THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2021-0244

Daniel J. Barufaldi

v.

City of Dover

BRIEF OF DANIEL J. BARUFALDI
APPELLANT

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Oral argument by:
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QUESTIONS PRESENTED

1. Whether the trial court erred by dismissing Mr. Barufaldi's Complaint on the grounds that he failed to exhaust administrative remedies, given that administrative exhaustion requirements do not apply where the questions presented constitute questions of law such as statutory interpretation and contract interpretation, where the questions presented by Mr. Barufaldi's case involve pure questions of law, and where the court and not the agency should resolve issues involving questions of law regardless of the administrative posture pursuant to Hamby v. Adams, 117 N.H. 606 (1977). Appendix at p. 057.

2. Whether the trial court erred by dismissing Mr. Barufaldi's Complaint on the grounds that declaratory judgment is not an available remedy, notwithstanding that: a.) Mr. Barufaldi claims a present legal right to mandatory enrollment in the New Hampshire Retirement System retroactive to July 27, 2017, based on RSA 100-A:3, I (d), given that the City of Dover appointed him effective July 27, 2017, to a position created after July 1, 2011, titled "Director of Economic Development for the City of Dover"; and b.) the City of Dover has claimed adversely to Mr. Barufaldi's right to such mandatory enrollment in the New Hampshire Retirement System, notwithstanding that RSA 100-A:3, I (d) prohibits an employer such as the City of Dover from treating as optional membership in the New Hampshire Retirement System for any employee in Mr. Barufaldi's circumstances appointed to a position created by the City of Dover after July 1, 2011. Appendix at p. 098.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES OR REGULATIONS INVOLVED IN THE CASE

RSA 100-A:2

RSA 100-A:3, I (a)

RSA 100-A:3, I (d)

RSA 491:22

The text of these statutes is set forth in the Appendix.

STATEMENT OF THE CASE

Mr. Barufaldi filed a November 10, 2020, Complaint for declaratory judgment with the Strafford County Superior Court. Appendix at p. 003. Mr. Barufaldi sought, among other things, a judicial determination that the City of Dover erred by failing to enroll Mr. Barufaldi in the New Hampshire Retirement System (NHRS) effective July 27, 2017, when the City appointed Mr. Barufaldi "Director of Economic Development for the City of Dover," given that: a.) RSA 100-A:3, I (d) divests employers of the option to decline to enroll employees in NHRS in the case of any newly appointed position created after July 1, 2011; and b.) the City of Dover created the "Director of Economic Development for the City of Dover" position in 2017. Id. at pp. 007-008.

The City of Dover filed a December 10, 2020, Motion to Dismiss, arguing that the Complaint was barred by: a.) res judicata, collateral estoppel and the doctrine of primary jurisdiction; b.) failure to exhaust administrative remedies before NHRS; and c.) failure to state a claim for

which relief can be granted based on the plaintiff's purported lack of a present right or title. Id. at p. 020.

Mr. Barufaldi then filed a January 15, 2021, Objection to Motion to Dismiss with Incorporated Memorandum of Law. Id. at p. 051. The City of Dover responded with a January 25, 2021, Reply Memorandum (Id. at p. 069), followed by Mr. Barufaldi's February 3, 2021, Surreply Memorandum. Id. at p. 080.

The Court granted the Motion to Dismiss by Order dated April 2, 2021. Id. at p. 086. The Court held that "[a] declaratory judgment action is not an available theory as a matter of law" and that Mr. Barufaldi "failed to exhaust his administrative remedies." Id. at pp. 092, 094. The Court did not address the City's primary jurisdiction, res judicata or collateral estoppel arguments. Id. at p. 096.

Mr. Barufaldi filed a Motion for Partial Reconsideration on April 19, 2021, to which the City of Dover objected on April 26, 2021. Id. at pp. 097, 104. The Court denied reconsideration by Order dated May 8, 2021. Id. at p. 109.

This Appeal followed.

STATEMENT OF THE FACTS

In 2017, the City of Dover created a City employment position titled, "Director of Economic Development of the City of Dover." Id. at p. 022. The City appointed Mr. Barufaldi to fill the position by an "Employment Agreement Between the City of Dover and Daniel J. Barufaldi" dated July 27, 2017. Id. at pp. 015-019. The City provided Mr. Barufaldi an

"Employment Agreement Between the City of Dover, NH And Daniel J. Barufaldi" containing the following provision at Section 9.A.: "The Employee hereby acknowledges and waives participation in the NH Retirement System **per the requirements and exemptions allowed by State of New Hampshire Retirement System**." Id. at p. 017 (emphasis supplied).

In or around March of 2020, Mr. Barufaldi contacted NHRS to question whether he should have been enrolled in the System. Id. at p. 005. NHRS notified the City of Dover on or about July 16, 2020, that the City was obligated to enroll Mr. Barufaldi in NHRS. Id. The City did so prospectively but failed to do so retroactive to July 27, 2017. Id.

On July 30, 2020, at 8:54:42 a.m., the City of Dover sent a fax to NHRS consisting of Mr. Barufaldi's Request for Cost Calculation to Purchase Service Credit and a 1-page letter from the City's Director of Human Resources opposing the Request. Id. at pp. 041-043.

The City's Director of Finance, Daniel R. Lynch, and Mr. Barufaldi signed the Request for Cost Calculation to Purchase Service Credit on the first page. Id. at p. 041. Mr. Barufaldi indicated on the Request that he wished to purchase service credit for the period running from March 1, 2009, through July 11, 2020.[1] Id. Director of Finance Lynch signed the Request, stating that the City disagreed with Mr. Barufaldi's Request and referencing a 1-page letter attached. Id. In the letter, the City argued that

[1] This Appeal concerns only Mr. Barufaldi's request for prior service credit for the period beginning July 27, 2017, when the City appointed Mr. Barufaldi to the new position of "Director of Economic evelopment of the City of Dover."

