the NHRS's have preclusive effect, and all the more so where, as here, a party has administrative process available to further adjudicate a matter, but the party chooses to forego such available processes.

For any and all of these reasons, the trial court correctly granted the City's motion to dismiss, which should be affirmed.

STANDARD OF REVIEW

In reviewing a motion to dismiss, the Court inquires "whether the allegations in the plaintiff's pleadings are reasonably susceptible of a construction that would permit recovery." *McNamara v. Hersh*, 157 N.H. 72, 73 (2008). The Court assumes as true well alleged allegations of fact, but not conclusions of law. *See Beane v. Dana S. Beane & Co.*, 160 N.H. 708, 711 (2010). The Court then tests the facts alleged against the applicable law. *See Surprenant v. Mulcrone*, 163 N.H. 529, 530 (2012). The plaintiff must allege a plausible claim. *See Aschcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Iannacchino v. Ford Motor Co.*, 451 Mass. 623 (2008); *Super. Ct. R*. 9(a).

In ruling on a motion to dismiss, the Court can consider "documents attached to the plaintiffs' pleadings, documents the authenticity of which are not disputed by the parties, official public records, or documents sufficiently referred to in the complaint." *Automated Transactions, LLC v. Am. Bankers Ass'n*, 172 N.H. 528, 523 (2019); *see also Chasan v. Village Dist. of Eastman*, 128 N.H. 807, 814 (1986).

On appeal, this Court conducts a *de novo* review of Orders ruling upon a motion to dismiss based on issues of law. *See Alward v. Johnston*, 171 N.H. 574, 580 (2018).

ARGUMENT

Mr. Barufaldi does not dispute that he petitioned the NHRS and received an adverse result he did not appeal (and now cannot appeal). Mr. Barufaldi's position in this appeal is that, in the face of a comprehensive benefits statute that prescribes one procedural remedy—a "petition" filed with the NHRS board of trustees—Mr. Barufaldi can file such a petition with the NHRS, receive an adverse ruling, then abandon that administrative process and, months later, after all conceivable appeals deadlines expired, have a new, *de novo* second bite at the apple (not contemplated in the NHRS statute) by way of an RSA 491:22 action filed in Superior Court against the City.

As the trial court held, at least two independent reasons warrant dismissal of Mr. Barufaldi's complaint: (1) Mr. Barufaldi's sole remedy to challenge the NHRS's determination was a writ of certiorari, which he did not pursue and now cannot pursue given the passage of time; (2) Mr. Barufaldi failed to exhaust administrative remedies before the NHRS.

As set forth below, the trial court's well-reasoned Order should be affirmed. Though Mr. Barufaldi has sequenced his issues/arguments on appeal to address the exhaustion issue first, the threshold issue (as the trial court found) is the lack of an RSA 491:22 cause of action and the inability to seek certiorari review, which this brief also addresses first in keeping with the trial court's Order on the merits.

I. Mr. Barufaldi's sole remedy for judicial review of the NHRS's determination was a writ of certiorari, which he did not pursue and is time-barred from pursuing.

The threshold issue in this appeal is whether a person can invoke the Superior Court's original jurisdiction by way of RSA 491:22 in order to seek relief under RSA 100-A:3, VI(d) for an employer's alleged failure to properly enroll an employee in the NHRS. The trial court properly held Mr. Barufaldi cannot—there is no basis to invoke RSA 491:22 and this Court's jurisprudence makes plain that the only avenue for seeking judicial review is a writ of certiorari.

As the first indicia that RSA 491:22 cannot be invoked in this case, the statutory remedy in RSA chapter 100-A sought by Mr. Barufaldi is only available with NHRS "board" approval. That is, there must be an "actuary's statement obtained under this paragraph", which includes "approval of the board," *see* RSA 100-A:3, VI(d)(1) (emphases added); *see also* RSA 100-A:3, VI(e) (mandatory timelines for filing a "petition" with board).[2] Thus, right at the outset Mr. Barufaldi's argument stumbles on the statutory text casting significant doubt on the ability to bypass RSA 100-A:3, VI by way of RSA 491:22.

Whatever doubt remained about the ability to rely on RSA 491:22 is removed by reviewing RSA 491:22 itself. RSA 491:22, I, only applies where a person has "a present legal or equitable right or title." RSA 491:22, I. Mr. Barufaldi does not have a recognized "present legal or

[2] Other relief is only available from the same board. *See* RSA 100-A:3, VI(d)(3) (certain relief available where an employee demonstrates "to the satisfaction of the board" inability to pay for the service credit).

equitable right or title" to have his "employer . . . pay the cost of the actuary's statement" pursuant to RSA 100-A:3, VI(d).[3] He therefore lacks any ability to invoke RSA 491:22, identical to the plaintiff in *Jaskolka v. Manchester*, 132 N.H. 528 (1989). In *Jaskolka*, an employee sued Manchester claiming she was entitled to prior service credit for a prior job, which, if credited, would have entitled her to salary and fringe benefits. The employee filed the Court action as one for certiorari (unlike this action). In the course of analyzing the certiorari claim's justiciability, this Court observed and held as follows:

> This case cannot properly be characterized as one for declaratory judgment, as the plaintiff lacks the requisite "present legal [or] equitable right or title" necessary for her case to proceed. The plaintiff seeks to obtain a judicial decree that she has the requisite number of continuous years of city service to entitle her to certain salary and fringe benefits, rather than already possessing those benefits and being faced with a threat of losing them.

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[3] Mr. Barufaldi tries to assert such a right based on enrollment in the NHRS itself, but in that regard is asserting a red herring by conflating his asserted right to be enrolled in the NHRS currently (which the City has complied with prospectively upon notification from NHRS) with his asserted right to have the City pay for the lack of enrollment. Those are two qualitatively distinct propositions. Whether or not Mr. Barufaldi was entitled to be enrolled, the NHRS has determined Mr. Barufaldi is partially at fault according to the fault-based standard in RSA 100-A:3, VI(d), which is anything but a pure issue of law. The issue is fact-sensitive—the statute requires an examination of the facts and circumstances surrounding two issues: (i) was the employer at fault, and if so, (ii) did the employee bear any of the fault? *See* RSA 100-A:3, VI(d)(1) ("In the case of an employer *which through its own fault, and not the fault of the employee*, failed to enroll an eligible employee . . . ." (emphasis added)).

Jaskolka, 132 N.H. at 531.

The corollary to the lack of any RSA 491:22 action is, as the trial court correctly concluded, that Mr. Barufaldi's only potential avenue for judicial relief was to file for certiorari review of an NHRS determination. *See* Order at Add. 29. That conclusion directly aligns with numerous prior decisions of this Court observing that "RSA chapter 100-A does not provide for judicial review" and that "a writ of certiorari is the sole remedy available to a party aggrieved by a decision of the NHRS." *Petition of Malisos*, 166 N.H. 726, 728 (2014); *Petition of Carrier*, 165 N.H. 719, 720 (2013); *see also Petition of State Employees' Assoc*, 161 N.H. 476, 478 (2011) (RSA chapter 541 does not apply to the NHRS).

The trial court's conclusion also directly aligns with, and countenances, the doctrine of primary jurisdiction followed in New Hampshire. *See Frost v. Comm'r, N.H. Banking Dep't*, 163 N.H. 365, 371 (2011). RSA chapter 100-A created the NHRS and empowered the NHRS's board of trustees for that agency to, among other things, decide the issue of fault for alleged employer oversight in failing to enroll an employee. The NHRS is a specialized administrative agency tasked with adjudicating the relief sought in the Complaint. As such, the primary jurisdiction doctrine also warrants dismissal. *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63-65 (1956); *Rymes Heating Oils, Inc. v. Springfield Terminal Ry. Co.*, 358 F.3d 82, 91 (1st Cir. 2004); *Chun v. Employees' Retirement System of State of Hawaii*, 73 Haw. 9, 13 (1992).