NHRS should deny Mr. Barufaldi the opportunity to purchase prior service credit retroactive to July 27, 2017, based solely on the contention that Mr. Barufaldi "ha(d) signed contacts indicating he waived participation in NHRS." Id. at p. 043. The City's letter ignored the language in Mr. Barufaldi's July 27, 2017, Employment Agreement limiting the scope of the purported waiver "per the requirements and exemptions allowed by State of New Hampshire Retirement System." Id. at p. 017.

An NHRS Member Account Technician, Makenzie Moore, issued an August 4, 2020, decision finding Mr. Barufaldi ineligible to purchase prior service credit. Id. at p. 045. Mr. Barufaldi's so-called "voluntary waiver of participation in Section 9.A. of [his] employment contract"[2] constituted the sole basis of Member Account Technician Moore's determination that Mr. Barufaldi was somehow ineligible to purchase prior service credit in NHRS retroactive to July 27, 2017. Id. As was true of the City's July 29, 2020, letter opposing Mr. Barufaldi's request to purchase prior service credit, Member Account Technician Moore ignored the language in the Employment Agreement limiting the scope of any purported waiver "per the requirements and exemptions allowed by the State of New Hampshire Retirement System." Id. at p. 017. Member Account Technician Moore also ignored the provisions of RSA 100-A:3, I (d).

Mr. Barufaldi then filed his November 10, 2020, Complaint.

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[2] Mr. Barufaldi's "Employment Agreement" dated July 27, 2017, is the same document that Member Account Technician Moore characterized as being dated July 13, 2017. While the last page of the document contains a 7/13/17 date, the first page of the Employment Agreement states that it was "made and entered" between the City of Dover and Mr. Barufaldi on July 27, 2017.

SUMMARY OF ARGUMENT

Mr. Barufaldi's case concerns: 1.) whether RSA 100-A:3, I (d) entitled him to mandatory membership in NHRS effective July 27, 2017, when the City appointed him to hold the "Director of Economic Development of the City of Dover" position created by the City in 2017; and b.) whether Mr. Barufaldi's purported waiver of enrollment in NHRS pursuant to Section 9.A. of his "Employment Agreement" was ineffective because RSA 100-A:3, I (d) prohibited exempting him from membership and the "Employment Agreement" only allowed exemptions allowed by RSA 100-A.

The trial court erred by dismissing Mr. Barufaldi's case based on administrative exhaustion, as demonstrated by the analogous case of Porter v. Town of Sandwich, 153 N.H. 175 (2006). Administrative exhaustion was not required in this case because the case does not concern factual disputes implicating administrative discretion, but instead concerns only questions of law for the Court involving statutory and contract interpretation.

The trial court further erred by holding that Mr. Barufaldi could not seek declaratory judgment relief because he somehow lacks a present "legal right." This case concerns Mr. Barufaldi's present statutory right under RSA 100-A:3, I (d) to mandatory enrollment in NHRS. The City claimed adversely to Mr. Barufaldi's statutory right on the basis of a contractual waiver provision. This case therefore involves a textbook controversy over legal rights that the declaratory judgment remedy is uniquely tailored to resolve.

In addition, the trial court erred under the circumstances of this case by finding that Mr. Barufaldi was limited to certiorari as a remedy. Because of the purely legal nature of this controversy, the issue never should have been referred to NHRS and only was so referred because the City faxed NHRS Mr. Barufaldi's claim for prior service credit and the City's opposition to it.

Cases prescribing certiorari as the remedy from an NHRS determination rather than declaratory judgment are materially distinguishable from this case, and should not dictate the result here, because they have involved appeals from agency determinations involving fact questions. Jaskolka v. City of Manchester, 132 N.H. 528, 531 (1989) (involving a fact question as to whether an employee had "the requisite number of continuous years of city service" to be eligible for prior service credit in the New Hampshire Retirement System); McNamara v. New Hampshire Retirement System, Case No. 2016-0278 (N.H. Jan. 27, 2017) (involving dispute over agency's calculation of retirement benefits). This case, by contrast, presents questions involving statutory and contract interpretation that NHRS neither addressed nor was qualified to address.

The principle that a court may decide matters that present purely legal questions "regardless of the administrative posture" supports that the trial court should not have paid heed to NHRS' action on legal questions within the province of the courts. Hamby v. Adams, 117 N.H. 606, 609 (1977). Rather, the trial court should have determined, via declaratory judgment, whether RSA 100-A:3, I (d) conferred upon Mr. Barufaldi a right to mandatory membership in NHRS effective July 27, 2017.

ARGUMENT

The Court Should Vacate And Remand Because Whether Mr. Barufaldi Had A Mandatory Right To Membership In NHRS Presents Purely A Question Of Law For The Court Not Requiring Administrative Exhaustion.

"A party is not required to exhaust administrative remedies where the issue on appeal is a question of law rather than a question of the exercise of administrative discretion." Porter v. Town of Sandwich, 153 N.H. 175, 178 (2006) (emphasis supplied). Administrative discretion is only implicated where the appeal questions involve disputed facts. Konefal v. Hollis/Brookline Coop. Sch. Dist., 143 N.H. 256, 259 (1998) ("Because Ms. Konefal's claims require resolution of disputed fact, her claims involve a question of administrative discretion."). This is so because the core purpose of administrative exhaustion is to provide the agency the opportunity to develop the relevant facts. John H. v. Brunelle, 127 N.H. 40, 44 (1985) ("exhaustion of administrative remedies doctrine functions to prevent the disruption of administrative processes by withholding judicial review until the agency develops the relevant facts….").

Contrary to the trial court's ruling, Mr. Barufaldi's Appeal does not involve disputed facts and therefore does not involve administrative discretion. The relevant facts are entirely uncontested: (1) the City of Dover created the appointed position of "Director of Economic Development of the City of Dover" in 2017—after July 1, 2011; (2) the City appointed Mr. Barufaldi to the "Director of Economic Development of the City of Dover" position effective July 27, 2017; and (3) the City failed to enroll Mr. Barufaldi in NHRS effective July 27, 2017, relying on Section

9.A. of the Employment Contract stating, "The Employee hereby acknowledges and waives participation in the NH Retirement System per the requirements and exemptions allowed."