Mr. Barufaldi did not file for or seek certiorari review. Even assuming *arguendo* his Complaint could be characterized after-the-fact as one for certiorari review, Mr. Barufaldi filed his action in Strafford County

Superior Court 98 days after the NHRS's August 4th letter—long after the expiration of the 30-day certiorari period.[4] As such, the Complaint cannot be treated as certiorari review. To accept Mr. Barufaldi's argument on appeal would be to effectively overrule cases like *Petition of Herron*, 141 N.H. 245, 246 (1996), holding certiorari is the "sole remedy" to challenge NHRS decisions. *See also Prop. Portfolio Group v. Town of Derry*, 154 N.H. 610, 617-18 (2008) (thirty-day appeal deadline applied to foreclose RSA 491:22 action challenging exercise of administrative discretion).

A non-precedential Order issued recently by this Court—on all fours with this case—foreshadows and confirms the outcome in this case. In *McNamara v. N.H. Ret. System*, 2017 N.H. Lexis 19 (N.H. January 27, 2017) (non-precedential order), this Court affirmed the dismissal of a declaratory judgment action against NHRS seeking to circumvent RSA chapter 100-A. The case involved an NHRS member who filed a declaratory judgment action in Superior Court challenging conclusions reached in a prior NHRS decision. The trial court dismissed the declaratory judgment action and this Court affirmed, citing *Jaskolka* and agreeing that certiorari was the sole remedy available and the Court action had not been filed within the required thirty-day time period for appealing NHRS

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[4] *See Petition of Goffstown Educ. Support Staff*, 150 N.H. 795, 98-99 (2004); *Chauffeurs, Teamsters, & Helpers Loc. Union No. 633 of N.H. v. Silver Bros.*, 122 N.H. 1035, 1037 (1982); *Wilson v. Personnel Comm'n*, 117 N.H. 783, 784 (1977); *Wentworth-Douglass Hosp. v. N.H. D.H.H.S.*, 131 N.H. 364, 367 (1988) (discussing "thirty day rule" applicable to appeals of administrative agencies); *McNamara*, 2017 N.H. Lexis 19, *8 (N.H. January 27, 2017) (non-precedential order) (holding RSA 541:6 period is appropriate for certiorari); *cf*. RSA 541:6.

decisions. *See McNamara*, 2017 N.H. Lexis 19, *9 to *10. "A party who has failed to timely pursue an administrative appeal may not circumvent the administrative appeal process by characterizing an appeal as a timely request for declaratory relief." *Id*. at *8.

In summary, Mr. Barufaldi's sole remedy was certiorari review, he did not seek certiorari review, and he cannot seek certiorari review at this point. The Complaint's dismissal should be affirmed on this basis.

II. Mr. Barufaldi's failure to exhaust available administrative remedies warrants dismissal.

Mr. Barufaldi's failure to exhaust administrative remedies before the NHRS constitutes a separate basis to affirm the trial court's dismissal of the Complaint. *See Konefal v. Hollis/Brookline Coop. Sch. Dist*., 143 N.H. 256, 258-59 (1998) (holding the failure to exhaust issues before the PELRB warranted dismissal of constitutional and tort claims). For a variety of reasons outlined below, Mr. Barufaldi makes no persuasive argument to avoid the exhaustion requirement.[5]

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[5] Mr. Barufaldi argued before the trial court that exhaustion does not apply to RSA chapter 100-A claims such as his against the City. *See* App. at 56-57. However, Mr. Barufaldi appears to have abandoned that argument now on appeal, instead focusing exclusively on his assertion that the existence of legal issues relieves him of the exhaustion requirement. *See Panas v. Harakis*, 129 N.H. 591, 617-18 (1987) (issues raised first in reply waived). In any event, numerous reasons expose the lack of merit in the suggestion below that exhaustion is not required for claims relating to RSA chapter 100-A. Mr. Barufaldi acknowledged exhaustion is required by initiating the administrative process. Exhaustion is normally required whenever an agency process is available. *See Frost,*, 163 N.H. at 373; *Darby v. Cisneros*, 509 U.S. 137, 153 (1993); *Kentucky Retirement Systems v. Lewis*, 163 S.W.3d 1, 3 (Ky. 2005); *cf. Chun*, 73 Haw. at 13; *Heimeshoff v.*

a. RSA 100-A intends the NHRS board to adjudicate enrollment and fault issues in the first instance.

RSA chapter 100-A intrinsically illustrates the legislature intended the NHRS board to interpret and apply the statutory text in the first instance. The statutory remedy in RSA 100-A:3, VI(d) is only available with NHRS "board" approval. That is, there must be an "actuary's statement obtained under this paragraph", which includes "approval of the board," *see* RSA 100-A:3, VI(d)(1) (emphases added). To allow a claimant to invoke the Superior Court's original jurisdiction would impermissibly read the procedural "board" language out of RSA 100-A:3, VI.

Moreover, just because this case involves statutes does not divest the NHRS of its administrative expertise and authority and its role in the administration of retirement funds. NHRS is invested with such authority by statute, *see* RSA 100-A:2; RSA 100-A:3; RSA 100-A:14, III, to be exercised within the limitations of the State Constitution, *see* N.H. Const. pt. I, art. 36-a. It is not the case, as Mr. Barufaldi effectively asserts, that agencies have no meaningful role in construing the statutes they administer.

Hartford Life & Acc. Ins. Co., 134 S. Ct. 604, 610 (2013). The NHRS is a specialized administrative agency. *See Day v. N.H. Retirement System*, 138 N.H. 120, 125-26 (1993); RSA 100-A:2; RSA 100-A:3; RSA 100-A:14, I & III. Given the important public policies at stake, as well as fiduciary duties and planning as trustee, it is paramount that benefits issues be resolved uniformly. *See also Chun*, 73 Haw. at 13. Lack of an exhaustion requirement would thwart NHRS's ability to make policy through adjudication, could or would result in a flood of disappointed benefits applicants bring their arguments directly to Court for resolution, and would imperil scarce judicial resources by depriving this Court of an administrative record.

"[I]t is well established in our case law that an interpretation of a statute by the agency charged with its administration is entitled to deference." *Appeal of Town of Seabrook*, 163 N.H. 635, 644 (2012) (collecting authority). Here, the NHRS has a clear statutory role the adjudicate claims that cannot be bypassed as Mr. Barufaldi proposes.

b. This case involves exercise of administrative discretion.

The core issues in this case involve administrative discretion. "Administrative remedies must be exhausted when the question involves the proper exercise of administrative discretion." *Konefal*, 143 N.H. at 259.[6] As outlined below, at least two core issues in this case implicate such discretion: (i) the ability to waive participation in the NHRS, and (ii) fault for failure to enroll.

Ability to Waive Participation: The ability to waive participation in the NHRS is a fact-sensitive inquiry that requires examination of the individual circumstances of employment to determine if participation is optional. *See* RSA 100-A:3, I ("Membership in the retirement system shall be optional in the case of elected officials, officials appointed for fixed terms, employees appointed to an unclassified position with no fixed term prior to July 1, 2011 . . . ."). Indeed, the 2017 agreement arguably provided for a fixed term of employment of the type that renders participation in

[6] *See also V.S.H. Realty, Inc. v. City of Rochester*, 118 N.H. 778, 782 (1978) (exhaustion "is particularly applicable where, as in this case, substantial questions of fact exist" concerning the matter in issue); *Pheasant Lane Realty Trust v. City of Nashua*, 143 N.H. 140, 142 (1998) ("matters of law" exception to exhaustion does not apply to cases involving "the exercise of administrative discretion").