Mr. Barufaldi's case involves issues of statutory and contractual law, specifically requiring: a.) interpretation of RSA 100-A:3, I (a) and (d); and b.) interpretation of Mr. Barufaldi's July 27, 2017, Employment Agreement. "Statutory interpretation is…a question of law." Porter, 153 N.H. at 178. "The interpretation of a contract is [also] a question of law." Id. Because the issues exclusively involve questions of law, the trial court erred by finding administrative exhaustion applicable. To the contrary, the trial court should have found—as should this Court—that this matter has always belonged before a Court and should never have been before an administrative agency. *See* Frost v. Comm'r, N.H. Banking Dep't, 163 N.H. 365, 371 (2012) ("Where…the issue or issues…involve purely questions of law, the matter will not be referred to an agency.").

The trial court erroneously "disagree(d)" with the incontrovertible proposition that statutory interpretation of RSA 100-A:3, I (a) and (d) is required to resolve the question of whether the City owed a mandatory obligation to enroll Mr. Barufaldi in the New Hampshire Retirement System effective July 27, 2017. *See* Appendix at p. 095.

RSA 100-A:3, I (d) governs Mr. Barufaldi's situation because the statute applies to "newly appointed positions created by political subdivisions after July 1, 2011." It is undisputed that the City created the "Director of Economic Development of the City of Dover" position in 2017—after July 1, 2011. It is further undisputed that the City "appointed [Mr. Barufaldi] to that position" effective July 27, 2017.

Given the applicability of RSA 100-A:3, I (d) to Mr. Barufaldi's "Director of Economic Development of the City of Dover" appointed position, "the option in [RSA 100-A:3, I (a)] **shall** not be available." RSA 100-A:3, I (d) (emphasis supplied). RSA 100-A:3, I (a) provides an option for certain employees not to belong to NHRS, stating, "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, or those employees of the general court who are eligible for membership in the retirement system." RSA 100-A:3, I (d) therefore creates a mandatory obligation—with no exceptions—for employees such as Mr. Barufaldi in "newly appointed positions created by political subdivisions after July 1, 2011" to belong to NHRS. The Legislature's use of the word "shall" specifies that employees such as Mr. Barufaldi must belong to NHRS, based on fundamental principles of statutory construction. Appeal of Coos County Comm'rs, 166 N.H. 379, 386 (2014) (emphasis supplied) ("The general rule of statutory construction is that the word 'may' makes enforcement of a statute permissive and that **the word 'shall' requires mandatory enforcement**.").

Interpreting RSA 100-A:3, I (a) and (d) together leads ineluctably to the conclusion that the statutes conferred on Mr. Barufaldi an absolute entitlement to membership in the New Hampshire Retirement System effective July 27, 2017, when the City appointed him to the "Director of Economic Development of the City of Dover" position. Contrary to the trial court's erroneous ruling, NHRS lacked "administrative discretion" to conclude otherwise because no disputed issues of fact have ever existed in this case for an agency to resolve.

Even if Section 9.A. of Mr. Barufaldi's Employment Contract is considered (which it need not be, given the absolute statutory mandate that Mr. Barufaldi belong to the Retirement System), Mr. Barufaldi's case remains a case for court adjudication, with no role for a fact-finding agency to play. "The interpretation of a contract is a question of law." Porter, 153 N.H. at 178. Mr. Barufaldi's contract provides that he only purported to "waive… participation in the NH Retirement System **per the requirements and exemptions allowed by State of New Hampshire Retirement System**" (emphasis supplied). A court interpreting this contract language should find that the contract only authorizes exemption from membership in NHRS consistent with the exemptions permitted by RSA 100-A, the chapter creating the Retirement System, providing its funding, defining its members, and defining its members' rights. *See* RSA 100-A:2 ("The retirement system hereby created…shall be known as the New Hampshire retirement system…."). Accordingly, a court interpreting Mr. Barufaldi's "Employment Agreement" should hold that Section 9.A. of the Agreement does not authorize exempting Mr. Barufaldi from membership in NHRS, given that RSA 100-A:3, I (d) mandates Mr. Barufaldi's membership in NHRS.

Again, no factual issues exist warranting an agency's exercise of its "administrative discretion," contrary to the trial court's erroneous holding. To the contrary, the trial court should have applied principles of statutory interpretation to determine that RSA 100-A:3, I (a) and (d) mandated Mr. Barufaldi's membership in NHRS effective July 27, 2017, when the City appointed him to the "Director of Economic Development of the City of Dover" position. The trial court should further have applied principles of

contract interpretation to hold that Section 9.A. of the "Employment Agreement" provides no basis to exempt Mr. Barufaldi from membership in NHRS because RSA 100-A does not allow such an exemption. Rather, RSA 100-A:3, I (d) mandates that employees such as Mr. Barufaldi belong to the Retirement System.

The Court should therefore vacate the trial Court Order and remand, finding that this case is on all fours with Porter v. Town of Sandwich, 153 N.H. 175 (2006). In Porter, the trial court erroneously dismissed a case involving interpretation of RSA chapter 79-D, and interpretation of a contract, on grounds of failure to exhaust administrative remedies. The trial court here committed similar error, dismissing Mr. Barufaldi's case based on the doctrine of administrative exhaustion, notwithstanding that Mr. Barufaldi's case also involves interpretation of a contract and a statute, RSA 100-A. The Porter court reversed, holding that the Porters had no obligation to exhaust administrative remedies, and that the Superior Court had jurisdiction over their claims, because the claims involved questions of law. This Court should do the same here, vacating the trial court Order and instructing the trial court to determine: a.) whether RSA 100-A, I (d) mandated Mr. Barufaldi's membership in NHRS; and b.) whether Section 9.A. of Mr. Barufaldi's "Employment Agreement" provided no basis to exempt him from membership in NHRS, given the RSA 100-A, I (d) mandate.

The Court Should Vacate And Remand, Holding That Declaratory Judgment Constitutes The Appropriate Vehicle To Resolve This Controversy Regarding Mr. Barufaldi's Assertion Of A Statutory Right Adverse To The City's Assertion Of A Contractual Right.