NHRS optional for officials such as Mr. Barufaldi, *see* App. at 015 ("Section 2"), but in this matter the NHRS appears to have exercised its discretion to disregard the stated term of the 2017 Agreement and instead view the employment arrangement as one "with no fixed term" within the meaning of RSA 100-A:3, I. So while RSA chapter 100-A lays the statutory framework for the analysis, the statute also leaves to the NHRS board the discretionary administration of that statute with respect to issues such as eligibility to participate in NHRS and the ability to waive same, underscoring the need to exhaust administrative remedies.

Fault Determinations: Similarly, fault determinations are not issues of law and cannot evade the exhaustion requirement. By statute, the NHRS board adjudicates oversight claims by applying a fault-based, totality-of-circumstances[7] standard to make its determination of funding responsibility, which is a pure exercise of administrative discretion (not an issue of law). *See*, *e.g.*, *Cass v. Ray*, 131 N.H. 550, 553 (1989); *Appeal of Keith R. Mader 2000 Revocable Trust*, 173 N.H. 362, 367 (2020); RSA 100-A:3, VI(d)(2) (setting forth a rebuttable presumption of employer fault).

Here, based on the facts and circumstances presented the NHRS "made an administrative determination that [Mr. Barufaldi is] partially at fault for the failure to be enrolled at the time of [his] initial eligibility" on July 13, 2017. *See* App. at 045 (Ex. 1 to Mot. to Dismiss at Ex B).

[7] It is worth underscoring that Mr. Barufaldi himself asserted below that a "key factual issue" is the identity of Plaintiff's employer from 2009 to 2017. *See* App. at 059 (emphasis added).

Mr. Barufaldi's brief on appeal proves the fact-sensitive nature of the NHRS fault findings by attempting to highlight various considerations which, in his view, warrant the outcome he seeks. For example, Mr. Barufaldi argues the literal text of the 2017 contractual waiver of NHRS participation, *see* Appellant's Brief at 14-15. Of course, the City has its own fault-based arguments, including Mr. Barufaldi's fixed term of employment the parties understood to enable a waiver, his express waiver of participation in the NHRS in the 2017 contract per the text of the agreement, and the indicia of shared intent to waive such as the fact that Mr. Barufaldi did not raise the issue until 2020. *See* App. at 005 (Complaint ¶ 12). In the end, these arguments should be, and should have been, directed to NHRS to weigh in its exercise of administrative discretion of fault for the failure to enroll in the NHRS, proving the need to exhaust.

Decisional law does not support Mr. Barufaldi's argument. The waivability and fault determinations here contrast sharply with the pure questions of statutory construction for prior pure issues of law excepted from the exhaustion requirement.[8] The case Mr. Barufaldi principally relies on—*Porter v. Town of Sandwich*, 153 N.H. 175 (2006)—does not support Mr. Barufaldi's argument. The *Porter* case turned entirely on issues of

[8] *See Frost v. Comm'r, N.H. Banking Dep't*, 163 N.H. 365, 371 (2011) (holding exhaustion not required based on dispute over the statutory meaning of the statutory phrase "in the business"); *Pheasant Lane Realty Trust*, 143 N.H. at 142 (holding exhaustion not required where parties' arguments centered entirely on the meaning of asserted statutory authority for tax assessment); *Bedford Residents Group v. Town of Bedford*, 130 N.H. 632, 639 (1988) (holding exhaustion not required where issue turned on "judicial construction of RSA 675:7, II").

statutory and contractual interpretation bearing on the legality of a tax assessment, relieving the plaintiff from the obligation to go through the normal tax abatement process. Unlike *Porter*, the asserted claim in this case pursuant to RSA 100-A:3, VI(d) turns on fact-based determinations as already discussed above.

Stepping back, just because an argument involves an assertion of law does not convert the issue into one of pure law. To allow Mr. Barufaldi to invoke the exception for matters of law would countenance an exception that threatens to swallow the rule of exhaustion. Whenever any claimant could find any law involved in their case and claims—which is a feature of every case—they could evade the exhaustion requirement by claiming their case involves "issues of law." That would significantly disrupt the NHRS's ability to perform its duty as trustee of State and public employees' retirement funds, *see* RSA 100-A:2, and routinely administer the comprehensive benefits scheme, *see McNamara*, 157 N.H. at 76 (rejecting exception to exhaustion requirement because there, as here, the claim was one "routinely resolved by the . . . board'). And, to accept Mr. Barufaldi's argument that his case is one of pure law is to impermissibly read the fault-based analyses out of RSA 100-A:3, VI(d).

Lastly, accepting Mr. Barufaldi's arguments would encourage forum shopping and harm judicial economy by encouraging disappointed parties to either skip the agency process altogether (and bring any number of matters to the Court in the first instance instead of an agency), or to start the agency process and then abandon it whenever a party received an adverse result (discussed in the next section of this brief). As a matter of judicial economy, Mr. Barufaldi's attempt to bypass the NHRS should be rejected.

c. Mr. Barufaldi prematurely abandoned exhaustion.

Yet another reason exhaustion is required here is that Mr. Barufaldi began the agency process and abandoned it. "[A]n administrative exhaustion rule is meaningless if claimants may impede and abandon the administrative process and yet still be heard in . . . court." *Vinieratos v. United States*, 939 F.2d 762, 772 (9th Cir. 1991). "Allowing a plaintiff to abandon the administrative remedies he has initiated would tend to frustrate the ability of the agency to deal with complaints. All participants would know that at any moment an impatient complainant could take his claim to court and abort the administrative proceedings." *Purtill v. Harris*, 658 F.2d 134, 138 (3d Cir. 1981); *see also McKart v. United States*, 395 U.S. 185, 193 (1969); *see also Jefferson v. Gates*, 2010 U.S. Dist. LEXIS 75010, *34-*37 (D.R.I. July 2, 2010).

For all these reasons, the Court should affirm the dismissal of Mr. Barufaldi's Complaint for failure to exhaust administrative remedies.

III. Res judicata and collateral estoppel warrant affirmance on alternative grounds.

Res judicata and collateral estoppel provide additional grounds for dismissing the Complaint. *See State v. Dion*, 164 N.H. 544, 552 (2013). As discussed more fully below, Mr. Barufaldi's complaint cannot re-litigate already-decided issues and claims asserted in the Complaint.

Preliminarily, with respect to a foundational issue shared between both preclusive doctrines, an administrative agency's determination rendered in a judicial context affecting private rights has preclusive effect. *See Morin v. J.H. Valliere Co*., 113 N.H. 431, 434 (1973); *Appeal of Global Moving & Storage*, 122 N.H. 784, 789 (1982); *Cook v. Sullivan*, 149 N.H.

774, 777-78 (2003); *Johnson v. Aetna Life & Casualty Co.*, 131 N.H. 698, 701 (1989). Here, the NHRS's designee acted in a judicial capacity, receiving a request from Mr. Barufaldi, prompting notice to and input from a disagreeing employer (City of Dover), and leading to a finding on the merits by NHRS staff based on the facts and applicable law. *See Appeal of City of Keene*, 141 N.H. 797, 800 (1997) ("An act is judicial in nature if officials are bound to notify, and hear the parties, and can only decide after weighing and considering such evidence and arguments, as the parties choose to lay before them."); *Michael v. City of Rochester*, 119 N.H. 734, 736 (1979) (observing a "judicial function [is] involved . . . when an agency decides a dispute between two or more parties with competing interests").

Against that backdrop, the elements of both collateral estoppel and res judicata are met as a matter of law in this case.