The trial court committed further error by holding that Mr. Barufaldi is somehow barred from seeking a declaratory judgment because he "cannot claim a present legal or equitable right to retroactive retirement benefits," given that Member Account Technician Moore found that Mr. Barufaldi had waived membership in NHRS based on Section 9.A. of his "Employment Agreement."

Contrary to the trial court's ruling, this case satisfies all the requirements for a declaratory judgment proceeding. Mr. Barufaldi indisputably claims a present "legal right" for purposes of RSA 491:22. Specifically, Mr. Barufaldi claims a statutory right to mandatory membership in NHRS from July 27, 2017, forward—a right conferred by RSA 100-A:3, I (d). The City has claimed adversely to that right, contending that Mr. Barufaldi somehow waived membership in NHRS based on Section 9.A. of his "Employment Agreement," the provisions of RSA 100-A:3, I (d) notwithstanding. Mr. Barufaldi has standing to bring the proceeding because his statutory right to membership in NHRS retroactive to July 27, 2017, "has been impaired." Carlson, Tr. v. Latvian Lutheran Exile Church of Boston and Vicinity Patrons, 170 N.H. 299, 302-03 (2017). Moreover, the facts are "sufficiently complete…to warrant the grant of judicial relief." Id. at 303. Indeed, the facts are entirely settled and not in dispute, as set forth above.

The purely legal nature of this dispute, coupled with the absence of any factual issues, demonstrate not only the inapplicability of administrative exhaustion and the appropriateness of declaratory judgment as a remedy, but also the trial court's error in finding that Mr. Barufaldi was somehow restricted to certiorari as a remedy as a person aggrieved by a decision of NHRS. The purely legal questions presented by this case should never have come before an agency for resolution. *See* Frost ("Where…the issue or issues…involve purely questions of law, the matter will not be referred to an agency."). The question of Mr. Barufaldi's entitlement to mandatory enrollment in NHRS only came before the agency because the City faxed three (3) sheets of paper to the agency, leading the agency to spit out a 1-page decision based entirely on Mr. Barufaldi's "Employment Agreement" that ignored his rights under RSA 100-A:3, I (d) and ignored the language in the Employment Agreement that any waiver of rights had to be consistent with RSA 100-A.

The cases where this Court has held that certiorari provides the sole remedy from NHRS decisions are materially distinguishable from Mr. Barufaldi's case because those cases did not involve purely legal questions but instead involved appeals from agency determinations involving disputed issues of fact. Jaskolka v. City of Manchester, 132 N.H. 528, 531 (1989) (involving a fact question as to whether an employee had "the requisite number of continuous years of city service" to be eligible for prior service credit in the New Hampshire Retirement System); McNamara v. New Hampshire Retirement System, Case No. 2016-0278 (N.H. Jan. 27, 2017) (involving dispute over agency's calculation of retirement benefits).

Questions of law are for a court to decide, not an agency. This Court has vested such importance in this principle that it has clarified that a court will resolve a matter presenting questions of law "regardless of the administrative posture." Hamby v. Adams, 117 N.H. 606, 608-09 (1977); Tremblay v. Town of Hudson, 116 N.H. 178, 179 (1976).

This Court should clarify that, pursuant to Hamby and Tremblay, the occurrences at NHRS are irrelevant in this case because the case involves purely questions of law that Member Account Technician Moore neither decided—nor was qualified to decide—and that the declaratory judgment remedy is uniquely tailored to resolve. Mr. Barufaldi claims a statutory right to mandatory membership in NHRS, while the City claims adversely to that right based on a waiver provision contained in Mr. Barufaldi's "Employment Agreement." Given that the pure questions of law that this case raises were not properly before the agency, the Court should vacate the trial court's ruling that the plaintiff was restricted to certiorari remedies and should remand with instructions that a declaratory judgment constitutes the appropriate vehicle to decide the legal questions the case presents.

CONCLUSION

The Court should vacate the trial court's Order dismissing the case and remand with instructions for the trial court to determine via declaratory judgment: a.) whether RSA 100-A, I (d) mandated Mr. Barufaldi's membership in NHRS; and b.) whether Section 9.A. of Mr. Barufaldi's "Employment Agreement" provided no basis to exempt him from membership in NHRS, given the RSA 100-A, I (d) mandate.

STATEMENT REGARDING ORAL ARGUMENT

The appellant requests 15 minutes oral argument and designates Benjamin T. King, Esq., as the attorney to be heard.

STATEMENT OF COMPLIANCE - WORD LIMITATION

I hereby certify that this brief is in compliance with the 9,500 word limitation as set forth in Supreme Court Rule 16 (11). This brief contains 4,019 words.

CERTIFICATE OF ATTACHMENT OF APPEALED DECISION

I hereby certify that the appealed decision is in writing and appended to the Brief.

Respectfully submitted,
Daniel J. Barufaldi
By his attorneys,
Douglas, Leonard & Garvey, P.C.

Date: September 28, 2021 By: /s/ Benjamin T. King

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being timely provided through the electronic filing system's electronic service to Joshua M. Wyatt, Esq. and Jennifer Perez, Esq.

/s/ Benjamin T. King
Benjamin T. King

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Benjamin King

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STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

Daniel J. Barufaldi

v.

City of Dover

Docket No.: 219-2020-CV-00352

ORDER ON CITY'S MOTION TO DISMISS

The plaintiff Daniel Barufaldi brought this action against the City of Dover seeking a declaration that he is entitled to retroactive enrollment in the New Hampshire Retirement System and that the City of Dover is at fault for failing to enroll him. (Court index #1). The City of Dover moves to dismiss the complaint in its entirety for lack of jurisdiction or alternatively for failure to state a claim. (Court index #6). Barufaldi objects. (Court index #10). The court finds a hearing is not necessary to decide the pending issues. See Super. Ct. Civ. R. 13(b). Based on the parties' arguments by pleading, the relevant facts, and the applicable law, the City's motion to dismiss is GRANTED.