Collateral Estoppel: "In order for collateral estoppel to apply …, the following elements must be satisfied: (1) the issue subject to estoppel must be identical in each action; (2) the first action must have resolved the issue finally on the merits; (3) the party to be estopped must have appeared in the first action or have been in privity with someone who did; (4) the party to be estopped must have had a full and fair opportunity to litigate the issue; and (5) the finding must have been essential to the first judgment." *See Farm Family Mut. Ins. Co. v. Peck*, 143 N.H. 603, 605 (1999).

With respect to collateral estoppel, the issues in the Complaint are identical to those adjudicated by the NHRS because both focused on the factual (employment) background and the applicability, and application, of RSA 100-A:3, VI(d). The first action resolved finally on the merits without any appeal filed, and such periods have long since expired, making the

NHRS ruling final. *See*, *e.g.*, *Bosonetto v. Town of Richmond*, 2013 U.S. Dist. LEXIS 76715, *21 to *24 (D.N.H. May 31, 2013) (discussing New Hampshire law); *Aunyx Corp. v. Canon U.S.A., Inc.*, 978 F.2d 3, 7 (1st Cir. 1992) (holding final judgment on merits by administrative tribunal where party to be bound failed to appeal decision).

Mr. Barufaldi was a party in both actions and had a full and fair "opportunity to litigate." *Cook v. Sullivan*, 149 N.H. 774, 777 (2003). He had the opportunity to litigate in the first instance seeking the administrative determination, as well as the (unpursued) opportunity to appeal that determination further and take advantage of a more involved adjudicatory process within the NHRS. An administrative agency determination has clear preclusive effect where a party "could have appealed . . . and engaged in adjudication that would have included" additional process and a new "forum." *Petition of Breau*, 132 N.H. 351, 362 (1989). The Court in *Breau* summarized its holding as follows:

> In sum, Breau had two opportunities to appeal the findings against him and to request the appearance, for personal examination, of the witnesses to the events claimed to underlie both his dismissal and the cancellation of his license. The failure to avail himself of these opportunities rests on him and raises no bar to the application of collateral estoppel to establish in the New Hampshire forum the facts upon which the ultimate New Brunswick administrative judgment rested.

Id. at 364. *See also Plaine v. McCabe*, 797 F.2d 713, 719 n.12 (9th Cir. 1986) ("If an adequate opportunity for review is available, a losing party cannot obstruct the preclusive use of the state administrative decision simply by foregoing her right to appeal.").

The NHRS's express findings foreclose Mr. Barufaldi from re-litigating the NHRS's denial of the plaintiff's request for prior service credit due to employer oversight, as well as the underlying determinations of the NHRS that (i) "[w]ith respect to [Mr. Barufaldi's] employment by the City commencing on 7/13/17, based on [his] voluntary waiver of participation in Section 9.A of [his] employment contract dated 7/13/17, NHRS has made an administrative determination that [he is] partially at fault for the failure to be enrolled at the time of [his] initial eligibility"; and (2) "[w]ith respect to [his] employment by the Dover Business and Industrial Authority (DB[ID]A) prior to 7/13/17, it is our understanding that DB[ID]A was a separate entity from the City and is not a NHRS participating employer" and, "[m]oreover, in Section 9.A of [his] employment contract dated 3/1/2009 [he] also acknowledged that [he was] waiving any right to participate in NHRS" meaning Mr. Barufaldi is "not eligible for service credit for that period of time either."

Mr. Barufaldi cannot re-litigate these findings and the relief sought in the Complaint is foreclosed by the preclusive effect of the NHRS findings.

Res Judicata: In addition, res judicata bars the claims for relief in the Complaint. The elements of res judicata are "(1) the parties are the same or in privity with one another; (2) the same cause of action was before the court in both instances; and (3) the first action ended with a final judgment on the merits". *Merriam Farm, Inc. v. Town of Surry*, 168 N.H. 197, 199 (2015).