Facts

The complaint alleges the following relevant facts, which the court must assume to be true for the purposes of this motion to dismiss. See Weare Bible Baptist Church, Inc., 172 N.H. 721, 725 (2019). Barufaldi was hired by the City of Dover, effective March 1, 2009, as the Director of Economic Development for the Dover Business and Industry Development Authority (the "DBIDA"). (Compl. ¶ 5). Barufaldi's employment agreement (the "2009 Employment Agreement") specified that his appointment to this position was "for a fixed term from March 1,

2009, through February 29, 2012, with subsequent automatic one-year reappointments unless appointment is otherwise terminated." (Id. ¶ 8; see also id., Ex. A).

Although Barufaldi's employment agreement states the agreement is between Barufaldi and the DBIDA, Barufaldi maintains that the City of Dover has been Barufaldi's employer at all relevant times since March 1, 2009. (Id. ¶¶ 6–7). The City of Dover has qualified as an employer within the meaning of RSA 100-A:1, IV at all times relevant to this action. (Id. ¶ 7). As a condition of employment, Barufaldi "acknowledge[d] and waive[d] . . . participation in the NH Retirement System per the requirements and exemptions allowed by State of N[ew] H[ampshire] Retirement System." (Id.). Accordingly, Barufaldi was never enrolled in the New Hampshire Retirement System ("NHRS"). (Id.).

Barufaldi served continuously in the role of Director of Economic Development for the DBIDA until 2017. (Id. ¶ 9). In 2017, the City of Dover created a city employment position titled Director of Economic Development for the City of Dover and appointed Barufaldi to fill that position. (Id. ¶ 10). As such, the City of Dover and Barufaldi executed a new employment agreement, dated July 27, 2017 (the "2017 Employment Agreement"). (Id.).

On June 22, 2017, Barufaldi spoke by telephone with the City Manager, J. Michael Joyal, and inquired whether he could now be enrolled in the NHRS. (Id. ¶ 11). The City Manager denied Barufaldi's request, stating that he would not be enrolled due to his contract being for a "fixed time period." (Id.). Subsequently, in or around March 2020, Barufaldi contacted NHRS to question whether he should be enrolled in NHRS. (Id. ¶ 12). Shortly after, the City Manager contacted Barufaldi and instructed him that all employment inquiries should go through him because the City was his employer. (Id. ¶ 13). The City Manager additionally restated the position that Barufaldi would not be enrolled in NHRS. (Id.).

In July 2020, Barufaldi submitted to the NHRS a "Request for Cost Calculation to Purchase Service Credit: Employer Enrollment Oversight" for the period between March 1, 2009, to July 11, 2020. (Mot. Dismiss ¶ 18).[1] This request sought to hold the City of Dover at fault for failing to enroll Barufaldi in NHRS. (Id. ¶ 19). Also included in that request was a section completed by the City of Dover clarifying the following: (1) Barufaldi was originally hired to work for DBIDA; (2) Barufaldi twice waived participation in NHRS in writing; (3) in 2017, the City of Dover did not realize that a "'fixed term' was no longer exempt from participation in NHRS" but, nonetheless, Barufaldi knowingly waived NHRS participation by signing the 2017 Employment Agreement. (Id. ¶ 20; see also id. ¶ 20, Ex. 1). By letter dated August 4, 2020, the NHRS issued an administrative determination stating Barufaldi had "been found ineligible for the prior service credit and [his] request ha[d] been denied." (Id. ¶ 21).[2] Specifically, the letter stated the following with regard to the reason for the denial:

> **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.

[1] See Boyle v. Dwyer, 172 N.H. 548, 553 (2019) (permitting a court to consider, on a motion to dismiss, various documents in addition to the complaint).

[2] On or around July 16, 2020, NHRS notified the City of Dover that it was obligated to enroll Barufaldi in the NHRS for retirement benefits. (Compl. ¶ 14). As of the filing of this complaint, the City of Dover enrolled Barufaldi prospectively, but not retrospectively. (Id.).

(Id.; see also id., Ex. 1 (emphasis in original)).

The August 4, 2020 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." (Mot. Dismiss ¶ 22; see also id., Ex. 1). Barufaldi did not appeal the adverse administrative decision. (Mot. Dismiss ¶ 23). Instead, approximately three months later, Barufaldi filed the instant declaratory judgment action seeking the court to declare that the City of Dover: (1) erred by failing to enroll him in NHRS effective March 1, 2009 and bears fault for such error; and (2) erred by failing to enroll him in NHRS effective July 27, 2017 and bears the fault for such error. (See generally Compl.).

Legal Standard

When ruling on a motion to dismiss, the court must discern "whether the allegations in the [complaint] are reasonably susceptible of a construction that would permit recovery." Boyle, 172 N.H. at 553. The court assumes the pleadings to be true and construes all reasonable inferences in the light most favorable to the pleading's proponent. Weare Bible Baptist Church, Inc., 172 N.H. at 725. The court then engages in a threshold inquiry that tests the facts alleged by the plaintiff against the applicable law, and if the allegations constitute a legal basis for relief, must deny the motion to dismiss. Pro Done, Inc. v. Basham, 172 N.H. 138, 141–42 (2019). "In conducting this inquiry, [the court] may also 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." Boyle, 172 N.H. at 553 (quoting Ojo v. Lorenzo, 164 N.H. 717, 721 (2013)).

Analysis

The City moves to dismiss on numerous grounds. (See generally Mot. Dismiss). First, the City contends that the doctrine of primary jurisdiction precludes the court from exercising jurisdiction because RSA 100-A:3, VI(d) commits the authority to determine such issues to the NHRS in the first instance. (See id. § I(1)). Second, the City contends that the court lacks jurisdiction because Barufaldi failed to exhaust his administrative remedies by failing to appeal the NHRS' administrative determination. (See id. § I(2)). Third, the City contends that the doctrines of res judicata and collateral estoppel bar the present complaint because NHRS has considered these very claims and rendered a decision adverse to Barufaldi. (See id. § I(3)). Finally, the City argues that the complaint fails to state a claim upon which relief may be granted because notably absent from this matter is a present right or title, as required to file a declaratory judgment action pursuant to RSA 491:22. (Mot. Dismiss 6, 10). Barufaldi disputes that any of the first three grounds warrant dismissal and maintains that the court may properly exercise jurisdiction over this declaratory judgment action. (See generally Obj.). As to the City's fourth argument in support of dismissal, Barufaldi maintains that this is action is properly one for declaratory judgment because he seeks a determination of his rights and the legal relation between himself and the City. (Id. at 4 (citing Benson v. N.H. Ins. Guaranty Assoc., 151 N.H. 590, 593–94 (2004)).

Upon review and taking the allegations in the Complaint in the light most favorable to Barufaldi, see Weare Bible Baptist Church, Inc., 172 N.H. at 725, the court finds the complaint must be dismissed. A declaratory judgment action is not an available theory as a matter of law, and Barufaldi's sole remedy—a writ of certiorari—requires a timely filed action. Further, Barufaldi nevertheless failed to exhaust his administrative remedies.

A declaratory judgment action is only available when "[a]ny person claiming a present legal or equitable right or title is faced with a claim adverse to that right or title." Jaskolka v. City of Manchester, 132 N.H. 528, 531 (1989) (quoting RSA 491:322). The New Hampshire Supreme Court has determined that where an administrative agency has determined an individual is not entitled to certain rights or benefits, that individual has no "present legal or equitable right" within the meaning of RSA 491:22. See id. In Jaskolka, the plaintiff filed a writ of certiorari seeking "a judicial decree that she ha[d] the requisite number of years of city service to entitle her to certain salary and fringe benefits." 132 N.H. at 531. The Court observed that "[t]his case cannot properly be characterized as one for declaratory judgment" because the plaintiff did not allege she already possessed certain benefits and "faced . . . a threat of losing them." Id. (emphasis added). Accordingly, the Court concluded that "[c]ertiorari review was appropriate here, as the plaintiff has requested prior service credit, and its attendant benefits, from what appears to be the appropriate administrative body, and been denied." Id. (emphasis added).

Here, because NHRS denied his claim,Barufaldi cannot claim a present legal or equitable right to retroactive retirement benefits, he is not faced with a claim adverse to such a right. As such, Jaskolka holds that his Complaint for declaratory judgment cannot be maintained. Accordingly, Barufaldi'sis only potential avenue for relief is a writ of certiorari from the decision of NHRS.

The New Hampshire Supreme Court has stated that "[b]ecause RSA chapter 100–A does not provide for judicial review, 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) (emphasis added); Petition of Carrier, 165 N.H. 719, 720 (2013); see also Jaskolka, 132 N.H. at 531 ("A petition for a writ of certiorari provides judicial review of governmental administrative action

when no statute authorizes an appeal."). "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." McNamara v. New Hampshire Ret. Sys., No. 2016-0278, 2017 WL 695383, at *3 (N.H. Jan. 27, 2017) (non-precedential order). Here, even assuming the court could construe the complaint as a writ of certiorari, it must be denied because it was filed several months after the NHRS administrative decision. Chauffeurs, Teamsters, & Helpers Loc. Union No. 633 of N.H. v. Silver Bros., 122 N.H. 1035, 1037 (1982) (finding a thirty-day period is the appropriate guideline for review by certiorari); McNamara, 2017 WL 695383, at *3 (holding thirty-day limitations period of RSA 541:6 (2007) is the appropriate period for filing a certiorari petition challenging a State administrative decision that is not otherwise appealable under RSA chapter 541).

Finally, even if the instant action was timely filed, it must still be dismissed because Barufaldi failed to exhaust his administrative remedies by not availing himself of the NHRS administrative appeal within 45 days. "[B]efore an agency decision may be reviewed, administrative remedies typically must be exhausted." Frost v. Comm'r, New Hampshire Banking Dep't, 163 N.H. 365, 373 (2012). "The rule . . . is based on the reasonable policies of encouraging the exercise of administrative expertise, preserving agency autonomy and promoting judicial efficiency." Konefal v. Hollis/Brookline Co-op. Sch. Dist., 143 N.H. 256, 258–59 (1998) (quoting Bradley v. City of Manchester, 141 N.H. 329, 331–32 (1996)). The exhaustion of administrative remedies doctrine is flexible, and exhaustion is not required under certain circumstances. Konefal, 143 N.H. at 258–59. Exhaustion is not required, for example, when further administrative action would be useless and result in delays that might make the claim moot, Petition of Chapman, 128 N.H. 24, 26 (1986), or when the issue involves a question

of law, Hamby v. Adams, 117 N.H. 606, 608 (1977). However, "[a]dministrative remedies must be exhausted when the question involves the proper exercise of administrative discretion." Konefal, 143 N.H. at 259; cf. Nelson v. Pub. Serv. Co., 119 N.H. 327, 330 (1979). "[T]he deliberate by-pass of administrative remedies[ ] [is] a major concern in the imposition of the exhaustion requirement." Hamby, 117 N.H. at 608 (1977).

Barufaldi argues that the administrative exhaustion requirement is inapplicable here for two reasons: first, he contends RSA chapter 100-A does not require exhaustion, (see Obj. § III(B)), and, second, he maintains the complaint presents questions of law, (see id. §§ III(B)(1)-(2)). As to RSA chapter 100-A's silence regarding exhausting administrative remedies, the court notes this fact is not dispositive and, when considered here, is unpersuasive. Hamby, 117 N.H. at 608 (explaining that the exhaustion requirement is within the superior court's discretion based upon the facts of each case).