Each of these elements is met. The same party appears in this litigation and appeared in the prior matter before the NHRS. Mr. Barufaldi

raises the same "cause of action"[9] and factual transaction concerning his enrollment (or lack thereof) in the NHRS, and the NHRS decided the issue finally and on the merits (and ample opportunity to further litigate existed, as discussed above), ultimately issuing a disposition adverse to Mr. Barufaldi that rejected his requests for prior service credit from 2009 and 2017 (as waivable and waived), and rejected his request for a finding that the City of Dover was solely at fault for not enrolling the plaintiff as an NHRS member in July 2017. As discussed, all appeal periods have long since expired.

Res judicata bars re-litigation in this matter and broadly "applies not only to those matters actually litigated by the parties but also to those matters that *could have been* litigated." *Durham v. Cutter*, 121 N.H. 243, 246 (1981).

Mr. Barufaldi cannot evade res judicata by pointing to the unexhausted agency process. Res judicata applies here the same as *Auburn v. McEvoy*, 131 N.H. 383, 386-388 (1988), where this Court held that res judicata applied to an agency order because a "statutory limitation on the availability of an appellate remedy will be rendered nugatory unless the failure to bring a timely appeal is held to bar a dissatisfied party from mounting a later attack on the order in question." *See also Durham*, 121 N.H. at 246 (application to matters that could have been litigated).

In the proceedings below, Mr. Barufaldi attempted to evade res judicata pointing to *Restatement (Second) of Judgments* § 83 (1980). In

[9] A "cause of action" will be considered the same when the same "factual transaction" is at issue in both proceedings. *See Eastern Marine Constr. Corp. v. First S. Leasing*, 129 N.H. 270, 275 (1987).

doing so, Mr. Barufaldi incorrectly ignored the significant procedural options available to him before the NHRS. While there is no need to consult the Restatement given controlling New Hampshire case law such as *Breau* and *Auburn*, in any event the *Restatement* only further confirms the applicability of res judicata. *Restatement (Second) of Judgments* § 83(2) applies when the administrative process "entails" the stated attributes, all of which are present here. By virtue of the extensive process available (but not exhausted), Mr. Barufaldi had "[a]dequate notice", "[t]he right . . . to present evidence and legal argument and fair opportunity to rebut evidence and argument by opposing parties", application of the standard to the facts presented, a specified point of finality in the administrative rules (with stated appeal deadlines), and other procedural elements, including discovery and the ability to compel same, all as envisioned in *Restatement (Second) of Judgments* § 83(2)(a), (b), (c), (d), and (e).

In sum, both collateral estoppel and res judicata warranted dismissal, providing adequate and alternative grounds for affirmance.

IV. Conclusion

For all the reasons set forth above, the trial court's Order dismissing the Complaint should be affirmed.

REQUEST FOR ORAL ARGUMENT

The City requests oral argument. In the event the Court schedules oral argument, the undersigned counsel (Joshua M. Wyatt) will present oral argument for the City of Dover.

CERTIFICATION OF COMPLIANCE WITH SUP. CT. R. 16(11)

The undersigned counsel certifies that this Brief, exclusive of pages containing the Table of Contents and Table of Authorities and the signature block, contains 6,907 words.

By:

Dated: October 27, 2021 /s/ Joshua M. Wyatt
Joshua M. Wyatt, City Attorney

CERTIFICATION OF SERVICE IN COMPLIANCE WITH SUP. CT. R. 16(10) AS MODIFIED BY SUP. CT. SUPP. R. 18

The undersigned counsel certifies that a copy of this brief is being filed on this date through the Supreme Court's electronic filing service, which "satisfies the requirement in Supreme Court Rule 26(2) that a filer provide to all other parties a copy at or before the time of filing." *Sup. Ct. Supp. R.* 18(b). Counsel of record for the appellant Daniel J. Barufaldi, is receiving a copy of this filing through the Court's electronic system on this date.

By:

Dated: October 27, 2021 /s/ Joshua M. Wyatt
Joshua M. Wyatt, City Attorney

Respectfully submitted,

City of Dover

By Its Attorneys,

By:

Dated: October 27, 2021

/s/ Joshua M. Wyatt

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