As to Barufaldi's assertion that he has presented questions of law—specifically, that he seeks interpretation of subsections I(a), (d), and IV(d) of RSA 100-A:3—the court disagrees. Barufaldi seeks a judicial decree that the City erred in failing to enroll him in the NHRS effective March 1, 2009 and July 27, 2017 and that the City is at fault for both failures. (See Compl. at 6 (prayer for relief)). Effectively, Barufaldi seeks a declaration from the court overruling the determinations already made by the NHRS. (See Mot. Dismiss, Ex. 1). The determinations made by NHRS were within its administrative discretion. See Konefal, 143 N.H. at 259. Indeed, this is precisely what the NHRS did in reaching its determination, (Mot. Dismiss, Ex. 1), and would have reexamined if Barufaldi had appealed that determination by requesting a hearing. Contrary to Barufaldi's assertions, resolution of the issues presented by the complaint would not require interpretation of certain provisions within RSA chapter 100-A, but rather would merely

require application of the facts in this case to the statutory language. Cf. Frost, 163 N.H. at 375 (interpreting the meaning of a specific phrase contained within RSA 397-A:2). Because the questions presented involve the proper exercise of NHRS' administrative discretion—determining whether Barufaldi was entitled to enrollment in the retirement system and whether the City was at fault for failing to do so—Barufaldi was required to exhaust his administrative remedies. Konefal, 143 N.H. at 259; see also McNamara, 2017 WL 695383, at *3. Accordingly, even if the present declaratory judgment action was the proper vehicle for Barufaldi to seek redress, cf. supra at 5–7, the court would decline to exercise jurisdiction where, as here, administrative remedies have not been exhausted. See Hamby, 117 N.H. at 608.

Finally, as the court finds dismissal appropriate on other grounds, the court need not address the City's remaining arguments regarding primary jurisdiction, and res judicata and collateral estoppel. (See Mot. Dismiss §§ III (A), (C)).

Conclusion

For the foregoing reasons, the City's motion to dismiss is GRANTED.

SO ORDERED.

Date: April 2, 2021

Mark E. Howard
Presiding Justice

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STATE OF NEW HAMPSHIRE

STRAFFORD, SS SUPERIOR COURT

Daniel J. Barufaldi

v.

City of Dover

Case No. 219-2020-CV-00352

PLAINTIFF'S MOTION FOR PARTIAL RECONSIDERATION

NOW COMES the plaintiff Daniel J. Barufaldi, by and through his attorneys Douglas, Leonard & Garvey, P.C., and respectfully moves for partial reconsideration of the Court's April 2, 2021, Order, stating as follows:

1. The Court has overlooked or misapprehended that this case presents questions of law that only a court can resolve regarding Mr. Barufaldi's entitlement to be enrolled in the New Hampshire Retirement System from July 27, 2017, forward. In a nutshell, these questions of law include: 1.) Whether RSA 100:3, I (d) required the City of Dover to enroll Mr. Barufaldi in the New Hampshire Retirement System when the City appointed him Director of Economic Development for the City of Dover effective July 27, 2017; and 2.) Whether Mr. Barufaldi's purported waiver of his right to enrollment in the New Hampshire Retirement System in his July 27, 2017, Employment Agreement was invalid as a matter of law because the waiver was not consistent with the exemptions allowed under RSA 100-A:3.

2. As set forth below, the questions presented by this case indisputably constitute questions of law that only a court can resolve, not an administrative agency. Given that the case presents legal questions, the Court should resolve them regardless of what happened at the administrative agency, pursuant to Hamby v. Adams, 117 N.H. 606 (1977).

Order: The court has thoroughly examined its original order, the motion to reconsider, the City's objection, and the plaintiff's reply. The court concludes that it has not overlooked or misapprehended a material point of fact or law in its original order. Accordingly, the motion within motion is denied.

1

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Mark E. Howard

Honorable Mark E. Howard
May 8, 2021

3. Moreover, declaratory judgment is the appropriate vehicle to resolve Mr. Barufaldi's claim to entitlement to enrollment in the New Hampshire Retirement System from July 27, 2017, forward because the claim presents a classic situation of one party claiming a legal right and the other party claiming adversely to such right. On the one hand, Mr. Barufaldi claims a statutory right under RSA 100-A:3, I (d) to mandatory enrollment in the New Hampshire Retirement System from July 27, 2017, forward. The City claims adversely to such right, claiming that Mr. Barufaldi executed a valid waiver of his right to such enrollment when he executed his July 27, 2017, Employment Agreement. Declaratory judgment is the correct remedy to resolve these adverse legal positions, not certiorari, particularly because it is of no consequence how the New Hampshire Retirement System might have addressed the questions, given the questions' legal nature.

4. Contrary to the Court's April 2, 2021, Order, Hamby v. Adams, 117 N.H. 606 (1977) supports that the Court should decide the legal issues Mr. Barufaldi's claim presents. As the Hamby court stated, "where, as here, the issue involves a question of law rather than an exercise of administrative discretion, a court will usually resolve the matter **regardless of the administrative posture**." Id. at 608-09 (emphasis supplied). In other words, it should not matter that an NHRS Member Account Technician wrote a letter finding that Mr. Barufaldi had executed a "voluntary waiver of participation" through his July 2017 Employment Agreement, and that he was therefore "partially at fault for the failure to be enrolled," because whether the waiver was valid—in light of RSA 100-A:3, I (d) and the language of the written Employment Agreement—presents questions of law that only a court can resolve. *See* Motion to Dismiss at Exhibit B.

5. The Court has overlooked or misapprehended that a question of statutory interpretation, and hence of law[1], arises from the City of Dover's failure to enroll Mr. Barufaldi in the New Hampshire Retirement System in connection with the City's appointment of him to the newly created position of "Director of Economic Development of the City of Dover" effective July 27, 2017.[2] The question of law is as follows: "Whether RSA 100-A:3, I (d) *requires* a municipality to enroll an employee in the New Hampshire Retirement System (NHRS), *regardless of whether the employee purports to waive enrollment in NHRS*, if the municipality employs the employee in an employment position created by the municipality after July 1, 2011."

6. The answer to this question, under the plain language of the statute, is: "Yes." The option for municipalities to exclude employees from membership in NHRS derives from RSA 100-A:3, I (a) [subparagraph (a) of the statute], which provides in pertinent part that "[m]embership 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, or those employees of the general court who are eligible for membership in the retirement system." RSA 100-A:3, I (d) carves out an exception for employees such as Mr. Barufaldi, however, who hold "newly appointed positions created by political subdivisions after July 1, 2011." RSA 100-A:3, I (d) specifically provides that, "**The option in subparagraph (a) shall not be available** in the case of any newly created positions for unclassified employees or

[1] Pheasant Lane Realty Trust v. City of Nashua, 143 N.H. 140, 142 (1998) ("Interpretation of a statute is a question of law.").

[2] The Court must take as true Mr. Barufaldi's allegations that the City created the "Director of Economic Development of the City of Dover" position after July 1, 2011, and that the City appointed Mr. Barufaldi to such position on July 27, 2017. Starr v. Governor, 148 N.H. 72, 73 (2002) ("In ruling upon a motion to dismiss, the plaintiff's factual allegations are assumed to be true and all reasonable inferences drawn therefrom are construed most favorably to the plaintiff.").

officials whether appointed with fixed terms or with no fixed terms nor **in the case of any newly appointed positions created by political subdivisions after July 1, 2011**." Emphasis supplied.

7. In short, a court's interpretation of RSA 100-A:3, I (d) is necessary to resolve the question of whether Mr. Barufaldi—as a municipal employee in an employment position created by the City of Dover after July 1, 2011—has absolute entitlement to membership in the New Hampshire Retirement System for the entire period that he held the position (from July 27, 2017, forward). This is a question for the Court to resolve "regardless of the administrative posture." Hamby, 117 N.H. at 609.

8. Given RSA 100-A:3, I (d), a related question of law arises as to whether Mr. Barufaldi validly waived his right to enrollment in the New Hampshire Retirement System when the City appointed him to the "Director of Economic Development of the City of Dover" position effective July 27, 2017, and required him to "acknowledge… and waive… participation in the NH Retirement System **per the requirements and exemptions allowed by State of New Hampshire Retirement System**." Complaint at Exhibit B at §9 (emphasis supplied).

9. In its April 2, 2021, Order, the Court overlooked or misapprehended that the validity of Mr. Barufaldi's waiver presents a question of law for the Court because assessing the validity of the waiver requires an interpretation of written documents—the Employment Agreement Between the City of Dover, NH, and Daniel Barufaldi. "The interpretation of written documents is a question of law." Mahindra & Mahindra v. Holloway Motor Cars of Manchester, 166 N.H. 740, 748 (2014) (holding that "the waiver issue presents a question of law") (citation omitted). How could Mr. Barufaldi waive enrollment in the New Hampshire Retirement System from July 27, 2017, forward per the "exemptions allowed" if RSA 100-A:3, I (d) specifies that no

exemption from enrollment is allowed for municipal employees such as Mr. Barufaldi appointed to employment positions created after July 1, 2011?

10. The Court further overlooked or misapprehended that declaratory judgment is the proper vehicle through which to determine whether Mr. Barufaldi enjoys a mandatory entitlement to enrollment in the New Hampshire Retirement System from July 27, 2017, forward. Mr. Barufaldi claims a legal right against the City of Dover, claiming adversely to such right, entitling Mr. Barufaldi to bring a declaratory judgment petition pursuant to RSA 491:22. Specifically, Mr. Barufaldi claims that he enjoyed a legal right pursuant to RSA 100-A:3, I (d) to be enrolled in the New Hampshire Retirement System effective July 27, 2017, and that his purported waiver of such right in his July 27, 2017, Employment Agreement is not valid, given that he waived nothing consistent with the "exemptions allowed" by New Hampshire law. The City claims adversely to Mr. Barufaldi's right, claiming that Mr. Barufaldi's waiver of participation in NHRS in the July 27, 2017, Agreement was valid. *See* City's Motion to Dismiss at Exhibit A, July 29, 2020, letter from Director of Human Resources Daudelin.

11. It would have been improper for the New Hampshire Retirement System ever to adjudicate a dispute as to competing legal rights of this nature—Mr. Barufaldi claiming statutory rights adverse to the City of Dover claiming a waiver of such rights arising from a written Employment Agreement. Pursuant to Hamby, the Court should reconsider its April 2, 2021, Order and resolve this dispute about competing legal rights, noting that it is appropriate for the Court to do so given the presence of questions of law, "regardless of the administrative posture." Hamby, 117 N.H. at 609.

12. Jaskolka v. City of Manchester, 132 N.H. 528 (1989) does not compel a contrary result, and specifically does not support the Court's finding that declaratory judgment is somehow

an improper vehicle for Mr. Barufaldi, because Jaskolka does not involve questions of law. Jaskolka involved a fact question as to whether the plaintiff was continuously employed by the City of Dover for a given time period in order to be eligible for prior service credit in the New Hampshire Retirement System. Id. at 530. The Jaskolka court correctly determined that declaratory judgment was not the proper vehicle for the plaintiff to resolve a purely factual dispute about whether she had "the requisite number of continuous years of city service." Id. at 531.

13. This case is materially distinguishable because it does not concern two (2) parties disagreeing on a factual finding but rather concerns two (2) parties claiming adverse legal rights, where Mr. Barufaldi's right is sourced in a statute and the City's claim is sourced in a waiver provision in a written Employment Agreement.

14. For these reasons, the Court should grant partial reconsideration and vacate its April 2, 2021, Order to the extent the Order dismissed Mr. Barufaldi's petition for a declaration that he is entitled to enrollment in the New Hampshire Retirement System from July 27, 2017, forward.

WHEREFORE, the plaintiff Daniel J. Barufaldi respectfully prays this Honorable Court:

A. Grant partial reconsideration and vacate its April 2, 2021, Order to the extent the Order dismissed Mr. Barufaldi's petition for a declaration that he is entitled to enrollment in the New Hampshire Retirement System from July 27, 2017, forward; and

B. Grant such other and further relief as is just and equitable.

Respectfully submitted,

DANIEL BARUFALDI
By his attorneys,
DOUGLAS, LEONARD & GARVEY, P.C.

Dated: April 19, 2021

By: /s/ Benjamin T. King

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically served to all counsel of record on this date.

/s/ Benjamin T. King
Benjamin T. King